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

Mary Carolyn Brown
202 862 5990
carolyn.brown@hklaw.com

October 20, 2004

VIA HAND DELIVERY

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

Re: BZA Case Nos. 16959 and 16959-A
Request for Minor Modification of Order

Dear Members of the Board:

On behalf of the Applicants in the above-referenced case, we are filing herewith their motion for a minor modification of Conditions No. 3 and 5 of the Order. The Applicants seek to extend the deadline for issuance of the permit for the Shakespeare Theater building until July 31, 2005, in satisfaction of the arts requirement on the site, and to clarify the type of permit that may be issued in fulfillment of that deadline to include the sheeting and shoring permit.

We look forward to the Board's consideration of this motion for minor modification of the order.

Very truly yours,

Carolyn Brown

Encl.

cc: Ellen McCarthy, Office of Planning
Jennifer Steingasser, Office of Planning
Leroy Thorpe, Jr., ANC 2C
Doris Brooks, ANC 2C

BZA
Case No. 16959
Exhibit No. 44

Board of Zoning Adjustment
District of Columbia
CASE NO.16959
EXHIBIT NO.44

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

APPLICATION NOS. 16959 and 16959-A

MOTION FOR MINOR MODIFICATION
OF CONDITIONS NO. 3 and 5 OF THE BZA ORDER

I.
SUMMARY

The Applicants in the above-referenced case hereby request the Board of Zoning Adjustment (the "BZA" or "Board") to approve minor modifications to Condition Nos. 3 and 5 of BZA Order Nos. 16959 and 16959-A to extend the date for issuance of a building permit from December 31, 2004, to July 31, 2005, and clarify that sheeting/shoring and excavation permits fall within the meaning "building permit" for purposes of the Order.

II.
BACKGROUND

The property that is the subject of Application No. 16959and 16959-A includes lots 880, 883 (formerly 878) and 41 in Square 456, which is bounded by 6th, 7th E and F Streets, N.W. The overall project is known as Terrell Place. Lot 41 is located at the northeast corner of 7th and E Streets (675 E Street) and is improved with a residential building with arts and retail uses on the ground floor and B-1 level. Lot 41 has further been divided into a series of air rights (7000 series) lots and condominium (2000 series) lots. Lot 880 is located at the southeast corner of 7th and F Streets (575 7th Street) and is improved with an office building with ground floor retail and service uses. Lot 883 (formerly Lot 878) is located on the south side of F Street east of the 575 7th Street building, and is further divided into a series of air rights (7000 series) lots. Lot 883 is currently vacant and is proposed to be improved with a new commercial structure, consisting of offices and a performing arts center and related support space for the Shakespeare Theater.

The subject property is located in a DD/C-4 District. Under the Downtown Development District, the property is subject to requirements for preferred uses, including residential and arts uses,

and to restrictions in on-site density under the historic preservation section. The Board has granted relief from a number of provisions of the Regulations to allow the development to proceed.

In Application No. 16959, the owners of the property requested a variance from the arts and entertainment requirements of §1704.3(a) to allow the Applicants to make a contribution to the Shakespeare Theater in lieu of providing preferred arts uses on-site. By Order dated January 29, 2003, the Board granted the Application subject to a series of conditions describing how the arts use requirement was to be satisfied. A copy of the Order is attached as Exhibit A. The Board modified Condition No. 1 of that Order on August 5, 2004, to specify that the required 7,000 square feet of arts space would be satisfied on Lot 41. A copy of BZA Order No. 16959-A is attached as Exhibit B.

III.
NATURE OF RELIEF SOUGHT

The Applicants now request the Board to grant a further minor modification to Condition Nos. 3 and 5 of BZA Order No. 16959-A. This request is made pursuant to the provisions of section 3129 of the Zoning Regulations. The Applicants further request the Board to grant a waiver from the provisions of section 3129.3 since this request is being made more than six months after the final date of the Order approving the Application.

IV.
WAIVER OF THE SIX MONTH TIME LIMIT

The Applicants have proceeded with development of the subject property on a phased basis. Phases I and II for the residential and commercial office buildings, respectively, have been completed. Phase III, which comprises the commercial office building and Shakespeare Theatre on F Street, N.W., has been designed and is presently waiting on issuance of permits to allow its construction. The Applicants had anticipated that a building permit would be issued for the new structure prior to December 31, 2004, the deadline under Condition Nos. 3 and 5 of the BZA Order for satisfaction of the arts requirement by the Shakespeare Theater. However, as described in greater detail below, issuance of the building permit may be delayed until January or February 2005 due to

the comments received on the construction drawings from the third-party reviewer in early September and change orders in the building finishes.

The nature and extent of the comments received, as well as the changes in the exterior material, could not have been anticipated by the Applicants when it sought the previous minor modification in July of this year. However, the additional time requested by the Applicants, and the clarification of the type of permit that will trigger the release of funds to the Shakespeare Theater to ensure its completion, are minor in nature and do not in any way affect the substance of the Board's earlier approval.

