BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Application of 1600 Fourteenth Street NW Limited Partnership, pursuant to 11 DCMR section 3103.2, for a variance from the residential recreation space requirements under section 773 and, pursuant to 11 DCMR section 3104.1, for a special exception to the first floor retail requirements under section 1901, to allow a mixed use (residential and retail) development in the Arts/C-3-A District at premises 1401 Q Street, N.W. Square 208, Lot 139	)	BZA No. 17197

Hearing Date: July 20, 2004
Decision Date: September 14, 2004

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE PARTY IN OPPOSITION, THE Q GROUP

PRELIMINARY MATTERS

Twenty individual property owners located within 200 feet of the Applicant's site filed with the Board a request for party status in opposition to the Application. At the public hearing these individual property owners were jointly granted party status by the Board as a single party, the "Q Group".

FINDINGS OF FACT

1. The property at 1401 Q Street, NW (Square 208, Lot 139) was created by amalgamation of former Record Lot 111 and Assessment and Taxation Lots 800 and 801, that were known as 1600, 1602 and 1604-6 14th Street, NW, respectively (Applicant's pre-hearing submission, "Submission", page 1). The site is a rectangular-shaped corner lot located at Q Street's intersection with 14th Street, NW with a frontage of 79 feet along 14th Street and 120 feet along Q Street (ibid. page 2). The site is accessible from three sides: 14th Street, Q Street, and a 20-feet-wide public alley that forms the rear boundary of the property (ibid. page 2). The site has a lot area of 9,480 square feet (ibid. page 3).

2. The site previously housed three historic Victorian storefront buildings. These buildings were allowed to fall into a state of disrepair by their owner, the John Wesley AME Zion Church (a partner in 1600 14th Street NW Limited Partnership), such that the buildings were condemned and demolished in 1996, after the Greater 14th Street Historic District came into being (Q Group's party status application, page 6). As a result there are now no structures on the site and it is effectively a large vacant lot currently in use as a parking area by the John Wesley AME Zion Church (Submission, page 3).

3. The Applicant intends to construct a new seven-story building containing 26 condominium apartment units, with almost half of the building's first floor area (that part of the first floor that faces 14th Street) to be used for retail, service or other arts-related uses as required by the Arts Overlay District (ibid. page 3). In

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addition, the Applicant intends to construct two levels of underground car parking at the site for a total of 35 car parks (July 20 Transcript "Tr.", pages 290-92, and Applicant's pre-hearing submission, Exhibit C, ASK 1 and 2).

Special Exception to Section 1901

4. Mr. Bill Bonstra, AIA, the project architect for the proposed development, testified on behalf of the Applicant. Mr. Bonstra testified that there are practical difficulties in meeting the first floor retail space requirement of section 1901 at the site due to the fact that the site is only 79 feet wide on one boundary line and requires a parking entry which then limits the location of the core of the building and constrains the amount of retail space that can be provided on the first floor (Tr. page 265).

5. The Office of Planning testified that because the Applicant is providing 47 percent of the first floor space for retail and other uses specified under section 1901 (just slightly less than the 50 percent requirement) and is also providing two serviceable retail bays in the same area, in the Office of Planning's view the intent and purpose of this section of the Zoning Regulations to provide retail space on 14th Street is satisfied (Tr. page 297).

6. Advisory Neighborhood Commission 2F, which is automatically a party to this Application, did not testify at the public hearing but submitted a letter dated July 12, 2004 (Exhibit 24). ANC 2F supported the request for the special exception from section 1901 (first floor retail space requirements) on the grounds that the requested deviation from the zoning requirement is negligible.

7. The Q Group testified at the public hearing that its property owners do not oppose the special exception to the first floor retail space requirement (Tr. page 303).

Variance from Section 773:

(l) Extraordinary or Exceptional Conditions at the Property

8. Regarding whether or not extraordinary or exceptional conditions exist at the property in accordance with the requirements for variances set out in section 3103.2, a range of testimony was presented at the public hearing.

