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February 4, 2002

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

Re: Case No. 16966

Dear Chairman Griffis:

Enclosed is one original and 20 copies of the party opponent's draft Findings of Fact and Conclusions of Law for the above-referenced case. We have also enclosed a diskette with a copy of this document as well.

Please call us with any questions or comments.

Sincerely,

Martin Sullivan

cc: Page Lansdale, Chevy Chase

BZA
Case No. 16966
Exhibit No. 37

Board of Zoning Adjustment
District of Columbia
CASE NO.16966
EXHIBIT NO.37

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2003, a copy of this draft Findings of Fact and Conclusions of Law was served by hand delivery and first class mail to:

Michael Cain
Hamilton and Hamilton
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Suite 1100
Washington, D.C. 20006

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PO Box 9348
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Document #: 1304083 v.1

PARTY-OPPONENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

GOVERNMENT OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Application No. 16966 of Nest and Totah Venture, LLC, pursuant to 11 DCMR § 3103.2 for a variance from the rear yard setback requirements under Section 774, and, pursuant to 3104.1, for a special exception to allow a penthouse not meeting the roof setback requirements under Section 411, to allow the construction of a retail/office building with a parking garage in the C-4 Zone District at premises 1426-1430 K Street, N.W. (Square 218, Lots 808 and 823) (the "**Property**").

HEARING DATE: January 14, 2003.

DECISION DATE: February 11, 2003.

DECISION AND ORDER

The Board of Zoning Adjustment denied Application No. 16966 of Nest and Totah Venture, LLC for a variance from the rear yard setback requirements and for a special exception for rooftop structure setbacks.

PRELIMINARY MATTERS

Requests for Party Status. The Board granted party status to Chevy Chase Bank, FSB, owner of the property adjacent to the subject property's rear lot line of 1426-1430 K Street, N.W.

Applicant's Case. The Applicant presented testimony and evidence from Alan Nessim, a manager for the Applicant, and from Richard A. Donnally, the architect for the Applicant.

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Office of Planning ("**OP**") Report. OP submitted a report dated January 8, 2003, and recommended that the Application be approved for a variance from the rear yard setback requirements and the special exception.

Parties in Opposition to the Application. Martin Sullivan of Shaw Pittman LLP, representing Chevy Chase Bank, FSB ("**Chevy Chase**"), testified in opposition to the Application. Chevy Chase is the owner of the property and improvements directly adjacent to the rear-yard lot line of the Applicant's property, located at premises 925 15th Street, N.W. ("**Chevy Chase Building**"),.

Persons in Opposition to the Application. The tenants of the adjacent Chevy Chase Building wrote a letter to the Office of Planning in opposition to the Application. This letter was attached to the OP Report.

Closing of the Record. The record was closed at the end of the hearing, except for specific documents requested by the Board. Chevy Chase filed proposed findings of fact and conclusions of law.

Decision Meeting. On February 11, 2003 the Board denied the Application.

SUMMARY OF EVIDENCE

Applicant's Testimony

1. Alan Nessim, Manager for the Applicant. Mr. Nessim testified that the combined lot area of the subject property was 7,196 square feet. He testified that the south side of K Street between 14th and 15th Streets, N.W., which includes the subject property, consisted of office buildings varying in height from six to fifteen stories. Mr. Nessim testified that because of the small size of the site the Applicant was unable to provide the requisite 27.29 foot rear yard setback and still

provide enough desirable office space to make the project financially feasible. Mr. Nessim further testified that the rooftop penthouse could only be provided at a distance of only six feet from the proposed building's rear building edge. Mr. Nessim testified that the variance was necessary to increase the subject property's marketability. Mr. Nessim testified that the Applicant had contacted its adjacent neighbors, but apparently regarded only the properties to its east and west as adjacent neighbors.

2. Richard Donnally, Architect for the Subject Building. Mr. Donnally testified regarding the design of the building generally. Mr. Donnally also testified regarding the conditions that he claimed made the subject property exceptional and why such conditions present a practical difficulty justifying variance relief. Mr. Donnally testified that the subject property was very small and had a lot width of 93 feet. He further testified that the subject property is the only non-corner lot in the surrounding area that lacked public alley access for the entire length of its rear property line, causing the rear yard setback to be measured from the property line, in accordance with the Zoning Regulations. Mr. Donnally testified that because of these conditions, it would be impractical to develop the subject property. Mr. Donnally testified that, in designing the proposed building, the Applicant considered the light and air of the buildings to the east and west of the subject property. Finally, Mr. Donnally testified that the rooftop penthouse will be set back thirty feet from K Street, but only six feet from the rear edge of the proposed building.

