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Saturday, December 18, 2004

Kevin Warner, Vice-President
National Capital Revitalization Corporation
1801 K Street, N.W., Suite 1210
District of Columbia 20006

Re: **KELSEY TEMPLE CHURCH (BZA Application #17232)**

Dear Mr. Warner:

I appreciated the meeting at the National Capital Revitalization Corporation ("NCRC") office on Tuesday, December 21. I believe that we made a lot of progress in that meeting. In fact, this letter complies with what you and Mr. Lloyd Levermore asked of me: a letter outlining how the parties could possibly reach an agreement about the development of the DC USA Mall site. I hope that, before next Tuesday, Kelsey Temple Church and RLA Revitalization Corporation ("RLA") will agree on terms for resolving this dispute about RLA's application for a parking variance and a rooftop exception. Otherwise, I fear that, because of District of Columbia law in this area, RLA will lose at the hearing and your group's hope for developing the Park Road site will be dashed indefinitely.

After all, RLA basically hopes to create something quite unique with this project. That is, RLA plans to construct a "big box" retail center, a design that American cities have typically rejected when proposed for densely populated neighborhoods like Columbia Heights. In fact, the people of Atlanta recently rejected a similar proposal to construct a Target "big box" store in that city. In the District of Columbia, the municipality has yet to establish standards for acceptable big box retail establishments within the city. As presently developed, this design (particularly with its large parking requirements) appears to be uniquely inappropriate for the Park Road area in Columbia Heights because the site lacks the large open space for outdoor parking that typically surround suburban and small town "big box" retailers.

BZA
Case No. 17232
Exhibit No. 44

Board of Zoning Adjustment
District of Columbia
CASE NO. 17232
EXHIBIT NO. 44

On this basis, I offer the following observations. I doubt that the Board of Zoning Adjustment will grant RLA a parking variance if Kelsey Temple Church opposes this application at the hearing. The proposed construction site could never be shown under local law to be uniquely deserving of a variance from the parking space regulation in 11 DCMR 2101.1. In other words, the site has no unique qualities that warrant a parking space "variance" under the D.C. Code, section 6-641.07(g)(3). I see nothing so unique about the site's size or shape that relates to parking spaces at a DC USA Mall. Also, I doubt that underground water or Metro lines near the site present circumstances so unique so as to warrant a variance from the 1,600 parking space requirement in 11 DCMR 2101.1. After all, RLA must prove that extraordinary or exceptional circumstances unique to this construction site will create "peculiar and exceptional practical difficulties" or an "exceptional and undue hardship" that would make impractical the construction of 1,600 parking spaces at the DC USA Mall. However, this project site has no unique features, whether in terms of size, shape, or underground conditions. Moreover, even if the site had unique features, those features would not warrant relief from the requirements of the statute or the local regulations.

In fact, what distinguishes this project and makes impracticable the requirement of providing 1,600 parking spaces appears to be the failure of the District of Columbia and its development partners to set aside the money for constructing more than 1,000 underground parking spaces. In the *Statement of the Applicant*, RLA admitted to the following:

> The feasibility of the entire project has always been, and continues to be, based upon financial assistance from the District Government. The legislation passed by the Council this year … capped the public financing for the project at approximately $42 million but the net available to the developer for construction is approximately $35 million. *The number of parking spaces proposed was based on the project budget assuming the maximum amount of public funding …*. Additional

> parking spaces [beyond 1,000] cannot be supported for the project.

Glasgow & Freeman, *Statement of the Applicant*, 9-10.

Moreover, the record before the Board in BZA Application #16858-A indicates that RLA earlier modified its proposed design for this project. That is to say, RLA modified its project design and made the floor space smaller than originally planned in order to decrease the number of parking spaces needed for the project. This proves that the big box proposal presently before the Board does not constitute an immutable condition peculiar to the site on which RLA would construct the DC USA Mall. In fact, the grounds currently include a number of smaller stores and buildings which could generate rent. Two stores, that is, the Quality Wash Laundromat and the Waffle Shop, currently provide rent. Moreover, as history readily proves, this site formerly included a collection of retail operations, including a now demolished post office on Irving Street, a now demolished Mary Ann's department store on the corner of 14th and Irving Streets, and a now demolished automobile repair shop on the corner of Irving Street and Hiatt Place, which never required the variance sought by RLA.