9. Mr. Fred Bahrami, the managing partner of 1600 14th Street NW Limited Partnership, testified on behalf of the Applicant. Mr. Bahrami testified that the Applicant had tried to incorporate numerous recommendations from the community and the Historic Preservation Review Board ("HPRB") regarding the design (Tr. pages 257-58). Mr. Bahrami also testified regarding several factors that apply to the property: the residential nature of Q Street and the commercial character of 14th Street requires the building on this site to effectively be two buildings in one (Tr. page 261); the zoning requires retail space on the first floor on the 14th Street frontage (Tr. page 261); and the property owner is required to maintain the green "parking zone" public space outside the property line on Q Street (Tr. pages 261-62 and Submission page 13).

10. Mr. Bill Bonstra similarly testified that the design team felt that the building requires two different facades due to the different natures of 14 and Q Streets (Tr. page 264). He also testified that the design team "feels very strongly" about (1) the three interlocking "forms" breaking the building into 3 pieces (Tr. pages 268-69) and (2) the duplex units on the top two floors of the building (Tr. page 270). Together, these three characteristics form the basis for the massing of the building and the setbacks on the Q and 14th Street facades of the building at the upper levels (Tr. pages 268-70). Mr. Bonstra testified that these setbacks at the higher levels of the building naturally constrain the size of the roof space (Tr. pages 268-70).

11. Mr. Lindsley Williams, land use, planning and zoning consultant, testified on behalf of the Applicant. Mr. Williams noted that, even if the roof deck were able to be made elevator accessible (which the Applicant believed would require a variance from the height limit for roof structures, section 1902, and a special exception to the requirements for roof structures, sections 770, 777 and 411), therefore allowing the roof deck to be counted toward the residential recreation space requirement, this measure would only increase the residential recreation space provided at the site from 6 percent to 7-8 percent (Tr. pages 371-72). Thus the roof deck is neither the cause of, nor the solution to, the residential recreation space falling below the 15 percent requirement and the roof deck cannot in and of itself resolve the Applicant's need for a variance from section 773.

12. The Office of Planning testified that two zoning requirements applicable in the Arts Overlay District (the first floor retail space requirement of section 1901 and the height limit on roof structures of section 1902), together with unspecified "architectural constraints" that prevent the proposed building from being lower in height, collectively have the effect of preventing the residential recreation space requirement from being met at the site (Tr. pages 297-99). The Office of Planning supported the request for the residential recreation space variance and its representative noted that he did not support the alternate option presented by the Applicant of a variance being provided from the limitation on the height of roof structures in order to allow elevator access to the roof deck (Tr. pages 301-02). The Office of Planning also noted that making the roof deck accessible would not resolve the lack of residential recreation space and the need for a variance (Tr. page 302).

13. In its letter of July 12, ANC 2F conditioned its support for the residential recreation space variance on the provision by the Applicant of the additional second level of proposed underground car parking at the site (taking the number of parking spaces from 20 to 35) barring unforeseen circumstances in the ground (Exhibit 24). ANC2F further noted that any increase in the height of the roof structure at the property would be undesirable because it would be visible from the street and detract from the historic district.

14. Ms. Andrea Doughty testified on behalf of the Q Group, the party in opposition. Ms. Doughty testified that the numerous design recommendations referred to by Mr. Bahrami in his testimony and in the Applicant's pre-hearing submission (page 3), and the unspecified "architectural constraints" alluded to by the Office of Planning, had virtually all sprung from the vision of the Applicant's project design team (as testified to by Mr. Bonstra) rather than being architectural

"requirements" or "burdens" that were placed on the project by the HPRB or somehow by the community (Tr. pages 305-309). She testified that the only setback required by the HPRB was the seven-feet wide setback on the northern side of the building; the other setbacks were in fact proposed by the Applicant to the HPRB (Tr. page 309). Ms. Doughty noted that, despite the fact that this site is surrounded by 3-story buildings (Tr. page 307), this is a case where the HPRB approved the seven stories requested by the Applicant for a total height very close to the zoning maximum (Tr. page 311). The HPRB did at one stage early in their consideration of the proposed building request that the Applicant consider reducing the height of the building by a full story; however, the Applicant chose not to do this and the Applicant's requested seven stories were ultimately approved by the HPRB. Thus, Ms. Doughty argued this is fundamentally not a case in which the HPRB has imposed burdensome architectural constraints on the Applicant (Tr. pages 311-12).