3. Chevy Chase Bank, FSB. Martin Sullivan of Shaw Pittman LLP filed a Statement in Opposition to the Application on behalf of party-opponent Chevy Chase and he also testified at the hearing on behalf of Chevy Chase. Mr. Sullivan testified that the Applicant's property was the fourth largest of the twelve properties in the subject square, and that the shape of the property

was not exceptional or unique, as it is nearly square and very similar in shape and size to the Chevy Chase property. Mr. Sullivan also testified that the tenants of the Chevy Chase Building had informed their landlord, Chevy Chase, of their vigorous opposition to this Application, believing that approval of the variance and special exception would adversely impact the light and air to the Chevy Chase Building.

4. Office of Planning. OP. in its reports and at the hearing, testified that the Applicant had met its burden of proof in order to obtain a variance for the rear yard setback and had also met the requirements for a special exception for the penthouse setback. OP testified that the subject property was unique because it was located on K Street, N.W. and K Street had a wide right of way, allowing a height of 130 feet. On cross-examination, OP testified that it did not know the widths of other surrounding streets, including 14th, 15th and 16th Streets. OP further testified that the property was unique because it would subject to a measuring point at the rear lot line, rather than the middle of the alley, pursuant to the Zoning Regulations. OP also testified that the variance, in combination with the special exception, would bring the mechanical rooftop penthouse approximately twenty-three feet closer to the Chevy Chase Building than is permitted as a matter-of-right under the Zoning Regulations.

FINDINGS OF FACT

The Property and the Surrounding Area

1. The subject property consists of approximately 7,196 square feet of land area located in a C-4 Zone District at premises 1426-1430 K Street, N.W. (Square 218, Lot 808, 823). The subject property is the fourth largest of twelve properties in Square 218. The Board finds therefore that the subject property is not exceptional or unique due to its size.

2. The subject property is nearly square in shape, with a slight "cut-out" in its southwest corner. The adjacent property, owned by Chevy Chase, FSB, is similar in shape, but in fact more narrow than the subject property, with a similar "cut-out". The Board finds that, as the adjacent property and several others in the surrounding area are similar, the shape of the subject property, by definition, is not unique or exceptional due to its shape.

3. The subject property is located on K Street, N.W. K Street consists of a right-of-way width of 148 feet, thereby allowing a building height in this zone of 130 feet. The street widths of 14th Street, N.W., 15th Street, N.W. and 16th Street, N.W., as well as all of K Street, N.W., each have a right-of-way width of 110 feet or greater, thereby permitting the maximum height allowable in the C-4 zones, or, the same height as is permitted on the subject property. For this reason, the Board finds that the subject property is not unique or exceptional due to the width of K Street, N.W. at this location.

4. The depth of the subject property is 93 feet. Other properties in this square and in the surrounding area have similar depths. The Board finds therefore that the subject property is not unique or exceptional due to its depth.

5. Because the subject property backs up to an adjacent property, rather than a public alley, its rear yard must be measured from the rear lot line, rather than from the mid-point of an adjacent public alley. When a property backs up to another property, the Zoning Regulations provide for an adequate rear yard to protect that adjacent property by making the rear yard requirement relative to the height of a proposed building. The Board finds that, because the Zoning Regulations specifically identify the measuring point for this particular situation, it cannot be considered exceptional or unique.

6. Regarding the special exception for relief from the required setbacks for the rooftop penthouse, the Board finds that the Applicant presented no evidence that constructing a mechanical rooftop penthouse, covering approximately 80% of the rear roof line, located only six feet from the rear roof line, would not affect the light and air to the Chevy Chase Building only 22 feet away from such penthouse. The Board finds that the proposal to move the penthouse approximately 23 feet closer to the Chevy Chase Building, and only six feet from the rear roof line, would affect the light and air to the Chevy Chase Building.

7. The Board finds that the Applicant did not present a legitimate practical difficulty that would merit receiving a variance from the Zoning Regulations, particularly where the proposed variance may adversely affect a neighboring property.

Substantial Detriment to the Public Good

8. The granting of the variance in this Application would move a 130 foot building forty percent closer to its adjacent neighbor than is permitted under the Zoning Regulations. The Board finds that this situation is likely to have a substantial adverse effect on the Chevy Chase Building and its tenants, especially if it were to be combined with the proposed rooftop penthouse setback relief, thereby moving the rooftop structure approximately fifty percent closer to the Chevy Chase Building than is permitted under the Zoning Regulations.

