Holland & Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

March 22, 2005

Steven E. Sher
Director of Zoning and Land Use Services
202 663 7278
steven.sher@hklaw.com

VIA HAND DELIVERY

RECEIVED
D.C. OFFICE OF ZONING
2005 MAR 22 AM 11:37

D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington D.C. 20004

Re: BZA Application No. 16601
New Jersey Avenue and 2nd, K and L Streets S.E.
Motion to Modify the Application and Condition No. 5

Dear Members of the Board:

The current owners of the subject property, NJA Development Housing LLC and NJA Hotel LLC, the successors in interest to the original applicants in the above-referenced application, hereby request the Board to modify the relief granted in the application and to eliminate Condition No. 5. That condition, the requirement that twenty percent of the residential units be for affordable housing, was a quid pro quo for the TDR variance and since the TDR variance was not pursued, the condition is no longer relevant.

Background

The subject property is in Square 741, bounded by New Jersey Avenue and 2nd, K and L Streets, S.E. The property is now a single record lot, Lot 37, and is also known as Lots 816, 817 and 7000. The above referenced application was for all of Square 741 except for one lot located at the corner of 2nd and L Streets S.E. The application requested relief to allow the construction of a fourteen story apartment house and hotel in the C-3-C District which is in the Capitol South Receiving Zone. The relief requested was a special exception under §411.11 to allow multiple roof structures not meeting the normal setback requirements, a variance from the requirements of §1709 to use transferable development rights (TDRs) and a variance from the residential recreation space requirements of §773.3

BZA
Case No. 16601
Exhibit No. 45

The Board held a public hearing on the application on September 19, 2000. There was no opposition to the application and there was support from the Office of Planning and from Advisory Neighborhood Commission 6B. At a public meeting held on September 26, 2000, the Board voted 3-0 to grant the application, with Board members Robert Sockwell, Anthony Hood and Anne Renshaw in favor.

Order No. 16601 was issued on December 13, 2000, approving the application subject to ten conditions. A copy of the order is attached. The conditions were based on the recommendations of the Office of Planning and the ANC. Condition No. 5, derived from the OP

Board of Zoning Adjustment
District of Columbia
CASE NO.16601
EXHIBIT NO.45

recommendation, requires the Applicant to "reserve at least 20% for the total number of apartment units for affordable housing for a minimum of 20 years subject to the terms and conditions of an agreement with DCHFA and its bond financing."

Permit applications were filed within the time frames required under the Zoning Regulations and the project, including both the apartment house and the hotel, is currently under construction.[1] The developer did not receive bond financing from the D.C. Housing Finance Agency (DCHFA) in the development of the project. Moreover, the developer purchased TDRs for the entire density of the project in excess of 6.5 FAR and elected not to take advantage of the variance relief granted from §1709.

Requested Modification

NJA Development Housing LLC and NJA Hotel LLC hereby request that the Board modify the relief granted in Order No. 16601 to eliminate the variance from §1709 and to consequently eliminate Condition No. 5. The project was required to purchase TDRs for the construction of the hotel. The developer did attempt to obtain financing for the affordable housing, but could not conclude such arrangements. Given the relatively low value for which TDRs could be purchased at the time that the project actually went forward, the developer determined that it was feasible to purchase TDRs for both the hotel and apartment house portions of the project.

Two TDR certificates of transfer were recorded in the land records of the District of Columbia, evidencing that, in 2001, the developer obtained 10,000 square feet from a site in Square 518 owned by the Archdiocese of Washington and, in 2004, obtained 115,000 square feet from a site in Square 529. Consequently, the height and gross floor area of the building in its entirety are now permitted as a matter-of-right. The project no longer requires a variance from the requirements to purchase TDRs because the TDRs were obtained. The elimination of the request for a variance from §1709 eliminates the most significant area of relief requested and moves the project more in the direction of compliance with the Zoning Regulations.

