BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application of TC MidAtlantic Development Inc. on Behalf of
Avalon Bay Communities, Inc. and 777 6th Street LLC
777 6th Street, NW

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

I. Background

A. Introduction

TC MidAtlantic Development, Inc.("Applicant"), on behalf of Avalon Bay Communities, Inc. and 777 6th Street, LLC, seeks an area variance from the rear yard provisions for the property located in Square 486 at Lots 10, 11, 12, 13, 36, 804, 805, 806, 807, and 808 (the "Property" or "Site"). The Applicant proposes to construct a ten-story office building with ground floor retail uses at the Site. The Property is located in the DD/C-2-C District. This relief supplements the special exception already granted by the Board of Zoning Adjustment ("Board" or "BZA") for roof structure setbacks in BZA Order No. 17078 dated December 3, 2003. The additional relief is necessary as a result of a recent application filed by the D.C. Preservation League ("DCPL") requesting historic landmark status for the existing rowhouse on the Site. As part of a compromise negotiated with the DCPL, the Applicant has redesigned its project to include the significant facades of the existing building.

B. The Site

The Subject Property is rectangular in shape, measuring approximately 225 feet by 85 feet. It is located in the northwest corner of Square 486, and the southeast corner of the intersection of 6th and H Streets, NW. Bounding the Subject Property are 6th Street, NW, to the west, a 30-foot wide public alley to the south, a 16.75-foot wide public alley to the east, and H Street, NW to the north.

II. Roof Structure Setback Relief

A. Overview.

In order to accomplish the proposed design revisions, the Applicant seeks special exception approval pursuant to §§770.6 and 411 of the Zoning Regulations regarding roof structure requirements in the commercial zoning districts. The location of the roof structures as previously approved by the Board in BZA Order No. 17078 remains unchanged. However, because the Applicant is required to file a new BZA application to reflect the new design, the Applicant must include all areas of relief needed for the redesigned building. Thus, the

BZA
Case No. 17186
Exhibit No. 5

Board of Zoning Adjustment
District of Columbia
CASE NO. 17186
EXHIBIT NO. 5

Applicant intends to demonstrate that it meets the burden of proof for roof structure setbacks, consistent with the approval granted in Order No. 17078, in the following manner:

1. Section 770.6

Section 770.6 of the Zoning Regulations provides that, if housing for mechanical equipment or a stairway or elevator penthouse is provided on a building's roof, it must be erected or enlarged in compliance with the provisions of §770.6, as follows:

(a) It shall meet the requirements of §411.
(b) It shall be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located;
(c) [Applicable only to C-5 zoned properties]; and
(d) It shall not exceed more than18 feet 6 inches in height above the roof on which it is located, nor shall mechanical equipment extend above the permitted 18 feet 6 inch height of the housing.

The penthouse structure for the proposed building measures 18 feet 6 inches in height and thus complies with §770.6(d). Because the penthouse structure is not set back from all exterior walls a sufficient distance, it does not comply with the provisions of §770.6(a) (by reference to §411.2) or with §770.6(b), and thus requires special exception approval by the Board pursuant to §411.11.

2. Section 411

Section 411 establishes numerous criteria for roof structures in all districts. Section 411.11 provides the Board authority to approve as a special exception the location, design, and other aspects of roof structures, including setbacks. In order to obtain such special exception approval, an applicant must demonstrate that: (1) compliance with the roof structure regulations is impractical because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to make full compliance unduly restrictive, prohibitively costly, or unreasonable and (2) the intent and purpose of Chapter 400 and the Zoning Regulations are not materially impaired by the structure and the light and air of adjacent buildings are not adversely affected.

In this case, special exception approval is required because the proposed roof structure does not meet the normal setback requirements of the Regulations. Roof structures are permitted up to a maximum height of 18 feet, 6 inches above the roof upon which they are located, provided that they are set back from all exterior walls one foot for each foot of height above the roof. The roof structure is 18 feet, 6 inches in height, and meets the 1:1 setback requirement on the north and west (H Street and 6th Streets, respectively) sides of the building, and on the south side (facing the 30-foot wide public alley). However, it does not meet the setback requirement on the east side of the building, running flush with the exterior wall along that side of the building, which fronts the 16.75-foot wide public alley.

B. Compliance with the roof structure regulations is impractical because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to make full compliance unduly restrictive, prohibitively costly, or unreasonable.

The placement of the roof structure is the direct result of the small depth of the building lot, measuring only 85 feet. The roof structure has a depth of 30 feet. Were the roof structure able to be located at the center of the roof, special exception would not be necessary and the required setbacks would be provided in all directions. However, in this case, such a placement of the structure could not readily be accommodated within the column grid anticipated for the building without negatively impacting the functionality of the structure. Further, a central location of the roof structure would force the relocation of the elevator and facilities core to the center of the building footprint, significantly compromising the layout of the various floors for multi-tenant use. As the Applicant will demonstrate at the hearing and through its prehearing submission, the relocation of the core to the center of the building would render office layout of the floors unduly restrictive and unreasonably narrow.

C. The intent and purpose of Chapter 400 and the Zoning Regulations are not materially impaired and the light and air of adjacent buildings are not adversely affected.