On the other hand, in order to construct the DC USA Mall, RLA would demolish the former Woolworth's department store at 3214 14th Street, the currently operating Quality Wash Laundromat at 3216 14th Street, the former Value Express store at 3218 14th Street, the former Payless Shoe Store at 3220 14th Street, the currently operating Waffle Shop at 1402 Park Road, a former restaurant at 1404 Park Road, and the currently operating parking lot managed by Kelsey Temple Church. As presently associated with each other, these establishments comply with **11 DCMR 2101.1** and do not require a parking space variance. Hence, RLA's proposed destruction of these properties would change current conditions which make use of above-ground parking spaces. In addition, if RLA constructed its big box DC USA Mall with underground parking, these changes would then require a variance because RLA and the District of Columbia never budgeted properly for the cost of constructing more than two levels of underground parking.

Under **Carliner v. D.C. Board of Zoning Adjustment**, 412 A.2d 52, 55 (D.C. 1980), "the affirmative action of the

applicant in making his property non-conforming" would be the basis for the Board's denial of a requested variance. In a related context, under **Barbour v. D.C. Board of Zoning Adjustment**, 358 A.2d 326, 327 (D.C. 1976), the District of Columbia Court of Appeals explained "that, in the commercial context, 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".

In addition, in **Palmer v. Board of Zoning Adjustment**, 287 A.2d 535, 539 (D.C. 1972), the court determined that

> To support a variance it is fundamental that the difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood. If the circumstances affect the whole area the reasonableness of the regulations are challenged and the proper remedy is to seek an amendment of the regulation rather than a variance.

Palmer. In its papers before the Board, RLA argues that the size and the shape of the site make it unique. **Glasgow & Freeman**, *Supplemental Statement of the Applicant*, p. 6. However, even if the site appeared to be distinct from the "angled lot lines" of the Tivoli site or the large acreage of the Cardozo High or the Lincoln Middle School campuses, these allegedly unique qualities would have nothing to do with making the parking space requirement an "exceptional and undue hardship" on RLA. The shape and the size of this 215,871 square feet of land have nothing to do with difficulties associated with constructing 1,600 parking spaces. Therefore, RLA would lose its effort to obtain a variance on that argument. *See* **Palmer**, 287 A.2d at 539.

As for groundwater that could affect construction of underground parking spaces, the geological engineer made the following remarks on behalf of RLA:

> Groundwater within the Washington, DC area typically exhibits relatively high iron content, which in a wet aerobic environment gives rise to the growth of

> iron-loving bacteria which can clog drainage lines and pumps. Previous experience in Washington projects indicates that frequent purging of the underdrainage system should be performed to minimize clogging by these bacteria.

Hugh S. Lacy, *Subsurface Investigation DC USA* (April 13, 2004), p. 6. Mr. Lacy, the geological engineer, added that

> Tunneling for Metro Sections E2, E3 and E4 which run from U Street NW along 14th Street, Park Road, and New Hampshire Avenue involved intense efforts at predrainage of groundwater. Installation and operation of deep wells encountered exceptional difficulties, particularly along Park Road. These involved the pervasive influence of iron-loving bacteria in clogging well filter packs and screens. No efficient remedy other than frequent purging was devised.

Lacy at 9.

These observations establish rather clearly that the groundwater at the proposed DC USA Mall site seems to be practically identical to, rather than different from, groundwater problems at other locations near the site and throughout the District of Columbia. Also, the location of the Metro near the DC USA Mall site along 14th Street appears to be no different from the location of the Metro along 14th Street but alongside the Tivoli project or the other construction projects near the proposed DC USA Mall site. Therefore, while the location of the Metro and groundwater at the DC USA Mall could make the construction of underground parking more expensive for RLA, this does not appear to be a unique condition as required by **section 6-641.07(g)(3)**. In fact, as the court in **Carliner** explained, RLA "would suffer no *exceptional* practical difficulty from the strict application" of the C-3-A zoning regulation in **11 DCMR 2101.1**. *See* **Carliner**, 412 A.2d at 54 (emphasis mine).