The areas of relief requested in the application are separate and distinct. The Board required the Applicant to prove that it met the standards for the special exception and for each

[1] To the extent that the Board deems it necessary, the owners of the property request a waiver from Section 3129, which requires that a motion for modification of plans be filed within six months of the date of the Board's order. In this case, the developer sought clarification from the Zoning Administrator that, since the development had not availed itself of the relief granted from Section 1709 and the wording of Condition No. 5 was keyed to the financing obtained from the DCHFA, Condition No. 5 no longer applied. The Zoning Administrator determined that the developer should seek an Order from the Board addressing the situation. The subject request was filed after consultation with staff of the Office of Zoning.

variance independently. It would not have been sufficient for the Applicant to meet the test for one variance and thereafter not meet the test for the other variance.

Consequently, Condition No. 5 of the Order is no longer relevant or appropriate. As the Board has stated on many occasions, conditions must be reasonably related to the relief requested. As noted in the Office of Planning report, the requirement to maintain twenty percent of the units for affordable housing was directly related to the request to be relieved from having to buy TDRs to build the amount of housing proposed. Testimony of the Applicant's experts, the Office of Planning, the ANC and Councilmember Sharon Ambrose all pointed to the pioneering nature of the proposed development and the unprecedented construction of a residential project in a TDR receiving zone. The fundamental economics of the development changed significantly since the project was presented to the Board, particularly as they related to the price to be paid to purchase TDRs and the need or ability to obtain financing from the DCHFA. The project did not use DCHFA financing and TDRs were obtained at a price which allowed the project to go forward at that level. Since the TDR variance relief was not acted upon, a condition related to the relief should be removed from the order.

For all of the reasons stated above, the owners of the subject property in Square 741 request the Board to approve a modification to Order No. 16601, to delete from the Order reference to a variance from Section 1709 and to eliminate Condition No. 5. The quid pro quo of affordable housing for a TDR variance was rendered moot when the developer purchased TDRs, so the Condition should be eliminated.

Sincerely,

Norman M. Glasgow, Jr.

Steven E. Sher
Director of Zoning and Land Use Services

Attachment

cc: Advisory Neighborhood Commission 6D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16601 of NJA Development Partners, LP./Daniel and Mary Loughran Foundation, Inc., pursuant to 11 DCMR §§3104.1 and 3103.2 for a special exception, under §411.11 of the Zoning Regulations, to allow multiple roof structures not meeting the normal setback requirements, for a variance from the requirement of §1709 to use Transferable Development Rights (TDRs), and for a variance from the residential recreation space requirement of §773.3. The requested relief is necessary to permit the construction of a 14-story apartment house and hotel in the C-3-C District in Square 741, located at the intersections of New Jersey Avenue, K Street, L Street, and 2nd Street, SE (Square 741, Lots 7, 8, 13, 14, 16-18, 20 –36, 801, 803, 804, 807-809, and a public alley to be closed.)

HEARING DATE: September 19, 2000
DECISION DATE: September 26, 2000

DECISION AND ORDER

PRELIMINARY MATTERS:

1. On the date of hearing, the Board admitted late-received filings from the Office of Planning, Advisory Neighborhood Commission ("ANC") 6B, and the Capitol Hill Restoration Society.

2. The Board, pursuant to its rules, provided proper and timely notice of the public hearing on this Application by publication in the D.C. Register, and by mail to ANC 6B and to owners of property within 200 feet of the site.

3. The site of this Application is located within the jurisdiction of ANC 6B, which is automatically a party to this Application, and which submitted a letter and testified in support of the Application.

4. The site of this Application is located within Ward 6. Sharon Ambrose, City Council Representative for Ward 6 appeared at the hearing and testified in support of the Application.

5. As directed by 11 DCMR §3119.2, the Board has required the Applicant to satisfy the burden of proving the elements which are necessary to establish the case for special exception pursuant to 11 DCMR §3104.1 and the case for variance pursuant to

Section 3103.2. The only parties to the proceeding were the Applicant and ANC 6B. No other person or entity requested to participate as a party or was granted party status in this proceeding.

