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May 6, 2002

D.C. OFFICE OF ZONING
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Zoning Commission
District of Columbia Office
of Zoning
441 Fourth Street, N.W.
Suite 210 South
Washington, D.C. 20001

Re: BZA Application No. 16833 of TP2 LLC

Dear Chairman and Members of
the Commission:

Daniel Meijer, through undersigned counsel, respectfully requests sua sponte review of the above-referenced BZA Application, approved by the Board in a Decision and Order of May 1, 2002 (copy attached). Review is requested pursuant to 11 DCMR § 3128.7(b), in that the BZA Decision is contrary to D.C. Code § 6-641.07(g)(3) (2001) and 11 DCMR § 3103.2, which narrowly limit area variances to the rare case of truly exceptional circumstances. Mr. Meijer participated in this matter before the Board and specifically raised the question as to whether a variance was justified in this case.

Not only is this not a case involving inability to comply with the law due to exceptional circumstances, it is also a case where the granted variance is based upon the undocumented, unsubstantiated claim that "it is necessary to maximize the number of rental units on the site." Application at 3. If developers are allowed to obtain variances by the mere assertion of economic necessity, however, there will be nothing left of the law and regulations intended to limit the proliferation of variances. The Commission should intercede to protect the integrity of the variance process.

STATEMENT OF FACTS

The developer has proposed a multi-story apartment building of 58 units on a 34,531 square foot lot in the C-2-A zone. The required 20 percent residential recreation space was determined to be 11,668 square feet, whereas the applicant sought

BZA
Case No. 16833
Exhibit No. 44

Board of Zoning Adjustment
District of Columbia
CASE NO.16833
EXHIBIT NO.44

permission to reduce this to 8,897 square feet, a reduction of 2,771 square feet, or 23.75% of the amount required by law. [The Board Decision (at 12) erroneously describes the variance as a "relatively small" five percent.]

The Board identified the following unique attributes of the property: its irregular pie shape; sharply sloping topography; a perpetual five-foot WMATA easement; a WMATA concrete retaining wall; and adjacent railroad and metrorail tracks. Id. The Board found that these characteristics limit the configuration and location of the apartment building and the amount of residential recreation space that could be provided. Id.

BASIS FOR SUA SPONTE REVIEW

The Board Decision states the correct legal standard for proof of an area variance, but the Board failed to apply it properly. No one at the hearing disputed that certain characteristics of the property limited how and to what extent it could be developed. But even a cursory review of the applicant's development plan reveals that none of the so-called unique characteristics impeded the developer from proposing an apartment complex that conquers every challenge presented by the property. For example, in those parts of the property where its shape and slope are most irregular, multiple stories of apartments are to rise, all adjacent to the tracks, concrete wall and WMATA easement. In short, the developer proposes development that obviates every practical difficulty identified by the Board.

As for the amount of recreation space, the Board concluded that the "courtyard, which would provide most of the recreation space, cannot be made any larger without significantly impairing the utility of the apartment units." Id. The Board also said that "there does not appear to be any other feasible location for providing additional, meaningful recreation space." Id. These observations may very well be correct, if one accepts at face value the developer's assertion of economic necessity that the apartment building must contain 58 units. But if a slightly less dense project had been considered -- e.g., 50-52 units -- this would simultaneously lower the open space requirement (which is tied to the gross floor area, see 11 DCMR § 773.3) and increase the open space, such that no variance at all would be required. The Board made no effort to explore the economic feasibility of such a variance-free project with the developer;

it simply accepted, without any requirement of substantiation, that the project had to be, in the applicant's words, one that would "maximize the number of rental units on the site." Application at 3.

This decision cannot be squared with established variance law in the District of Columbia. A variance is not proper simply to fulfill a desire for the most profitable development of the land. Russell v. BZA, 402 A.2d 1231, 1236 & n.8 (1979). See Barbour v. BZA, 358 A.2d 326, 327 (1976). And the burden of proof on the need for a variance remains at all times on the applicant. Russell, supra, 402 A.2d at 1235.

