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May 10, 2002

D.C. OFFICE OF ZONING
RECEIVED
2002 MAY 10 AM 3:25

By Fax (202) 727-6072

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:

I write to request that the Commission overrule the staff interpretation of 11 DCMR § 3128.6, as contained in the attached letter of May 7, 2002. The staff letter sets forth impractical and misleading policy that is not contained in the regulation and in fact is contrary to its basic purpose.

The Policy is Not Compelled by the Regulation

The stated policy is that a request for sua sponte review under § 3128 is to be disregarded because such review is a discretionary internal process. The regulation, however, says only that such requests "need not be answered," not that they are to be disregarded. There is a world of difference between "need not be answered" and "must be disregarded." The former does not imply the latter; rather, it implies that such requests are appropriate. If such requests are per se improper, the text of the regulation should plainly so state.

One can readily conclude, as I did, that the "need not to be answered" language is the logical outgrowth of the whole sua sponte rule, interpreted in a manner where review requests are considered, not disregarded. First, one has no right of appeal to the Commission under the sua sponte review process. § 3128.5. Second, a determination to review a Board decision is discretionary. §§ 3128.6, 2128.7. Third, the Commission takes no adverse action on the Board decision without first affording affected parties an opportunity to respond. §§ 3128.2, 3128.3

BZA
Case No. 16833
Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO.16833
EXHIBIT NO.46

Finally, if a determination to review a case is not made in the very brief ten-day period after service of a Board decision, such review is simply unavailable. § 3128.1. All of these features of the rule are consistent with the notion that timely requests for sua sponte review may be submitted and considered, and need not be answered. Indeed, the "answer" contemplated by the regulation is either expiration of the review period without action by the Commission or notice to the parties of a determination to review the case.

The Regulation is Misleading if the Policy is Correct

As explained above, it is reasonable to interpret the regulation as an opportunity to timely bring to the attention of the Commission a Board decision that the Commission should review. For example, considerable time and effort went into highlighting why the Board decision in Case No. 16833 warranted such review, resulting in my letter of May 6, 2002 (attached to the staff's May 7, 2002 rejection letter). None of this effort would have been expended if the regulation clearly foreclosed the Commission from considering such requests. Hence, if the policy does accurately reflect the Commission's intention to disregard the concerns of participants in Board hearings about Board decisions, its ambiguity in this respect is misleading and it promotes a waste of resources. At the very least, the regulation should be clarified.

The Policy is Impractical and Unwise

The policy assumes that the Commission can invariably determine, purely on its own initiative, when sua sponte review is appropriate. But the Commission is neither omniscient nor isolated from all external sources of information. If sua sponte review may sometimes be initiated purely on the basis of a concern raised by one or more Commissioners, the legitimacy of that review simply cannot depend on whether that Commissioner's (or Commissioners') concern (a) was purely spontaneous, (b) was the result of awareness of public concern, or (c) reflected the concerns of a particular interested person or persons. The important question for the Commission is not the **source** of the concern, but its **merit**. Thus, it should not matter whether the concern is raised via a formal request for sua sponte review or via an informal timely communication with one or more Commission members. Indeed, a policy of rejecting the filing of sua sponte review requests can only encourage ex parte contacts with single Commissioners during the sua sponte review period.

Further, if the policy reflects an effort to insulate the Commission entirely from voices of concern about Board decisions, it is not just impossible to enforce; it is also unwise and counter-productive. The Commission cannot possibly always know, with no information or assistance other than as contained in the Board's decision, in which cases it would be optimum to invoke its sua sponte review authority. A policy that needlessly shuts off an avenue of informed communication is a disservice to the Commission, impairs its effectiveness in monitoring and overseeing Board decisions, and can never be fully and realistically enforced in any event.

For all the foregoing reasons, I respectfully request that the Commission reject the staff interpretation of 11 DCMR § 3128.6 and allow the filing of timely requests for sua sponte review of Board decisions, including the one contained in my May 6, 2002 letter to the Commission.

Very truly yours,

David W. Brown

David W. Brown

Attachment

Government of the District of Columbia

OFFICE OF ZONING

441 4TH STREET N.W.
SUITE 210
WASHINGTON D.C. 20001
(202) 727-6311

May 7, 2002

David W. Brown, Esq.
Knopf & Brown
401 East Jefferson Street
Suite 206
Rockville, Maryland 20850

Re: BZA Application No. 16833 – TP2 LLC

Dear Mr. Brown:

The Office of Zoning is in receipt of your letter dated May 6, 2002, regarding the above referenced case. Unfortunately, we must return your letter, as pursuant to 11 DCMR § 3128.6:

3128.6 Because there is no right of appeal to the Zoning Commission from any action of the Board, communication to the Zoning Commission (regardless of the form) requesting that *sua sponte* review be undertaken need not be answered by the Zoning Commission. *Sua sponte* review is a discretionary internal process.

Communications to the Zoning Commission, regarding *sua sponte* review, are to be disregarded as it is a "discretionary internal process". If you have any questions regarding this matter please call Richard S. Nero, Jr. on (202) 727-6311.

Sincerely,

JERRILY R. KRESS, FAIA
Director

Attachment

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May 6, 2002

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

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

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FAX MESSAGE

DATE: TIME:

PLEASE DELIVER THIS COVER AND THE FOLLOWING 7 PAGE(S):

TO: Chairman Zoning Commission FAX NO: 2027276072

FROM: David Brown FAX NO: 301 545-6100

If you do not receive any or part of this, please call our firm at (202) 785-8200 and ask for _____. Thank you.

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