With the exception of the setback, the roof structure is fully compliant with the Zoning Regulations and harmonizes with the main structure in architectural character, material, and color. Likewise, any impact of the roof structure on light and air to adjacent buildings would be comparatively minimal. The roof structure would be setback from the edges of the building fronting along 6th and H Streets, thus insuring no visual impact on the skyline of vistas of those streets. Given the comparatively significant heights of the proposed building and the neighboring Red Roof Inn to the immediate east, any impact of the roof structure placement on the light and air to the hotel will be negligible. The Applicant notes that the Red Roof Inn appears to have chosen a similar approach for its roof structure, with at least a portion of the structure sited flush with that building's west wall, nearest to the Subject Property.

For all these reasons, special exception from the roof structure setback provisions is appropriate.

III. Area Variance from the Rear Yard Requirements

A. Overview

After two years of public scrutiny through the BZA and large tract review process, and consideration by the affected Advisory Neighborhood Commission ("ANC"), the Applicant received approval and proceeded to file for the necessary building permits to construct its project. Among the permits applied for was a demolition permit to allow the removal of the one existing structure on the site. In accordance with the ANC law and building code provisions, the public was informed of this pending application.

Just prior to the expiration of the public review period, DCPL filed a landmark application with the D.C. Historic Preservation Office. In accordance with the provisions of the District's historic preservation law, the 19th century structure was afforded immediate landmark protection until the question of its historic and architectural merit could be decided by the Historic Preservation Review Board ("HPRB"). As a result, the Applicant was and is prevented from obtaining any permits for the approved project.

Last summer, prior to proceeding through the BZA and large tract review process, the Applicant consulted with EHT Traceries, a professional architectural history firm, to determine whether the dilapidated building on the site was worthy of individual designation. While Traceries recognized the building was a typical row house from the late-nineteenth century, and could possible contribute to the character of an historic district, Traceries concluded that the building did not rise to a level of importance to merit individual designation. Based on this assessment, the Applicant proceeded through the approval process, which included numerous meetings with the Office of Planning ("OP"), which incorporates the Historic Preservation Office.

Despite this professional assessment and OP approval of the project, DCPL concluded that the building did, in fact, merit landmark status and filed its designation request. During the past two months, Traceries has conducted more in-depth study of the building and has reaffirmed its earlier conclusion that the building is not individually important. Nevertheless, the Applicant met several times with DCPL to determine if a compromise could be reached. After numerous discussions, the Applicant and DCPL agreed that DCPL would withdraw its landmark application if the Applicant would incorporate significant portions of the building's façade into the new building and a manner that is sensitive to the building's original form. The Applicant has achieved this goal in its current submission to the Board. In reconfiguring the new building's mass around the existing row house, however, the Applicant no longer meets the rear yard setback requirements. Thus, the Applicant seeks relief from the provisions of section 774 of the Zoning Regulations, as described below.

B. Relief from Section 774.

Section 774 of the Zoning Regulations requires that each building constructed in the C-2-C District provide a rear yard with a minimum depth of fifteen feet. Further, section 774.7 provides that in the C-2 District, where a lot a lot abuts an alley as in the present case, the rear yard may be measured as follows:

> (a) For that portion of the structure below a horizontal plane twenty feet (20 ft.) above the mean finished grade and the middle of the rear of the structure from the center line of the alley to the rear wall of the portion; and
>
> (b) For that portion of the structure above the horizontal plane described in § 774.6(a), the depth of rear yard shall be measured from the rear lot line to the rear wall of that portion immediately above the plane.

The redesigned building does not provide the appropriate depth for a rear yard in its entirety. The existing row structure abuts the rear property line and extends both above and below the twenty-foot horizontal plane. Thus, there is no rear yard along the western (6th Street) portion of the site. Similarly, in order to protect the setting of the nineteenth century building, the new construction provides ample setbacks north of the existing structure and shifts the mass to the east, behind the existing building. Consequently, there is no rear yard along the eastern portion of the site, either.

C. Standard for Granting Area Variance Relief.

Deviations from the required rear yard provisions of section 774 are appropriate when an Applicant can demonstrate that it complies with the three-part test for area relief:

> (1) the property is unique because, *inter alia*, of its size, shape or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; (3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1035 (D.C. 1995), *quoting Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). *See, also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment,* 534 A.2d 939 (D.C. 1987).

The Applicant meets this three-prong test. First, the existing building on the site creates an exceptional situation or condition inherent in the property. *See Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) (existing structures are as important as topography in creating "other extraordinary or exceptional situation or condition of a specific piece of property"); *see also Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979). The row structure was constructed prior to the enactment of the Zoning Regulations and abuts the rear property line for almost its entire width. Consequently, the existence of this building on the site is a practical difficulty that makes it virtually impossible for the Applicant to meet the rear yard depth requirements. Third, granting the relief will not impair the intent, purpose or integrity of the zone plan. The incorporation of the existing structure into the new building comports with the zone plans intent to respect historic buildings. Moreover, the existing 30-foot wide alley that abuts the rear yard will help protect the light and air of surrounding properties.

Thus, the Applicant meets the test for variance relief.

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