If it had correctly applied variance law, the Board would have addressed the evidence -- or in this case the lack of evidence -- of economic feasibility. Its task was to make express findings "to decide on which side of the - necessarily imprecise - line ... the evidence in this case falls." Tyler v. BZA, 606 A.2d 1362, 1368 (1992). On one side of the line are applicants merely seeking the most profitable use of their land; on the other side are applicants facing difficulty financing any improvement without a variance. Id. At the least, therefore, the Board should have demanded a demonstration by the applicant that, in light of the cost of the development, slightly less that the "maximum" number of apartments will not produce a reasonable return. See Barbour, supra, 358 A.2d at 327. But the Board had no idea how many apartment units are necessary for a reasonable return; there are no figures whatsoever in the record from the applicant on project economics.

CONCLUSION

If the Commission allows the Board to approve in this case a substantial (23.75%) variance in an important open space requirement on an undocumented assertion of economic necessity, the door is wide open for other developers to do the same in ensuing cases. This endangers not only the continued viability of the open space requirement at issue here, but the integrity of countless other Zoning Ordinance standards as well. The Commission should not allow the Board's action to stand unreviewed.

Respectfully submitted,

David W. Brown

Attachment

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16833 of TP2 LLC, pursuant to 11 DCMR § 3104.1, for a special exception from the limitation on the number of roof structures and the roof structure setback requirements under subsection 411.11, and pursuant to 11 DCMR § 3103.2, for a variance from the residential recreation space requirements under section 773, to permit the construction of a mixed-use apartment house (retail on the street level) in a C-2-A District at premises 306 Carroll Street, N.W. (Square 3354, Lot 26).

HEARING DATE: February 12, 2002

DECISION DATE: February 19, 2002

DECISION AND ORDER

TP2 LLC, a District of Columbia corporation and the owner of Lot 26 in Square 3354, with a street address of 306 Carroll Street, N.W., filed an application with the Board of Zoning Adjustment on December 13, 2001, requesting zoning relief to permit the construction of a mixed-use apartment house, with retail on the street level, in a C-2-A Zone District. The applicant is represented in these proceedings by attorney Stephen N. Gell.

The applicant is seeking a special exception pursuant to 11 DCMR §§ 411.11 and 3104.1 from the provisions of § 411.3 (applicable in a Commercial District through § 770.6(a)), which limits roof structures to one enclosure, as well as from the setback requirement of § 770.6(b), which requires that a roof structure be set back from all exterior walls a distance at least equal to its height. In addition, the applicant seeks an area variance pursuant to § 3103.2 from the provisions of § 773, which require that an apartment house in a C-2-A District provide residential recreation space in an amount equal to at least 20 percent of the gross floor area devoted to residential use. The zoning relief requested in the application is self-certified pursuant to § 3113.2. After a public hearing, the Board granted both the special exception and the variance.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memorandum dated December 17, 2001, the Office of Zoning provided notice of the filing of the application to the District of Columbia Office of Planning; Advisory Neighborhood Commission (ANC) 4B, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the two affected Single-Member Districts; and the Ward 4 Councilmember.

The Board scheduled a hearing on the application for February 12, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on January 4, 2002, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 4B notice of hearing. Notice of hearing was also published in the *D.C. Register* on January 11, 2002, at 49 DCR 235. The applicant's Affidavit Of Posting indicates that on January 28, 2002,[1] three zoning posters were placed on the property, two on Carroll Street and one on Vine Street, in plain view of the public.

Participation in this Case by the Board Chairman. Chairman Geoffrey H. Griffis disclosed that the architectural firm where he is employed, Hickok Warner Fox, is a consulting architectural firm to Montgomery Oaks Management, Inc., the project architect. Mr. Griffis indicated that he had not worked on the TP2 project; had no knowledge of the facts of the case other than through the Board of Zoning Adjustment process; and had no personal or economic interests that could be affected by the Board's proceedings. He stated that he could be fair and impartial in hearing and deciding the case.

Mr. Griffis asked if anyone, including the two parties (the applicant and the ANC) and the persons interested in the case who were present in the hearing room, objected to his participation. No one raised any objections. All of the Board members stated their concurrence with his involvement. Therefore, Mr. Griffis did not disqualify himself from hearing and deciding this application.

Requests for Party Status. There were no requests for party status in this case.

Applicant's Case. The applicant presented testimony from Russell Katz, TP2 president; Lawrence Caudle, who was qualified as an expert witness in architectural design; and Frances Phipps, a neighbor and professional planner. In addition, the applicant submitted a petition from the Eastmont Cooperative, Inc., indicating that the vacant property has been an eyesore and that the proposed project would complement the redesign of the 4th and Cedar Street corridor.