6. Five witnesses testified in support of the Application, including the Applicant and qualified experts in architecture, real estate appraisal, and urban planning. No persons testified in opposition to the Application.

7. The Office of Planning submitted a report and testified in support of the Application.

FINDINGS OF FACT:

1. The property that is the subject of this Application occupies virtually the entirety of Square 741, bounded to the north by K Street, SE, the east by 2nd Street, SE, to the south by L Street, SE, and to the west by New Jersey Avenue, SE. The subject property includes a public alley to be closed and all lots in Square 741, with the exception of Lot 19 in the southeasternmost corner of the square.

2. The subject property has a total lot area of approximately 48,108 square feet.

3. The northern portion of the subject property, along K Street, SE, is occupied by a large commercial building that was formerly utilized as a warehouse. The subject property is also currently improved with a number of vacant buildings located in the southeastern portion of the square along 2nd and L Streets, SE.

4. Directly north of the subject property, across K Street, SE, a storage facility owned by the District of Columbia occupies the entirety of Square 739.

5. Adjacent to the eastern portion of the subject property, in Square 768, are the Arthur Capper Dwellings apartments and a vacant area utilized for school bus parking.

6. Along the south side of L Street, SE, is Square 742, an unusually small, virtually triangular-shaped square that contains vacant property, automotive-related industrial uses including a truck painting facility at 1109-1113 2nd Street, SE, and an auto painting shop at 1120 New Jersey Avenue, SE. One block further south, at M Street, SE, is the site of the Southwest Federal Center and, further to the east, the Washington Navy Yard.

7. West of the subject property, in Square 740, are located additional large scale industrial structures, at 1017 and 1029 New Jersey Avenue, SE.

8. Diagonally opposite the subject property, in Square 743, are the Matthews Baptist

Church at 1103 New Jersey Avenue, SE, and an electric parts warehouse at 107 L Street, SE. This square contains an entrance to the Navy Yard metrorail station, one block south of the subject property.

9. The subject property is zoned C-3-C. Uses permitted as matter of right in the C-3-C Zone include commercial, hotel and residential uses. C-3-C zoning permits height to a maximum of 90 feet and density to a maximum of 6.5 FAR. One hundred percent lot occupancy is allowed in the C-3-C Zone. Prior to June 10, 1996, the subject property was located in the C-M Zone before receiving its present C-3-C Zoning designation.

10. The subject property is included within the Capitol South Receiving Area for Transferable Development Rights (TDRs), established by §1709.18 of the Zoning Regulations. That designation allows additional height and density to be purchased, resulting in the maximum permitted building height increasing from 90 feet to the maximum height allowed by the 1910 Height Act (130 feet in the case of the subject property) and the maximum permitted density increasing from 6.5 FAR to 10.0 FAR. The receiving area designation has no effect on permitted uses.

11. The Application involves construction of an apartment house and hotel with a height of 130 feet and 9.65 total FAR. The total gross floor area for the project will measure approximately 464,000 square feet. The apartment house portion of the Applicant's project will measure 10.0 FAR, 347,443 square feet of gross floor area and contain approximately 375 units. The apartment house portion will have a C-shaped footprint, fronting approximately 144' (97' at all levels above the ground level) along 2nd Street, SE, approximately 242' along K Street, SE, and approximately 244' along New Jersey Avenue, SE. The hotel portion will be located in the southern portion of the square and maintain approximately 162' of frontage along L Street, SE, with an FAR of 8.72, 116, 570 square feet of gross floor area and approximately 171 hotel rooms. The project also will contain two below-grade floors to provide parking for the occupants of both the apartment house and the hotel.

12. The Applicant testified that it has a long-standing commitment to, and history in, the field of real estate development in the Washington area, with project experience in Georgetown, the west end of Downtown and the L'Enfant Plaza/Southwest area.