15. Ms. Doughty testified that there are no exceptional or extraordinary conditions at the property and thus this case does not meet the first prong of the variance test (Tr. pages 317-319). She argued that this site is unencumbered by any existing historic structure; that it is a plain vanilla rectangular shape (80 feet by 120 feet); flat with no gradient and easy site access from three sides; and that it is an amalgamation of three lots, any individual lot of which would also have been able to be built on singly (Tr. pages 317-318). In this regard, Mr. Williams and Mr. Bonstra confirmed (Tr. pages 374-75) that there are significant advantages and efficiencies that accrue to the property owner from building on the three lots as a single amalgamated property rather than as three individual lots, due to the need for only one building core with stairwells, only one entranceway, one set of services, etc., thus substantially increasing the condominium density that can be achieved.

16. Ms. Doughty noted that, while the Applicant had argued that the legal requirement that the property owner "maintain" the green "parking zone" public space in front of the property on Q Street is a "burden", all property owners in Washington, DC who have such public space in front of their properties face the same requirement. It is neither an exceptional nor an extraordinary condition of the property. In fact, this has proved to be a benefit rather than a burden due to the aesthetic and marketing advantages that accrue to property owners (and would accrue to the Applicant) from this 16-feet wide strip of green space in front of each property (Tr. pages 318-19).

17. Ms. Doughty also testified that the Q Group shares the view of ANC 2F and the Office of Planning concerning the undesirability of any variance from the height limits for roof structures in this case, since the building's height has been the subject of extensive consideration during the historic review process. (Tr. page 304). She also noted that the project had been represented by the Applicant before the HPRB as a matter-of-right project that would require no zoning variances (Tr. page 314).

(II) Exceptional Practical Difficulties or Exceptional Hardship

18. Mr. Bonstra testified that the extraordinary circumstance of this site being a corner site that faces onto two streets (14th and Q) with different characters gives

rise to practical difficulties in that the building effectively requires two differing orientations (Tr. page 264).

19. Ms. Doughty testified that there are no factors that give rise to exceptional practical difficulties or exceptional and undue hardship to the property owner at this site as a result of strict application of the Zoning Regulations (Tr. pages 311 and 318-319). She testified that the HPRB had not placed burdens on the Applicant that would result in exceptional practical difficulties and that the one small setback required by the HPRB on the northern façade does not constitute an extraordinary condition that results in exceptional practical difficulties in providing the recreation space (Tr. page 318). Equally, the practical issues regarding the vehicular entry and the location of the core of the building, as well as the zoning requirement for first floor retail space were each issues that were manageable at the site, that do not in themselves constrain the amount of residential recreation space that could be provided at the property, and do not rise to the level of exceptional practical difficulties or exceptional hardship (Tr. page 319).

20. Ms. Doughty testified that the reason that the Applicant is unable to provide the required indoor and outdoor residential recreation space at the property is because the Applicant is trying to fit too many condominiums onto the site (Tr. page 352). In addition to the indoor recreation space being able to be met if the number of condominiums were reduced from 26 to 24-25, the Q Group noted that the necessary elevator access to the roof deck space could be provided without a variance from the height limit for roof structures simply by lowering the height of the building (Q Group's party status application, page 6).

(III) Absence of Substantial Detriment to the Public Good and of Substantial Impairment to the Intent, Purpose and Integrity of the Zoning Regulations

21. Ms. Doughty presented unrebutted testimony that there are two sources of substantial detriment to the public good that would arise from granting the variance from the residential recreation space requirement (Tr. pages 320-22).

22. First, instead of providing the recreation space, the Applicant is proposing (Tr. pages 285-86, and Submission page 13) to intensively utilize the green "parking zone" public space in front of the property on Q Street as a recreation area for the building's occupants and potentially for passers-by. Ms. Doughty testified that placing benches and tables in this area would be out of character with the rest of the "parking" area on Q Street, which comprise landscaped garden areas, and would be likely to attract homeless persons and vagrants to that part of the site, which would be a distinct detriment to the public good (Tr. pages 320-322).

23. Second, Ms Doughty testified that the failure to provide the required recreation space at the site would result in a further significant burden being placed on the already scarce and inadequate public recreation spaces in the neighboring area and that this would represent a further substantial detriment to the public good (Tr. page 323).