D.C. Office of Planning (OP) Report. In its report dated February 4, 2002, OP recommends approval of the requested special exception and variance. OP advises that the Historic Preservation Review Board has approved the massing and conceptual design of the building. OP states that additional work is needed outside the Board of Zoning Adjustment process to address two issues related to the project: (1) Carroll Street traffic circulation and (2) the alignment of the Metropolitan Branch Trail, a proposed bicycle and pedestrian trail.

D.C. Division of Transportation (DDOT) Report. In its report dated February 4, 2002, DDOT states that it has no objection to the requested zoning relief. DDOT is, however, concerned about the possible traffic impacts of the project, and indicated that it would be conducting a traffic study in the Takoma area. DDOT is also concerned about the potential impact of the project on the Metropolitan Branch Trail, since one of the four proposed alignments in Takoma runs along the west side of the subject property. DDOT states that it is conducting a study to help determine the most appropriate alignment. DDOT anticipates

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[1] The affidavit, signed on January 28, 2002, and filed with the Board on February 6, 2002, erroneously indicates the property was posted on February 28 rather than January 28. The attached, dated photographs show that the property was posted on January 28.

working with the applicant to develop a traffic management plan for the project that will address these issues.

ANC Report. The Board waived the seven-day advance filing requirement of § 3115.1 to accept the late-filed ANC report, as the ANC was not familiar with the Board's procedural requirements and the waiver would not prejudice the applicant's rights. The ANC report indicates that at a public meeting on January 24, 2002, with a quorum present, the ANC voted to support the application.

The ANC notes that the property has a very odd shape and a steep embankment on two sides. The ANC states that the applicant's design makes the best possible use of the site, and that the proposed building would be well under maximum permitted height and floor area ratio limits and provide more than the required number of parking spaces. With respect to the residential recreation space variance, the ANC states that the project would provide a very high quality interior courtyard and other amenities; that the applicant has provided additional public space at his own expense to widen the sidewalk; and that with the proposed window wall at the Metrorail underpass, the building would improve public safety. The ANC also states that the requested variance would not result in a substantial detriment to the public or the zone plan, in that it would remove a blight in the neighborhood and improve the quality of life in Takoma through the provision of apartments and retail space. The ANC did not take a position with respect to the Metropolitan Branch Trail, other than to note that one possible alignment would run on or alongside the applicant's property and that any final decision on the trail would likely entail a lengthy process. Sara Green, the Single-Member District Commissioner for the area surrounding the project, presented the ANC's report.

Persons in Support of the Application. James Brockett (adjacent property owner), Bonnie Moss (representative of Plan Takoma, a neighborhood association), Loretta Neumann (Vice President, Historic Takoma, Inc.), and Chris Turner (member, Historic Takoma and Plan Takoma) testified in support of the application. The Board also received supporting letters from Raymar Corporation, the owner of the property at the corner of Maple and Vine Street, and Dodie Butler.

Persons in Opposition to the Application. Ellen Jones, Executive Director of the Washington Area Bicyclist Association (WABA); Daniel Meijer, whose father is a bicycle activist; and WABA member Andrea Ferster testified in opposition to the residential recreation space variance. No one objected to the proposed roof structures, either in written or oral comments.

WABA is a bicycle advocacy organization with 5,400 members in the metropolitan Washington region, including 1,700 members residing in the District of Columbia and 142 members residing in the Takoma Park area. Its objections centered on the effect the project might have on the Metropolitan Branch Trail. WABA stated that construction of the project would eliminate two out of four possible trail alignments through Takoma, including WABA's preferred alignment. WABA argued that the project would thus reduce the safety and effectiveness of the trail and possibly undermine completion of the trail altogether, thereby resulting in substantial detriment to the public good. WABA testified that the trail option in

question would require the construction of an above grade bridge for bicycle use and require the addition of an easement on the subject property. Mr. Meijer, through counsel, argued that the applicant had not met the variance test, stating that neither the shape nor the topography of the lot are exceptional, and that the applicant had not demonstrated practical difficulties in complying with the Zoning Regulations. He felt that if the building could be set back to permit the WABA preferred trail alignment, which he characterized as an important public amenity, then a variance from the residential recreation space requirement in its entirety could be approved.