13. The Applicant testified that 20% of the total number of residential units in the apartment house portion of the project will be devoted to affordable housing uses, subject to financing terms issued by the District of Columbia Housing Finance Authority (HFA).

14. Through its experts in architecture, the Applicant testified that the proposed project will require four separate roof structures in order to contain necessary

elevator machinery, cooling towers and fire egress stairs. Three of the four structures contain elevator equipment and will measure a uniform 18'6" in height. The fourth roof structure, located nearest the subject property's shared property line with Lot 19, will measure a lesser height as that structure will not contain elevator equipment. The number of roof structures could possibly be reduced through a connection approximately 165 feet in length, however, such a connection would serve no useful purpose for the building and would be a waste of resources. Regarding the location of the various roof structures, the Applicant demonstrated that it is physically unable to comply with the 1:1 setback requirement established in the Zoning Regulations as a direct result of Building Code compliance issues and design considerations based on the dual uses of the subject property as an apartment house and hotel. With regard to the three elevator core and stair enclosures, the Applicant is limited by the Building Code as to the amount of distance allowed between emergency egresses. Likewise, the double-loaded corridor nature of both apartment houses and hotels largely dictates the location of the elevators and stairs, and consequently, their roof structures. A final limitation on the location of the roof structures is created by the design of the building, which is set back 10 feet along New Jersey Avenue, SE, at the eleventh floor of the apartment house portion. In so doing, the width of that portion of the building is reduced from 65 feet to 55 feet, further restricting the location of the corridor and, thus, the stairs and elevator banks and their roof structures. All roof structures will meet the set back requirements from their respective street frontages.

15. Through its expert in land use and urban planning, the Applicant testified that it had satisfied the standards for special exception relief under §411.11 of the Zoning Regulations, regarding the location and number of roof structures, namely, impracticality because of operating difficulties, size of building lot or other conditions making full compliance with the Regulations unduly restrictive, prohibitively costly or unreasonable, and that the structures do not materially impair the Zoning Regulations nor is the light and air of adjacent buildings impacted adversely.

16. Through its experts in architecture, the Applicant testified that the residential recreation space requirement of 10 percent of the area of the apartment building, or 34,744 square feet in the present case, cannot physically be met on the site. The Applicant proposes to develop approximately 15, 155 square feet of residential gross floor area to residential recreation space, in the form of a courtyard (8,643 square feet), a pool (2,620 square feet), a clubhouse (1,792 square feet) and a meeting/party room (2,100 square feet).

17. Through its expert in real estate valuation, the Applicant testified that the proposed apartment house portion of the project is not feasible on a pure market basis. The amount of loss can be reduced through DCHFA and Tax Increment Financing to the extent that the project may proceed. As a result, the Applicant cannot afford to purchase the TDRs necessary to provide the critical mass of apartment units to operate the project in a feasible fashion.

18. Through its expert in land use and urban planning, the Applicant testified that TDRs have traditionally been awarded for providing preferred uses or underbuilding on historic sites within the Downtown Development District (DDD), and that it has largely been presumed that TDR receiving areas would be developed as commercial areas.

19. Through its expert in land use and urban planning, the Applicant testified that it had satisfied that requirements for area variance relief from the residential recreation space requirement under §773.3 of the Zoning Regulations and from the requirement under §1709 to purchase TDRs for additional density, in that the subject property is affected by exceptional conditions, strict application of the Regulations would create practical difficulties for the construction of an apartment house on the subject property, and the variances can be granted without substantial detriment to the public good.