In fact, this DC USA Mall case resembles the facts in **Palmer** where proprietors wanted a parking variance for a Georgetown store which, under the regulations, needed off-street parking no more than 800-feet away from the establishment. Since neighboring shops, like the one in question, operated in Georgetown more than 800 feet away from off-street parking and otherwise faced circumstances identical to that confronting the applicant, the **Palmer** court observed that "the lack of off-street parking is a problem faced by many establishments in Georgetown", and, "consequently, there is no 'extraordinary or exceptional situation or condition' with respect to the" property in question. **Palmer**, 287 A.2d at 540. On these facts, the court ruled that the proprietor could not be regarded as uniquely situated and hence could not obtain a parking variance.

At the end of the day, this review of the law establishes that, at best, RLA has about a 35% chance of winning a parking variance at the Board hearing on Tuesday, and that would be the case even if Kelsey Temple Church offered no evidence whatever. Apparently, RLA relied heavily on the lack of community opposition to this project. Now, however, Kelsey Temple Church, the institution with perhaps the deepest roots in the neighborhood, formally opposes the grant of the parking space variance sought by RLA. If RLA loses the hearing, it loses the value of not only its preliminary costs invested into this project, but also the anticipated accrual value of this development which would draw upon hundreds of millions of dollars of construction money.

On the other hand, if RLA somehow prevailed at the hearing, the threat posed by this "big box" retail project would inspire indigenous enterprises and charities, along with local residents, to organize actions hostile to the good will needed for the success of this retail enterprise. To be sure, Kelsey Temple Church would vigorously organize against each stage of this development if somehow we lost the hearing on Tuesday, December 21. In other words, the community resistance that undermined the development of a major league baseball stadium along the Anacostia River and of the Trammell Crow condominiums on the site of the Boys' and Girls' Club on 14th Street would stand in the way of this project. Moreover, with the law on our side, we would appeal this matter and, I am sure, prevail in the District of Columbia Court of Appeals. In this light, the best and

most affordable hope for RLA would be to persuade Kelsey Temple Church to withdraw its opposition to the variance.

PROPOSED SETTLEMENT TERMS

I propose the following terms for settling the matter that will be litigated before the Board of Zoning Adjustment on Tuesday, December 21. (1) First, I ask that RLA and its partners pay Kelsey Temple Church and its subordinate corporation, the Temple Church Building & Economic Development Corporation ("TCBEDC"), $3,500,000.00, and I suggest that NCRC provide for Kelsey Temple Church up to 350 parking spaces on the proposed parking lot, with an adjustment of 100 fewer parking spaces during the holiday period from Thanksgiving to the following December 30 of each year. (2) I suggest that NCRC provide Iglesia Apostolica Pentecostal with twenty-five parking spaces. I also suggest that RLA and its partners pay Iglesia Apostolica Pentecostal each month an amount equal to twenty-five percent of the church's rents, so long as the construction of the DC USA Mall continues, but only so long as Iglesia Apostolica Pentecostal remains at its present location at 1426 Park Road.

As for the proprietors, I offer the following suggestions. (3) I suggest that NCRC provide Hermano at 1426 Park Road, QSI Consulting Services at 1428 Park Road, Samuel Kelsey Community Outreach Center at 1430 Park Road, Shoe Repair at 1432 Park Road, Kantouri Fried Chicken at 1434 Park Road, Thu Do Capital Café at 1436 Park Road, Cho' Vietnam at 1438 Park Road, Que' Huong Market at 1450 Park Road, New York Fashion at 1454 Park Road, DMC Unisex at 1456 Park Road, Lalos Market at 1458 Park Road, and A&C Beauty Salon at 1460 Park Road with two employee parking spaces for each enterprise. I also suggest that RLA and its partners provide each of these enterprises with $25,000 in liquidated damages for the inconvenience of incidental and consequential losses that will result from the development of the DC USA Mall site. (4) I suggest that NCRC provide Samuel Kelsey Community Outreach Center, Shoe Repair, Kantouri Fried Chicken, Thu Do Capital Café, DMC Unisex, and A&C Beauty Salon with five patron parking spaces for each enterprise. (5) Except as shall be provided for the Waffle Shop, I suggest that RLA and its partners promise to exclude from the mall any Asian eating establishment, any Hispanic or Latin eating establishment, and any chicken-based fast food eating establishment in

order to protect El Sausalito Restaurant, the Waffle Shop, Kantouri Fried Chicken, and Thu Do Capital Café from competition.