Closing of the Record. The record closed at the conclusion of the public hearing.

Decision Meeting. At a special public meeting on February 19, 2002, the Board approved the application, voting 5 – 0 – 0.

FINDINGS OF FACT

The Subject Property and the Surrounding Area

1. The property that is the subject of this application is Lot 26 in Square 3354, also known as 306 Carroll Street, N.W.

2. The property is zoned C-2-A. It is located in the Takoma Park Historic District.

3. It is a long, irregular, pie-shaped through lot, extending from Carroll Street on the north to Vine Street on the south. The lot is 34,531 square feet in area.

4. The Carroll Street frontage, approximately 180 feet, follows the curvature of the street. The Vine Street frontage is 30 feet.

5. The lot is bounded on the west by the CSX Railroad and Washington Metropolitan Transit Authority (WMATA) Red Line Metrorail tracks. The western side of the lot is angled, following the railroad right-of-way, with a length of approximately 326 feet. WMATA has a perpetual five-foot surface easement along the western property line.

6. Along the eastern side, there is a historic property used for residential and commercial purposes fronting on Carroll Street, and a contractor's lot, fronting on Vine Street.

7. The lot has a very small access area on Vine Street, which flares out at grade. The lot then rises steadily to brick retaining walls, located about three quarters of the way north on the lot, that mark a significant change in grade of 10 to 12 feet. The site then slopes downward toward Carroll Street. The northern portion of the lot facing on Carroll Street is between 8 and 16 feet lower than the southern portion of the lot on Vine Street. Along Carroll Street, the lot slopes 9 feet down from east to west.

8. The western side of the lot includes part of a two and one-half foot thick, concrete reinforced wall built by WMATA during the construction of the Takoma Metrorail Station. The applicant is unable to remove this wall, which extends about 20 feet into the lot.

9. The property is primarily surrounded by commercial and public facility uses. To the north, directly across Carroll Street is the Takoma Metrorail Station and parking lot. Residential and mixed-use buildings are planned for the area surrounding the station. Several industrial, commercial, and warehouse facilities are located along Vine Street. Vine Street dead ends at the railroad tracks.

10. The Takoma neighborhood is located in the far northeast corner of Ward 4, near the District boundary with Maryland. The City of Takoma Park, Maryland, is to the east. The Takoma Central District is the center of the Takoma neighborhood, and the subject property is essentially at the center of the Takoma Central District. Carroll Street is the central east-west connecting road through the Takoma Central District, extending through the railroad and Metrorail underpass.

The Proposed Project

11. The property has been vacant for over 20 years. Several factors have made development difficult, including the shape of the lot, its steep slope, the proximity of the railroad and Metrorail tracks, the existing WMATA-constructed retaining wall, and historic district development controls.

12. To address the shape and topography of the lot, the applicant is proposing a five-level interior courtyard building. The ground floor, including 3,580 square feet of street level retail space, would occupy only the northern portion of the lot. The next three floors would be residential, with a total of 58 apartment units, 18 on the first floor and 20 on both the second and third floors. Due to the shape of the lot and the applicant's objective of having the apartments face inward away from the railroad tracks on the west and the adjacent property on the east, most of the apartment units would be arranged around a triangular-shaped courtyard. On the western side, the first floor of apartments would be set back five feet to accommodate the WMATA easement. The upper two apartment floors would be cantilevered over the easement. A partial fourth level would provide an upper level for ten of the third-floor apartments. Some of the apartments would face on Carroll Street.

13. In deference to the character and scale of the buildings in the neighborhood, the applicant has kept the height of the building and floor area ratio below the maximum permissible amount.

14. To accommodate community concerns regard pedestrian traffic along Carroll Street, the applicant has set the front of the building back between four and six feet to permit the widening of the public sidewalk.

Roof Structures

15. As a result of the interior courtyard design of the building, there would be three roof structures.

16. The first roof structure is an elevator overrun on the Carroll Street side of the building. It would accommodate the building's only elevator. The Carroll Street lobby connects vertically to lobbies on all levels of the building, whereas the Vine Street lobby does not. This roof structure, which is eight feet high, would be set back just over eight feet from the front exterior wall, meeting the minimum setback requirement.

