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February 7, 2002

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Mr. Geoffrey H. Griffis
Chairman, Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington D.C. 20001

RE: BZA Application No. 16833

Dear Chairman Griffis & Board Members,

I am writing out of respect for my father, longtime resident (1956) of the District of Columbia who has for the last ten years of his life (he is now 80 years old) spent many hours advocating for a bike trial from Silver Spring to Union Station.

At a well attended public hearing last year (1/16/01), held at a local DC library, DC Government transportation representatives clearly stated that the Mayor of the District of Columbia views this bike path as an future alternate commuter route. We were told that his decision was based on reducing DC traffic congestion and to help DC comply with its Clean Air Act obligations. None of these goals will occur if the bike path does not take a direct route as originally proposed. The present design of this project effectively blocks this route. For that reason, the proposed building design creates a "substantial detriment to the public good". If the building setback at the Metro property line were sufficient to accommodate such an important public amenity, I believe the applicant would meet his "recreational area" zoning requirements.

I have asked my attorney to review the variance application. He questions the legality of this requested variance for the reasons stated in the attached letter for your review.

Thank you for reviewing this matter from such a broad urban planning perspective.

Sincerely,

Daniel Meijer

BZA
Case No. 16833
Exhibit No. 28

Board of Zoning Adjustment
District of Columbia
CASE NO.16833
EXHIBIT NO.28

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DAVID W. BROWN

February 8, 2002

Mr. Daniel Meijer
929 Gist Avenue
Silver Spring, Maryland 20910

Re: BZA Application No. 16833

Dear Mr. Meijer:

You have retained this firm to provide advice regarding whether the Board of Zoning Appeals may lawfully grant the area variance request contained in the above-referenced Application, i.e., reduction of Residential Recreation Space from the required 11,719 square feet to 8,846, a reduction of about 24.5%. I have reviewed the Application, the Zoning Administrator's Memorandum of December 31, 2001, and the BZA Staff Report of February 4, 2002. I have not reviewed the legality of any part of the Application other than the request for a variance. For the reasons explained below, I conclude that granting the requested variance, on the information presented, would be unlawful and subject to legal challenge.

The Board's authority to grant area variances is defined and limited by statute. D.C. Code § 5-424 (g)(3); 11 DCMR § 3103. Under this standard, the Board must find that all of the following conditions are met:

(1) the property suffers from "exceptional narrowness, shallowness or shape" or from "exceptional topographic conditions or other extraordinary or exceptional situation or condition;"

(2) these exceptional circumstances "result in peculiar and exceptional practical difficulties" to the owner unless he or she can obtain a variance; and

(3) variance relief will not create "substantial detriment to the public good" or "substantially impair the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map."

Draude v. BZA, 527 A. 2d 1242, 1254 (1987).

Further guidance on how these standards are to be implemented, as here, in an application for an area variance, is contained in Draude. What is meant by "exceptional condition" is "unusual conditions *of the property, not* merely ... unusual circumstances personal to the owner and related to the property only in the sense that that the owner's personal situation makes it difficult to develop the land consistently with the zoning regulations." Id. at 1255 (emphasis in original). Nor is a variance proper "just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance if the owner could use or improve the land in other ways compatible with zoning restrictions." Id. The burden of proof on all these considerations lies with the property owner. See Russell v. BZA, 402 A. 2d 1231, 1235 (1979).

In this case, the applicant seeks a variance on the 20% residential recreation space requirement of 11 DCMR § 773.3. He seeks to reduce the space provided by almost 25%, from the over 11,719 square feet required to 8,846 square feet. The applicant makes only a perfunctory effort to justify this substantial reduction, and he does not come close to meeting the above standards.

First, there is nothing "exceptional" about the shape or topography of the property in question that requires development to take place exactly as proposed, and the applicant does not attempt to prove otherwise. This property-specific limitation is intended to limit variances to situations where, because it is difficult to build on one part of a property, it may be appropriate to afford the applicant greater latitude elsewhere on the lot. By contrast, here development is proposed throughout the property and there is only a modest elevation change, one that does not appear to inhibit development.

Second, there is no showing the owner could not improve the property in a manner compatible with the 20% open space requirement. Instead the applicant asserts, in conclusory fashion, that he needs to "maximize the number of rental units," presumably to achieve an unstated return on his investment in the property. But this is nothing more than a claim to entitlement to the most profitable development of the land. Such claims have been squarely rejected as justification for a use variance, Russell, supra, 402 A.2d at 1236 & n.8, and are no more valid for an area variance. As explained in the area variance case of Barbour v. BZA, 358 A.2d 326 (1976), "in the commercial context, a variance cannot be granted where property conforming to the regulations will produce a reasonable income, but, if put to another use, will yield a greater return." Id. at 327 (citations and quotation marks omitted). In any case, to the extent project economics may sometimes be a legitimate consideration, the applicant cannot simply invoke them and thereby gain entitlement to a 25% reduction in the residential recreation space requirement; he would have to demonstrate, at a minimum, that a reasonable return is not possible without this generous variance, and might even need to demonstrate that "*no* use could be made of the property absent a variance...." Id. at 327 n.4 (emphasis in original). The Board need not decide in this case which of these standards to apply; the applicant has not attempted to satisfy either.

In this connection, it is noteworthy that the Staff Report concludes as follows: "It does not appear possible to add additional meaningful recreation space." This has the statutory test exactly backward. It is up to the **developer** to demonstrate that providing the required space is not possible, and that the development proposed is the only way a reasonable return on investment can be achieved. Given the strict test for area variances, a developer cannot sustain his burden of proof on "appearances," and approval over your opposition on this point would be reversible error.

Please do not hesitate to contact me if you have any questions about the foregoing, or if further assistance is needed.

Sincerely,

David W. Brown