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December 23, 2002

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VIA FAX AND HAND DELIVERY

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Application No. 16959
Distinction Between Area and Use Variances

Dear Members of the Board:

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At the conclusion of the hearing in the above-referenced case on December 17, 2002, the Board of Zoning Adjustment (the "Board" or "BZA") requested the Applicant to brief the issue of whether the relief requested constitutes an area variance or whether it is more properly characterized as a use variance. The application is properly before the BZA as an area variance as discussed in greater detail below.

I. Summary

Application No. 16959 properly requests relief as an area variance because it requests deviations in the square footage requirements for the areas where arts uses are to be provided. The application does not request permission to provide uses which are otherwise prohibited in the DD/C-4 District. Therefore, the application cannot and does not constitute a use variance.

II. Discussion

A. Statutory and Regulatory Basis for Variance Relief

Neither the Zoning Act nor the Zoning Regulations for the District of Columbia make a distinction between an area variance and a use variance. *See* D.C. Code § 6-

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641.07(g)(3) (2001 ed.) and 11 DCMR § 3103.2 (July 1995). Both simply refer to the authority of the Board to grant variance relief generally under a three-part test. The distinction between area and use variances is a creation of the judicial system. *See* 3 Kenneth H. Young, Anderson's American Law of Zoning, § 20.06 (1996). Courts have generally held that a use variance is one where an applicant is requesting to establish a use that is otherwise not permitted in that zone district. An area variance, on the other hand, is one where an applicant requests to deviate from certain provisions pertaining to permitted uses, such as setbacks, height limitations, lot areas, roof structures, density restrictions, parking and yard requirements. An "'area variance has no relation to change of use. It is primarily a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the ordinance.'" *Id.* at § 20.07 *quoting Alumni Control Board v. Lincoln,* 137 N.W.2d 800 (Neb. 1965).

B. District of Columbia Interpretation

The District of Columbia Court of Appeals has made similar findings. In *Palmer v. District of Columbia Board of Zoning Adjustment,* 287 A.2d 535 (D.C. 1972), the leading case on the difference between area and use variances, the court held that "an area variance, relating to restrictions such as side, yard, rear yard, frontage, setback or minimum lot requirements, does not alter the character of the zoned district, whereas a *use variance seeks a use ordinarily prohibited in the particular district.*" *Id.* at 541 (internal citations omitted) (emphasis added). The court elaborated on this interpretation in *Association for the Preservation of 1700 Block of N Street, N.W. v. D.C. Board of Zoning Adjustment,* 384 A.2d 674 (D.C. 1978) where it held that "an area variance does not affect the *use* of the land and does not threaten the neighborhood or adjacent landowners with the maintenance of an incompatible *use* of the subject property." *Id.* at 667 (relief from off-street parking requirements properly characterized as an area variance).

The courts have recognized that in some instances it is difficult to distinguish between an area variance and a use variance. For example, in *Wolf v. District of Columbia Board of Zoning Adjustment*, 397 A.2d 936 (D.C. 1979), an applicant requested an area variance to convert a row dwelling in the R-4 District into a four-unit apartment without providing 900 square feet of land area per unit. Opponents challenged the application on the grounds that the applicant should have requested a use variance because he could not meet the requirements for converting the structure from a row dwelling to apartments. The Board found, however, that the requested relief was properly characterized as an area variance. The Board stated, and the court agreed, that "the variance requested by intervenor was one of area, since the only requirement not met for a conversion as of right of the subject property was the one of 900 square feet per unit – *i.e.,* of area." *Id.* at 940.

C. Application of Interpretations to BZA Case No. 16959

Based on the past rulings of the Board and decisions by the various courts, including the D.C. Court of Appeals, the relief requested in the instant case is properly characterized as an area variance. The arts uses that are the subject of the application are permitted as a matter of right in the DD/C-4 District. The only requirement which would not be met is the *floor area* devoted to these arts uses during a discreet period of time. The requested relief does not affect the *use* of the land in that all the uses which would occupy the building are permitted as a matter of right. The requested relief does not threaten the neighborhood or adjacent landowners with the maintenance of an incompatible *use* of the subject property.

The Board has made similar findings in other cases. For example, the Board granted a special exception and area variance to allow the regulations applicable to a portion of the lot in a less restrictive use district (C-4) to be extended to that portion of the lot in a more restrictive use district (SP-2) for the establishment of a restaurant on the basement and first floor levels of an existing building at 918 16th Street, N.W. *See* Order in BZA Application No. 16343 (May 27, 1998). There, the applicant requested an area variance to extend the less restrictive regulations a distance greater than the permitted 35 feet under section 2514.2 of the regulations. Although the application dealt with uses, the actual relief requested addressed the *area* covered by the extended boundary. Thus, the Board properly ruled on the application as an area variance. Similarly, while the instant application deals with required arts uses, the relief sought only addresses the areas in which the art uses will be provided.

With respect to the subject site in Square 456, the Board also held that the relief requested to permit commercial development to proceed prior to the issuance of a certificate of occupancy for nonresidential development within the DD District until a certificate of occupancy is issued for affordable housing was properly granted as an area variance. *See* Order in BZA Application No. 16387 (December 3, 1998). Likewise, the applicants here are essentially requesting to allow the issuance of a certificate of occupancy for the commercial office space prior to the issuance of a certificate of occupancy for the space devoted to the required arts space. Thus, consistent with the order in BZA Application No. 16387, the instant application is properly before the Board as an area variance.

III. Conclusion

Based on the foregoing analysis, BZA Application No. 16959 constitutes an area variance and not a use variance because it does not propose to establish a use that is otherwise prohibited in the DD/C-4 District. Rather, it simply requests a variance from the square footage requirements to be devoted to arts uses, in accordance with specific proposed conditions that would ensure that all the required

arts uses would ultimately be provided. Under consistent interpretations of the Board and the courts, such relief constitutes an area variance. Accordingly, the Board should find that BZA Application No. 16959 constitutes an area variance and should be decided by the Board on that basis.

Respectfully submitted,

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