17. The second roof structure is a mechanical equipment enclosure that would be located at the southeast corner of the building, at the rear, facing Vine Street. It would also enclose a stairway that would provide roof access. This roof structure, seven feet high, would set back just four inches less than required from the rear and side exterior walls, a minimal deviation.[2] Visually, it would appear as an extension of the wall around the mezzanine level.

18. The third structure at 18 feet, 6 inches, would enclose the cooling tower. The applicant located the cooling tower at the southwest corner of the building, adjacent to the railroad tracks, since the cooling tower is too large to fit into the mechanical and stairway enclosure. Due to the narrowness of the building, it can only set back 5 feet, 2 inches, from the west building wall, and 15 feet from the south building wall. It would be located as far away from Carroll Street and Vine Street as possible, and not next to any other occupied lot. It would, however, be visible from Blair Road, from across the railroad tracks.

19. All three roof structures would be stucco, which would match the rooftop elements, including the mezzanine level enclosure.

20. The roof structures were designed and placed so as to be integrated with the building in form and material, and to reduce the visual impact from Carroll Street.

21. Based on the above, the Board finds that the size, shape, and topography of the lot, which in turn limit the size, shape, and various levels of the building that can be constructed, would tend to make full compliance with the one enclosure and one-to-one setback requirements of the Zoning Regulations impracticable, unduly restrictive, and unreasonable.

22. The Board further finds that the proposed roof structures will not adversely affect the air and light of adjacent properties.

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[2] This deviation appears to fall within the scope of the Zoning Administrator's minor flexibility authority under 11 DCMR § 2522(c).

Recreation Space Requirement

23. The applicant is requesting an area variance to permit the reduction in the required residential recreation space from 20 percent (11,668 square feet) to 15.2 percent (8,897 square feet). Ex. 38.

24. The recreation space to be provided would consist of the interior courtyard, which would have flowering shrubs, large mature trees, and a re-circulating water element. The courtyard would also accommodate the storm water treatment system. In addition, the applicant has included as recreation space those parts of the lobby that would provide seating areas and a bicycle storage area.

25. The apartments facing the courtyard, approximately 48 units, would have balconies that open to the courtyard.

26. The size of the courtyard maximizes the light and air available to the apartment units, and provides open space. Since the lot narrows significantly from north to south, the applicant cannot expand the size of the courtyard without reducing the size of the surrounding apartment units, substantially reducing their utility.

27. The applicant has investigated other means of providing additional recreation space, such as excavating additional basement levels and providing rooftop recreation space. These alternatives are not feasible due to the property's physical characteristics and its proximity to the railroad tracks.

28. Across Carroll Street and adjacent to the Takoma Metrorail Station is open space, at least one acre of which will be maintained in perpetuity as a park.

29. The Board finds that the applicant would confront practical difficulties in complying with the residential recreation space requirements due to unique and exceptional conditions of the property; namely, the irregular shape of the lot, its sloping topography, the permanent WMATA easement along the western property line, the WMATA-constructed retaining wall on the lot, and the adjacent railroad tracks. These conditions limit the size and shape of the building that can be constructed, which in turn limit the amount and location of the residential recreation space that can be provided.

Impacts on the Zone Plan and the Public Good

30. The Comprehensive Plan Generalized Land Use map designates the Takoma Central District for low-density residential and commercial development. The Generalized Land Use Policies Map indicates the area west of the tracks as a multi-neighborhood commercial center.

31. Section 509.1(j) in the Transportation Chapter of the Comprehensive Plan (10 DCMR) states, "Support completion of a feasibility study and other measures necessary to construct the

Metropolitan Branch Trail for bicyclists and pedestrians adjacent to the Metropolitan Red Line between Union Station and the Maryland border on the northeast side of the District."

32. The Ward 4 Plan of the Comprehensive Plan includes a number of policies relating to the Takoma neighborhood and especially the Takoma Central District. Section 1528.12 states that the development of areas surrounding certain metrorail stations, including the Takoma Metrorail Station, are critical to the Ward's future. Section 1530.1(c) calls for a Takoma Metrorail Station Area Study to determine the appropriate mix, scale, intensity, and design of development, and recommends land use and zoning actions that "encourage new and accommodate existing town houses and garden apartment development and that discourage more industrial use."

33. OP advises that it has transmitted the Takoma Central District Plan, a small area plan, to the Mayor for review and transmittal to the Council for the District of Columbia. Among other things, the plan identifies the subject property one of five priority redevelopment sites.