As for El Sausalito Restaurant and the Waffle Shop, I suggest the following. (6) I suggest that NCRC provide El Sausalito with three parking spaces for employees and six parking spaces for patrons. (7) I suggest that RLA and its partners pay El Sausalito $30,000.00 in liquidated damages for the inconvenience of incidental and consequential losses that will result from the development of the DC USA Mall. (8) Regarding the Waffle Shop, I suggest that RLA and its partners provide the Waffle Shop with a five-year lease for premises within the newly constructed DC USA Mall, and that these premises be comparable to those now leased by the Waffle Shop. (9) I suggest that the RLA and its partners lease these premises to the Waffle Shop at the highest monthly rental charged to the Waffle Shop during January through November 2004, with that rent paid to TCBEDC, but with a ten percent surcharge paid to RLA or the successor-landlord-in-interest. (10) I suggest that RLA and its partners agree to pay fifty percent of the costs for the Waffle Shop to move from its present location to its new premises in the DC USA Mall.

As for other aspects of the project, I propose the following. (11) I suggest that NCRC, RLA, the Development Corporation of Columbia Heights, or others join TCBEDC, as equal partners, in providing façade renovations for the premises at 1424-1460 Park Road, but with TCBEDC taking the lead in community relations on this project. (12) I suggest that NCRC or the Development Corporation of Columbia Heights join TCBEDC, as equal partners, in the renovation and the remarketing of the transitional shelter premises at 1448 Park Road, with perhaps twenty percent of the residents allowed to live on a permanent basis in the newly remodeled premises and with the remaining 80% relocated to fine housing located throughout the city (as identified by TCBEDC), from Connecticut Avenue near the Zoo to Marbury Plaza on Good Hope Road. All these tenants, as necessary, would be permitted to use section 8 subsidies for their rental obligations. (13) I ask that NCRC join TCBEDC, as equal partners or on some other acceptable basis, in acquiring ownership of the soon to be abandoned site of the Giants Food Store located at the 3400 block of 14th Street. I ask that RLA, NCRC, and the Development Corporation of Columbia Heights assist TCBEDC in developing

these premises for the economic and the social prosperity of local residents and businesses. (14) Finally, I ask RLA and its partners to pay $15,000.00 to Kelsey Temple Church for its attorney's fee.

While detailed, I believe that this listing of possible settlement terms outlines the indigenous business and residential interests that have been neglected in DC USA Mall planning to date. To be sure, these interests must be accommodated, in one effective way or another, before the Columbia Heights community truly becomes wedded to the big box retail project designed to attract Target to Park Road. Kelsey Temple Church fears that, without these protections, and without a mindset that would be supportive of these protections, the Park Road neighborhood will become nothing more than a fiefdom for Target Stores. Local residents, particularly the homeless in 1448 Park Road, will be displaced, and they will suffer. Local businesses will be overwhelmed and will be displaced by the big box design imposed on our neighborhood by RLA and its partners. Finally, at the end of the day, local charities, like Kelsey Temple Church, Iglesia Apostolica Pentecostal, and others will be overwhelmed, deprived of essential parking spaces, and precluded from effectively serving their constituency.

This proposal in essence calls for a modest sacrifice so that the parties ensure the prosperity of indigenous business and residential roots in the Park Road area. Without this sacrifice, the DC USA Mall investors would simply engender animosity from local interests. In this context, the sacrifice appears to be appropriate in light of private investors' expectation of a handsome profit from their endeavors. In my proposal, the city government revenue bond financing truly serves many of the needs of local interests. On this basis, I hope that we will speak again, long before the Board hearing, about settling this dispute.

Sincerely,

Thomas Ruffin

Thomas Ruffin, Jr.

c: Jennifer Budoff, Development Mgr.
Norman M. Glasgow, Jr., Esq.
Michael L. Hentrel, Deputy General Counsel