Impairing the Integrity of the Zoning Regulations and Map

9. If the Board were to grant a variance from the rear yard setback requirements based on the Applicant's contention that it is exceptional or unique in that it does not back up to a public alley, such a variance would greatly impair the integrity of the Zoning Regulation (774.9(b)), which

identifies the lot line measurement point for rear yard setbacks. The Board finds that a variance from that regulation, based on the contention that the subject property is actually subject to that regulation, would effectively make Section 774.9(b) null and void.

10. The Applicant has not presented evidence of any condition of the subject property that is exceptional or unique, such as to give justification for the Board granting a variance from the minimum rear yard setback requirement. The Board finds that, because such standard has not been met by the Applicant, the granting of a variance would impair the integrity, intent and purpose of the Zone Plan.

11. The Applicant's contention that the project is not economically feasible without the requested zoning relief is not a proper consideration for the Board's deliberation. A property owner, especially a commercial developer, should be aware of a property's zoning and the restrictions contained therein. If a project is not financially feasible, then that owner should not have purchased the property at a price assuming the granting of a variance. Likewise, if the owner purchased the subject property at a price based on the current restrictions of the Zoning Regulations, the owner should not be allowed to speculate and gain profit from the Board's grant of a variance. It is not in the public interest for the Board to grant relief from zoning in order to alleviate a developer's financial burden, or to reward a developer with additional density and a financial windfall.

CONCLUSIONS OF LAW AND OPINION

To meets its burden as to variance relief, the Applicant must show that, by reason of exceptional narrowness, shallowness, or shape of its property or by reason of exceptional

topographical conditions or other extraordinary or exceptional condition of its property, the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulty to the Applicant. This relief may be granted by the BZA only if the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan.

To meet its burden of proof for a special exception under Subsection 3104.1, the Applicant must demonstrate that the purpose and intent of the Zoning Regulations shall not be materially impaired by the proposed structure, and that the light and air of adjacent buildings shall not be affected adversely by such special exception.

A showing of uniqueness is required in order to obtain an area variance in the District of Columbia. *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326,327 (D.C. 1976).

The Board found that the size and shape of the property are clearly not unique. If the Applicant's difficulty is due to the size of its property, then seven other properties within the same square are more gravely afflicted (or "more unique"); and therefore more deserving of variance relief. The Board found also that the requirement that the property's rear yard setback be measured from the rear lot line rather than the mid-point of a public alley is not unique. The Board found also that the width of K Street was clearly not a unique condition for the subject property. Therefore, the Board concludes that there is no unique or exceptional condition present in the subject property such that variance relief may be granted.

"[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." *Palmer v. District of Columbia Board of Zoning Adjustment*, 287 A.2d 535, 539 (D.C. 1972). The fact that expansion requiring a variance is personally preferable to other methods not requiring variances does not constitute a unique property condition entitling owner to a variance. *Barbour v. District of Columbia Board of Zoning Adjustment*, supra at 327-328.

The Board concludes that the Applicant is not subject to any legitimate practical difficulties, both because (i) there is no unique or exceptional condition present to cause such a practical difficulty and (ii) the Board can not grant a variance merely to improve an owner's return on investment.

The D.C. Court of Appeals held in *Clerics of St. Viator v. D.C. Board of Zoning Adjustment,* 320 A. 2d. 291 (D.C. 1974) that a variance may not be granted, even to alleviate a bona fide serious hardship to an owner, if the granting thereof would adversely affect the surrounding neighborhood. The present case is much simpler, as neither a unique condition nor a practical difficulty has been proven. The Board concludes that if it granted this Application, it would be likely to adversely affect the adjacent property to the south owned by Chevy Chase.

Due to the lack of a unique or exceptional condition, and the lack of a legitimate practical difficulty to the owner, and, specifically, due to the harm possible to the future application of Zoning Regulations § 774.9(b), relating to the rear yard setback measurement point, the Board concludes that the granting of this Application would substantially impair the intent, purpose and integrity of the Zone Plan.

Regarding the special exception request, the Board concludes that the movement of the location of the rooftop structure approximately fifty percent closer to a neighboring property, and only six feet from the building edge, will adversely affect the light and air of adjacent buildings, particularly the building owned by Chevy Chase.

For the reasons stated above, the Board concludes that the Applicant has not met its burden regarding the variance and the special exception requested in this Application, and it is hereby **ORDERED** that the application be **DENIED.**

VOTE:

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

ATTESTED BY: _____

SHERI M. PRUITT-WILLIAMS

SECRETARY TO THE BOARD

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