34. As described in the Zoning Regulations in 11 DCMR §§ 720.1 – 720.5, the C-2-A District is a community business district designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the city outside of the central core. Areas zoned C-2-A are located in low and medium density residential areas, with access to main highways or rapid transit stops, and include office employment centers, shopping centers, and medium-bulk mixed use centers.

35. OP states that despite its relatively small size, the proposed project is a significant project at a key location in the central business district of the Takoma neighborhood. According to OP, the project is important in obtaining additional development around the Takoma Metrorail Station.

36. The site serves as an important link between the east and west portions of the Takoma Park Historic District, which is bisected by railroad tracks. The location of retail on the ground floor would assist in uniting the two remote ends of the Carroll Street commercial corridor and begin to encourage pedestrian traffic on the south side of Carroll Street.

37. The lot, which has been vacant for some 20 years, is described as blighted and an eyesore. The ANC report states that the retaining walls on the property are covered with graffiti, and that trash and abandoned vehicles accumulate on the site. The ANC also points out that thousands of Metrorail commuters see this site every day.

38. The applicant has engaged in extensive public outreach and modified its plans in an effort to incorporate as many community concerns as possible. For example, the applicant set the building back to widen the sidewalk on Carroll Street and relocated a fire stair inside, allowing for corner retail. As a result of the applicant's efforts, this project enjoys broad community support.

39. OP and the participants in the Board of Zoning Adjustment proceedings have identified two concerns relating to this project.

40. First, OP indicates that there is community and planning staff concern about vehicular, bicycle, and pedestrian circulation on Carroll Street and movements into the proposed TP2 project. These traffic concerns are not directly related to the zoning relief requested of the Board, but will be addressed through the development of a traffic management plan by the District Division of Transportation (DDOT) and the applicant. In addition, the applicant has already reduced the number of retail parking spaces and eliminated one of two proposed curb cuts (the curb cut closest to the Metrorail Station) on Carroll Street.

41. Second, the Metropolitan Branch Trail is a proposed regional bicycle and pedestrian trail linking suburban Maryland and the center of Washington, generally following the "Metropolitan Branch" railroad alignment, now the CSX tracks and the Metrorail Red Line. Certain segments of the trail have been constructed or are under design.

42. There are four potential trail alignments in the Takoma section. DDOT is presently undertaking a study of the alternatives, including their physical alignments and any required property acquisition.

43. One of the alignments, the Eastern Off-Street Alignment, follows the east side of the railroad/WMATA right-of-way and would require acquisition of a portion of the subject property. This alignment has certain advantages in terms of eliminating at-grade crossings of the trail and major arterial streets.

44. If the TP2 project is constructed as configured, it would essentially eliminate the Eastern Off-Street Alignment (WABA options A1 and A2). DDOT is concerned with foreclosing this alignment.

45. With the TP2 project poised for commencement, the applicant has advised the Board that an indefinite delay to permit the completion of the Metropolitan Branch Trail alignment studies and the related public participation process would jeopardize the feasibility of the project.

46. Moreover, accommodating the trail would require a significant redesign of the TP2 project, reducing the width of the proposed building along the railroad tracks by approximately ten feet, and reducing the number of apartment units and the size of the courtyard. The applicant has further advised OP and the Board that the project cannot be revised to incorporate the Eastern Off-Street Alignment without destroying the project's feasibility.

47. While the Eastern Off-Street Alignment is the only alignment that allows for a grade-separated crossing of Carroll Street, WABA did not present any technical studies indicating which alignment is best, nor is there a schedule for the completion of such studies or the public participation process. The evidence is not sufficient to support a finding that once all the studies are completed, the Eastern Off-Street alignment will be the preferred alignment.

48. Based on the above findings of fact, the Board finds that granting the requested special exception for the roof structures will be in harmony with, and will not materially impair, the general purpose and intent of the Zoning Regulations, and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

49. The Board also find that the requested residential recreation space variance can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code §§ 6-641.07(g)(2) and (3) (2001)), to grant special exception and variance relief from the Zoning Regulations. TP2 LLC is seeking a special exception pursuant to § 411.11 from the limitation in § 411.3 on the number of roof structures (applicable in a Commercial District through § 770.6(a)), as well as from the minimum setback requirement of § 770.6(b). In addition, TP2 is seeking an area variance from § 773, to reduce the required minimum area to be provided as residential recreation space from 20 percent to 15 percent of the gross floor area of the building devoted to residential use. The public notice requirements of § 3113 for the public hearing on the application have been met.