20. Through its expert in land use and urban planning, the Applicant testified that the subject property is affected by a number of exceptional conditions that qualify it for variance relief, including its location, configuration and zoning history. The subject property is one of only 14 squares in the C-3-C Zone designated to form the Capitol South TDR Receiving Zone. Furthermore, among those 14 squares, Square 741 is one of only 4 such squares that abut residentially zoned squares. The subject property is also exceptional in that it occupies virtually the entirety of Square 741. The development of a property of this exceptional size and prominent location so near M Street, SE, the Southeast Federal Center and Navy Yard will likely signal the tone of future development of the Capitol South Receiving Zone and surrounding properties. The subject property is further exceptional as a result of its unusual zoning history. The subject square was rezoned from C-M-2 to C-3-C in 1996, pursuant to Zoning Commission Order No. 797. Prior to its rezoning to C-3-C, residential use was prohibited in the C-M-2 Zone. While residential use is permitted under C-3-C zoning, the C-M history of the square indicates that residential use was not historically contemplated for the subject property. The zoning history of a site may constitute an exceptional condition in a variance application. *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091 (1979).

21. Through its expert in land use and urban planning, the Applicant testified that strict application of the Zoning Regulations would result in a practical difficulty to the Applicant. Without the additional building envelope provided to properties within the receiving area, the Applicant will not be able to develop a viable residential project on the subject property, even more so when the Applicant is proposing to provide 20 percent of the residential units at subsidized levels. The subject property, and those around it, are generally expected to be developed for commercial use, as evidenced generally by the C-3-C zoning classification as well as by the TDR mechanism which established the subject property as a lot to receive the commercial density. Development and management costs of a

residential property further increase the difficulties of establishing residential use in a commercial zone.

22. Through its expert in land use and urban planning, the Applicant testified that variance relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the zone plan. The Applicant's project will provide a major source of new housing in an area that is in an early stage of significant redevelopment. A further benefit of the proposed project is the potential it has to spur similar quality development on neighboring properties. It sets an important precedent for residential uses in this vicinity, a use that has been publicly heralded by community members.

23. Through its expert in land use and urban planning, the Applicant estified that, with regard to the Applicant's request for variance relief from §1709, the TDR mechanism will not be compromised as a useful tool of community planning. The Capitol South and other receiving zones were created to provide a tangible reward for sensitive development in the DD, development that involved historic preservation and the creation of numerous bonus uses downtown. The various receiving zones were chosen as locations suitable for more dense commercial development, locations where historic preservation and bonus uses such as housing and arts use were less in issue. In the present case, more recent planning, including such efforts as the Office of Planning's Near Southeast Neighborhood and Waterfront Planning Workshop, has indicated a general preference for a substantial mixture of uses, commercial, residential, retail and recreational, in this area. Residential and combined use of the property furthers its rezoning from C-M to C-3-C where residential is permitted as a matter of right.

24. The Office of Planning, by memorandum dated September 13, 2000, and by testimony at the public hearing, recommended that the Application be approved and that the recommendation found at page 4 of the memorandum, regarding the height of the four proposed roof structures, be revised to provide that the southeastern roof structure, located on the hotel portion, may maintain a lesser height than the other 3 structures.

25. Advisory Neighborhood Commission 6B, the only other party to this Application, offered its support for the application, by letter dated September 12, 2000 and by testimony of Executive Director Gottlieb Simon. ANC 6B concluded that the requested special exception and variance relief is appropriate because of the uniqueness and practical difficulties of the site, so long as the project remains a "true residential" use. According to Section 3115.2 of the Zoning Regulations, the Board is to give "great weight" to the written report of the ANC.

26. No parties or persons testified in opposition to the Application.

CONCLUSIONS OF LAW AND OPINION:

Based upon the foregoing findings of fact, the Board concludes that the Applicant is seeking a special exception under §411.11, an area variance under §1709, and an area variance under subsection §773.3 of the Zoning Regulations.