24. Mr. Bonn Macy, on behalf of the Q Group, presented photographs (Tr. page 324) of the public recreation areas cited by the Applicant (Submission, page 15) as

being alternative recreation areas in the neighborhood that would be available to the occupants of the property, namely: Shaw Basketball/Skateboard Park, Stead Park, Logan Circle, an elementary school and a junior high school.

25. Mr. Macy presented unrebutted testimony: (1) that these recreation spaces are extremely limited in how they can be used: they are for the use of skateboarders, basketball players or for children playing on equipment (Tr. pages 324-27); (2) that these facilities are restricted in access: the schools are for use of school children only; the playing field at Stead Park is padlocked and can only be used by groups with advance permission; access to many of these spaces is either not permitted or not advisable after dark when most adults come home from work (Tr. pages 326-27 and 338); (3) that these spaces are already intensively and continuously used and are already effectively at capacity in terms of the numbers of people that they can support (Tr. page 328 and 338); (4) that some of these spaces are in poor condition or are poorly configured as recreation areas for the "high-end" condominium clientele that the Applicant states (Tr. page 257) it is targeting for this site (Tr. pages 329-331); and, (5) that there are simply insufficient public recreational spaces in the neighborhood to accommodate all the new residents arriving in the area and that the displacement of existing users of these recreation areas would result in a substantial detriment to the public good (Tr. pages 328-29 and page 336 and 338).

26. Ms. Doughty testified that the Q Group believes that, in general, some specific countervailing public benefit associated with the property development would be necessary in order to offset the substantial detriment to the public good that would arise from the shortfall in residential recreation space being provided at the site (Tr. pages 342-48). She noted that this principle has already been implicitly and sometimes explicitly recognized in many previous BZA cases (for example, BZA No.s 16841, 16848, 16892, 17009) where less recreation space has been traded off for more off-street car parking and other amenities (Tr. pages 342-43). The essential principle that there is value associated with amenities such as recreation spaces and that, in the absence of a countervailing benefit, detriment is created when they are not provided is already recognized by the Zoning Commission in its treatment of Planned Unit Developments (for example, Case No. 03-27) and has been acknowledged by the Office of Planning in the past (for example, in its consideration of imposing a per square footage charge in lieu of recreation space during the process of the creation of the Downtown Development Overlay District in 2001, where funds raised were planned to be specifically earmarked for improving public parks and recreation areas) (Tr. pages 343-48).

27. Ms. Doughty testified that Q Group, like ANC 2F, believes that the additional second level of car parking planned at the site is important (Tr. page 339). By balancing more of one amenity for less of another, she argued that the additional car parking would, if built, go some way toward mitigating the detriment associated with the lack of recreation space (Tr. page 339-40). Ms Doughty noted that other developers in the immediate vicinity of the site have successfully managed to construct multiple levels of underground car parking despite facing real encumbrances unlike the Applicant's site (Tr. page 341). She requested that, should the Board determine, despite Q Group's testimony regarding the lack of extraordinary conditions or exceptional difficulties, that the variance relief sought

by the Applicant should be granted, the Board make such relief conditional on the additional second level of car parking being constructed at the site (Tr. page 341).

28. Ms Doughty argued that the Zoning Commission has specified in the current Zoning Regulations that the private sector is responsible for capital investment in on-site recreation spaces for residential developments located in commercial zones of at least 15 percent (Tr. page 348). She noted that it is simply not sustainable to waive that responsibility (in the absence of a countervailing benefit) and thereby effectively pass onto the public sector the responsibility for all capital investment in recreation areas without a public detriment resulting due to the unplanned nature of that additional burden on the public sector (Tr. page 348). This is explicitly not the balance of private investment and public investment in recreational spaces that is set down in the Zoning Regulations by the Zoning Commission (Tr. page 350 and 354).

CONCLUSIONS OF LAW

The Board is authorized by section 8 of the Zoning Act, D.C. Code, 2001 Ed., Section 6-641.07(g), to grant special exceptions to, and variances from, the strict application of the Zoning Regulations. The notice requirements of 11 DCMR section 3113 for the public hearing on the application have been met.

In reviewing proposed special exceptions and variances, the Board is required under D.C. Code section 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, the ANC's written report noted its support for the special exception to section 1901 (the first floor retail space requirements) and its conditional support for the residential recreation space variance (section 773) provided that the additional second level of underground car parking be provided at the site.