In reviewing special exception and variance cases, the Board is required under D.C. Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. The Board is also required under D.C. Code § 6-623.04 (2001) to give "great weight" to OP's recommendations. The Board has carefully considered both the ANC's and OP's reports and, as discussed below, finds their recommendations to approve the application persuasive.

Roof Structure Special Exception

Under § 770.6, which governs roof structures in the Commercial Districts, if housing for mechanical equipment or a stairway or elevator penthouse is provided on the roof of a building, it must meet the requirements of § 411 and be set back from all exterior walls a distance at least equal to its height above the roof. The Board is authorized under § 411.11 to grant special exception relief to approve "the location, design, number, and all other aspects of the structure regulated under §§ 411.3 through 411.6, even if such structures do not meet the normal setback requirements of . . . § 770.6 . . . ." Such relief can be granted where operating difficulties and conditions relating to the building or surrounding area would tend to make full compliance impracticable, unduly restrictive, prohibitively costly, or unreasonable, provided that the roof structures will not materially impair the intent and purpose of the Zoning Regulations, including the area restrictions of chapter 4, nor adversely affect the light and air of the adjacent buildings. The intent and purpose of § 411, as stated in §§ 411.1 and 411.3, includes the exercise of a reasonable degree of architectural control over roof structures, with roof structures to be in harmony with main structures with respect to architectural character, material, and color.

The applicant has proposed three roof structures rather than one roof structure, as required under § 411.3. In addition, one roof structure, the mechanical equipment and stairway enclosure, would be set back four inches less than required from the exterior wall, while another

roof structure, which houses the cooling tower, would be set back five feet, two inches, from the west side wall and fifteen feet from the south wall. The Board concludes that the applicant has demonstrated that full compliance with the requirements of §§ 411 and 770.6 would be impracticable, unduly restrictive, and unreasonable, given the shape, topography, and location of the lot, which has in turn limits the shape and size of the building that can be constructed. The size and shape of the building, its various levels, and its frontage on Carroll Street, in turn, result in the need for three roof structures. A separate elevator penthouse is necessary to permit the elevator to connect all building levels. A separate cooling tower enclosure is necessary given the size of the cooling tower and to permit the cooling tower enclosure, the tallest roof structure, to be placed adjacent to the railroad tracks. Incorporating community concerns, the applicant has located and designed the three roof structures so as to reduce their visual impact. In addition, the Historic Preservation Review Board has approved the massing and conceptual design of the building. Because the roof structures would be integrated with the building in form, material, and color, setting two of the roof structures closer to the exterior walls on the western and southern sides would not have an appreciable effect on the appearance of the property. These roof structures would be visible only from Vine Street, a dead end street with limited usage, and from Blair Road, from across the railroad tracks. Finally, the number and setback of the roof structures do not have any direct bearing on the concerns raised by DDOT, OP, and the public relating to traffic circulation on Carroll Street, nor the Metropolitan Branch Trail alignment. These concerns will be addressed by DDOT outside the Board of Zoning Adjustment process.

Therefore, based upon the findings of fact and having given great weight to the ANC and OP reports, the Board concludes, as required for special exception relief under § 411.11, that the proposed roof structures will not materially impair the intent and purpose of the Zoning Regulations, including chapter 4, nor adversely affect the light and air of adjacent buildings. As required under § 3104.1, the Board concludes that the requested special exception relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map, and will not affect adversely the use of neighboring properties.

Residential Recreation Space Variance

Section 773 requires that the owner of a building in a C-2-A District devoted to apartment house use provide residential recreation space in an amount equal to at least 20 percent of the gross floor area of the building devoted to residential use. Residential recreation space must be safe, secure, and suitably equipped or landscaped for the active or passive recreation use of the residents. It may be located at ground level, on or above the residential plane, on rooftops, or within a building or other structure. At least 50 percent of the total residential recreation space must be located outdoors. However, the area of a balcony may not be counted to satisfy the residential recreation space requirement if the balcony, or a portion of it, adjoins an individual residential unit and is accessible only from that unit.