A special exception use is a use deemed compatible with other uses permitted in that particular zoning classification provided that the specific regulatory requirements are met. In reviewing Applications for a special exception, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements set forth in the appropriate section. If the Applicant meets its burden, the Board must ordinarily grant the Application. Under §411.11 of the Zoning Regulations, the Board may approve the location, design, number, or any other aspect of a roof structure even if it does not comply with the setback requirements of §770.6, where it would be impractical because of operating difficulties, size of building lot or other conditions relating to the building or surrounding area that would make full compliance unduly restrictive, prohibitively costly or unreasonable. The Board has the power to approve a roof structure under §411.11, provided that the intent and purpose of the chapter and title of the Zoning Regulations are not materially impaired by the structure, and the light and air of adjacent buildings are not affected adversely.

The granting of area variance relief requires proof of a practical difficulty upon the Applicant arising out of some unique or exceptional condition of the property. The Board further must find that the relief requested can be granted without substantial detriment to the public good and that it will not substantially impair the intent of the zone plan.

The Board concludes and agrees with the Applicant, the Office of Planning and the ANC that the Applicant has met the respective requisite burdens of proof. The Board further concludes that the subject property is affected by exceptional conditions because of its location, configuration, and zoning history, the nature of the proposed building (an apartment house) and the requirements of the Regulations as to residential recreation space and TDRs, that strict application of the Regulations would create practical difficulties for the Applicant, effectively precluding its ability to construct a viable residential project on the subject property, in an area where no new residential construction has occurred and where the Applicant is proposing to provide a significant portion of the residential units at subsidized levels. Finally, the Board concludes that the relief requested will not cause substantial detriment to the public good. The project will increase the housing stock in this neighborhood, including low and moderate income housing, and will be a significant contribution to the City's policy of encouraging mixed use in an area formerly devoted to and planned for commercial use. Nor will the grant of relief in the present case compromise the larger TDR mechanism as a useful tool of community planning.

As conditions to the Board's Approval:

1. the Applicant shall design the roof structures as if they were "towers" above the main building; i.e., face all sides of the roof structures with materials of the same type and/or appearance as those of the principal building facades; the footprint of the structures shall be approximately the same size; the height of three roof structures shall be a uniform 18'6'' per the plans and the fourth roof structure over the stair tower shall be a lower height; and there shall be a clear termination to the top of the roof structures, consistent with the detailing of the top of the principal building facades;

2. the Applicant shall meet the design guidelines specified in the plan for all structures;

3. the Applicant shall set back in a 1:1 ratio the roof structure that is now flush with the wall at the property line shared with Lot 19;

4. the Applicant shall refine the design of the blank wall adjacent to Lot 19 so that it incorporates patterns and, on the upper floors, where permitted by the Building Code, windows, that reflect the rhythms, fenestration, and materials of the proposed apartment building façade on 2nd Street;

5. the Applicant shall reserve at least 20% for the total number of apartment units for affordable housing for a minimum of 20 years subject to the terms and conditions of an agreement with DCHFA and its bond financing;

6. the Applicant shall landscape at least 80% of the 8,643 square foot courtyard and include active recreational uses in at least 30% of the courtyard area;

7. the Applicant shall provide a secure entrance and exit for apartment residents on the 2nd Street frontage or from the courtyard to 2nd Street;

8. the Applicant shall reserve the pool and adjacent meeting room/party room for activities catering exclusively to residents of the apartment building for at least six hours per month, at no cost;

9. the residential/apartment portion of the project shall satisfy the requirements for an apartment house use as set forth in the Zoning Regulations and shall not be used as an inn or an expansion of the hotel for so long as the TDR variances granted pursuant to Section 1709 are utilized;

10. the Applicant shall enter into a First Source Employment Agreement with the Department of Employment Services in connection with the development of the hotel portion of the project. The applicant shall report quarterly to ANC 6B as to job availability during the construction phase for the entire project; and

It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: 3-0 (Robert Sockwell, Anthony Hood and Anne Renshaw to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:
Jerrily R. Kress, FAIA
Director

Final Date of Order: DEC 13 2000

PURSUANT TO D.C. CODE SEC. 1-2531 (1999), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1999), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.