Under the requirements set out for a special exception in 11 DCMR section 3104.1, an applicant must demonstrate that the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and will not tend to adversely affect the use of neighboring property. With respect to the special exception requested to section 1901, the Board concludes that the provision of 47 percent, instead of 50 percent, of the first floor space for retail and other uses as required by section 1901 will satisfy the requirement for the provision of such space in a manner that is in accord with the purpose and intent of the Zoning Regulations and in a way that does not adversely affect the use of neighboring property.

Under the three-prong test for area variances set out in 11 DCMR section 3103.2, an applicant must demonstrate that (1) the subject property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. See Gilmartin v. District of Columbia Board of Zoning Adjustment, 379 A.2d 1164, 1167 (D.C. 1990).

With respect to the variance test, the Board concludes that neither the location of the site within the Greater 14th Street Historic District, nor the location of the site within

the Arts Overlay District, have placed extraordinary architectural or zoning constraints or conditions on the property in this case. The applicable D.C. Historic Preservation Guidelines and Arts Overlay Zoning Regulations apply to all properties in these districts and do not in this case impact the Applicant site in any unique way. The Board further notes that, while one of the purposes of the Arts Overlay District is to foster 18-hour activity (section 1900.2), the Zoning Regulations specify that where there is a conflict between the provisions of the Arts Overlay District and the underlying zoning, the more restrictive regulations apply (section 1900.3). Thus, the fact that this property is in the Arts Overlay District does not remove the responsibility of the Applicant to provide the level of residential recreation space on site that is required by section 773.

The Board further concludes with respect to the variance test that the fact that this property is a corner site that fronts onto one primarily commercial street and one primarily residential street is not a unique condition of this property since this characteristic applies to scores of sites within the District of Columbia. The Board finds this site to be unencumbered by any existing historic structures and to be of a simple rectangular shape with no gradient and site access on three sides, characteristics that each facilitates the development of this particular site. The Board determines that neither the practical issues of vehicular entry to the site and location of the building core, nor the maintenance of the green "parking zone" public space in front of the property, establish extraordinary conditions at the site that in themselves result in practical difficulties in providing the required recreation space or in some other unique or extraordinary burden on the property owner. Finally the Board concludes that substantial detriment to the public good, in the form of further over-burdening the already scarce and inadequate public recreation areas serving the immediate neighborhood, would arise from the relief sought.

With regard to the alternative to the variance from section 773 proposed by the Applicant, namely a variance from the height requirement for roof structures (section 1902) and special exceptions from roof structure requirements (sections 770, 777 and 411), the Board determines that the Applicant has not met the three-prong test for the variance from section 1902, nor proved that the special exceptions to the requirements for roof structures would be in harmony with the general purpose and intent of the Zoning Regulations and could be granted without adversely affecting the use of neighboring property.

Based upon the record before the Board and having given great weight to the ANC and Office of Planning reports and testimony in this case, the Board concludes that the Applicant has met the burden of proving under 11 DCMR section 3104.1 that the special exception requested to section 1901 will be in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to adversely affect the use of neighboring property. The Board further concludes that the Applicant has not met the burden of proving under 11 DCMR section 3103.2 that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations and that requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map. Finally the Board concludes that the Applicant has not met the burden of proving under 11 DCMR sections 3104.1 and 3103.2, respectively, that the tests for a variance from section 1902 and for special exceptions from sections 770, 777 and 411 have been met. Therefore, it is hereby ORDERED that the special exception to section 1901 requested

in Application No. 17197 be GRANTED, that the variance from section 773 requested in Application No. 17197 be DENIED, that the variance from section 1902 be DENIED, and that the special exceptions to sections 770, 777 and 411 be DENIED.

VOTE: (Geoffrey Griffis, Chair; Ruthanne Miller, Vice-Chair; National Capital Planning Commission representative, John A. Mann II; Zoning Commission representative, Anthony Hood)

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

ATTESTED BY: _____
Jerrily Kress, Director,
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2004, a copy of the foregoing Proposed Findings of Fact and Conclusions of Law of the Party in Opposition, the Q Group, was served by mail on:

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