Under the three-prong test for an area variance set out in D.C. Code § 6-641.07(g)(3) (2001), and quoted in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, or topography, or other extraordinary or exceptional situation or condition connected with the property; (2) the applicant would encounter practical difficulty

as a result of the unique characteristics of the property if the Zoning Regulations were strictly applied; and (3) granting the variance will not result in 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 Zoning Map. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990); *Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1254 (D.C. 1987). To show practical difficulty, an applicant must prove that compliance with an area restriction would be unnecessarily burdensome and that the practical difficulty is unique to the particular property. The nature and extent of the burden are determined on a case-by-case basis, and the Board may consider a wide range of factors in determining whether there is an unnecessary burden or practical difficulty. *Gilmartin*, 579 A.2d at 1170.

Based upon the findings of fact and having given great weight to the ANC and OP reports, the Board concludes that the proposed project meets the three-prong test for a variance. First, the Board concludes that the subject property is unique due to its irregular pie-shape; sharply sloping topography; the perpetual five-foot WMATA easement along the western property line; the presence of a permanent WMATA-constructed concrete retaining wall on the lot; and the adjacent railroad and Metrorail tracks, with their attendant noise and visual impacts.

These exceptional characteristics of the property significantly limit the configuration of any building that could be built and the resulting location and amount of any residential recreation space that could be provided. The courtyard, which would provide most of the recreation space, cannot be made any larger without significantly impairing the utility of the apartment units. And, apart from the bicycle storage area and the lobby areas that are counted as residential recreation space, there does not appear to be any other feasible location for providing additional, meaningful recreation space. The Board thus concludes that as a result of the unique characteristics of the property, the strict application of the minimum residential recreation space requirements of § 773 would be unduly burdensome and result in peculiar and exceptional practical difficulties to the owner.

Finally, the Board concludes that the requested variance would not result in substantial detriment to the public good, nor substantial impairment of the zone plan. The proposed apartment house enjoys broad support from adjacent property owners, the Takoma neighborhood, and the affected ANC. At five percent, the variance is relatively small. The courtyard will provide a safe, secure, and landscaped area for the active and passive recreation use of the residents, and will provide light and air to the apartment units. While the balconies are not counted toward the residential recreation space requirement, the residents of the units with balconies will be able to enjoy the view of the courtyard year round. The residents will also have access to nearby public green space. As an apartment house with street level retail, the project is in keeping with the C-2-A zoning, and OP indicates that the property is a priority redevelopment site.

Concerns regarding the project centered on the impact the project would have on Carroll Street traffic and the alignment of the Metropolitan Branch Trail through Takoma. The requested variance does not have any bearing on the traffic concerns. However, the Board notes that the applicant has already eliminated one curb cut along Carroll Street and certain retail

parking spaces in response to traffic-related concerns and that DDOT states that it will be working with the applicant to develop a traffic management plan for the project. In addition, there is a narrow public sidewalk along the Carroll Street frontage, and applicant has set the proposed building back approximately five feet to permit its widening.

The selection of the Metropolitan Branch Trail alignment is not within the Board's purview. In any event, the Board's decision does not preclude the completion of the trail, nor affect in any way the proposed alignments, other than the Eastern Off-Street Alignment, that have been identified to date. Planning for the trail through Takoma is only in the early stages, and a final decision as to the preferred alignment may be a long way off. Delay would not only adversely affect the applicant's ability to construct a building on the subject property, but it would allow the property, a priority development site, to remain vacant and blighted, to the detriment of the public good.

For the reasons stated above, the Board concludes that the applicant has met its burden of proof. It is hereby **ORDERED** that the application is **GRANTED**, to permit the construction of the proposed mixed-use apartment house as shown in the applicant's plans dated December 13, 2001 (Ex. 9), as modified by Floorplan G (page A 3) and the Carroll Street Elevation (page A 10) (Ex. 40), filed with the Board on February 13, 2002.

VOTE: 5 – 0 – 0 (Geoffrey H. Griffis, David W. Levy, Anne M. Renshaw (by absentee vote), Curtis L. Etherly, Jr., and James H. Hannaham to approve).

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

Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: MAY - 1 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 25 IN TITLE 1 of the D.C. CODE. SEE D.C. CODE § 1-2531 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

MS/BAB/4.19.02

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16833

As Director of the Office of Zoning, I hereby certify and attest that on MAY - 1 2002, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____
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