V.
DESCRIPTION OF THE MODIFICATION

The Applicants request minor modification of Condition Nos. 3 and 5 of Order No. 16959-A to extend the deadline for issuance of a building permit for the Shakespeare Theatre space, and to clarify that a building permit includes permits for sheeting/shoring and excavation for the new structure. Conditions 3 and 5 currently read as follows:

> 3. Upon issuance of a *building permit* for the shell space of the Shakespeare Theater facility on Lot 878, the $1.5 million will be released to the Shakespeare Theater. On or before the date the payment is transferred to the theater, the Combined Lot Development Covenant shall be amended to reflect that the arts requirements for Lots 41, 880 and 878 shall be satisfied entirely on Lot 878.
>
> * * *
>
> 5. If the arts requirements are not satisfied consistent with Condition No. 3 of this order by *December 31, 2004*, the Office of Planning will direct the $1.5 million escrow to be paid in one of the following manners in satisfaction of the arts requirements for Lots 880, 878 and 41....

BZA Order No. 16595-A, August 5, 2004, at 2 (emphasis added).

The Applicants propose to modify this language, as follows:

> 3. Upon issuance of a building permit <u>for sheeting/shoring or excavation of the structure to be located on Lot 883 (formerly Lot 878) that will house</u> the Shakespeare Theater facility on <u>Lot 883</u>, the $1.5 million will be released to the Shakespeare Theater. On or before the date the payment is transferred to

the theater, the Combined Lot Development Covenant shall be amended to reflect that the arts requirements for Lots 41, 880 and 883 shall be satisfied entirely on Lot 883.

* * *

5. If the arts requirements are not satisfied consistent with Condition No. 3 of this order by July 31, 2005, the Office of Planning may direct the $1.5 million escrow to be paid in one of the following manners in satisfaction of the arts requirements for Lots 880, 883 and 41....

These minor modifications to the Board's Order will provide enough time for the city to issue the building permits, which are currently under review, for the Shakespeare Theater and clarify that the term "building permit" includes permits issued for sheeting/shoring and excavation of the site for the Shakespeare Theater structure.

VI.
RATIONALE FOR THE REQUEST

When the Board first considered this application in December 2002, the Applicants believed a two-year deadline was ample time to secure the necessary permits for the Shakespeare Theater building. In July 2004, when the Board considered the first minor modification request, the Applicants had already submitted the construction drawings for third-party review for compliance with the D.C. Construction Codes. Drawings were also sent out for construction bids on July 23, 2004.

On September 8, 2004, the Applicants received preliminary comments from the third-party inspector on the drawings. About the same time, upgrades were requested for the exterior cladding of the building, necessitating new drawings for the bid process. The new exterior cladding drawings are being issued for bid October 15, 2004, and the drawings responding to third-party comments will be reissued late October or early November 2004. Thereafter, the Applicants will receive final comments from the third-party reviewer, and from the Historic Preservation Review Board staff on the exterior cladding. Once all comments are received, a final set of drawings will be produced for permit issuance, with certification from the third-party reviewer that drawings comply with the D.C.

Construction Codes. Thereafter, the city can issue the construction permit for the new theater and office building.

The permit for sheeting and shoring of the site was issued October 12, 2004. A building permit for the new construction is anticipated in January or February of 2005, with construction starting immediately thereafter. In an abundance of caution, however, the Applicants are seeking a six-month extension of the BZA deadline until July 31, 2005.

The Applicants also seek a clarification of the type of building permit that will satisfy the requirement of Condition No. 3 to trigger release of the $1.5 million to the Shakespeare Theater for completion of the space. In November 2002, the city awarded the Shakespeare Theater a grant of $19.7 million for relocation of the theater on Lot 883 (formerly Lot 878) in Square 456. Approximately $6 million of the grant may be spent on planning, with the remainder allocated for construction and development. The grant documents which trigger the release of funds for building permit purposes include sheeting/shoring and excavation permits in the definition of "building permits". In order to clarify that the BZA Order is intended to correspond to the definitions in the grant document, the Applicants are requesting that Condition No. 3 expressly state that sheeting/shoring and excavation permits will satisfy the permit issuance deadline and trigger the release of the $1.5 million escrow funds to the theater. This minor modification does not affect the substance of the Board's previous approval, but only adds clarity to the term "building permit" as used in the Order. If the Board approves this minor modification, the Applicants will be able to meet the December 31st deadline as a result of the issuance of the sheeting and shoring permit on October 12, 2004.

VII.
GOVERNMENT AND COMMUNITY RESPONSE

The Applicants will coordinate with the Office of Planning, Advisory Neighborhood Commission 2C and affected property owners prior to any public hearing convened by the Board to consider this minor modification.

VIII.
CONCLUSION

Based on the foregoing, the Applicants respectfully request the Board to waive its rules and grant the requested the minor modification so that the permit issuance deadline is extended to July 31, 2005, and that sheeting/shoring and excavation permits are included in the definition of "building permit" under Condition No. 3.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: _____
Norman M. Glasgow, Jr.

_____
Mary Carolyn Brown

Suite 100
2099 Pennsylvania Avenue, N.W.
Washington D.C. 20006
202-955-3000

Date: October 20, 2004

2325722_v1