DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

RLA Revitalization Corp.
applicant

v. BZA Application #17232

Kelsey Temple Church of God in Christ, *et al.*
intervenors

MOTION TO CHALLENGE RLA MISREPRESENTATIONS ABOUT DC USA MALL OFF-STREET PARKING REQUIREMENTS AND TO DENY RLA APPLICATION FOR VARIANCE AND EXCEPTION

Kelsey Temple Church of God in Christ ("Kelsey Temple Church") and the Temple Church Building & Economic Development Corporation ("TCBEDC") ask this Board to deny the application sought in this case by RLA Revitalization Corporation ("RLA"), and Kelsey Temple Church and TCBEDC also ask that this Board dismiss the application with prejudice. The two intervenors, Kelsey Temple Church and TCBEDC, make this motion for the following reasons.

Introduction

The applicant, RLA, in its December 7, 2004 *Supplemental Statement of the Applicant*, informed the Board of Zoning Adjustment that, while the gross floor area of the proposed DC USA Mall equaled an alleged 516,949 square feet,[1] "only approximately 480,611 square feet is included

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[1] **Norman Glasgow & Kyrus Freeman,** *Supplemental Statement of Applicant* (BZA Application #17232)(Dec. 7, 2004), p. 5.

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in the parking calculation" mandated by **11 DCMR 2101.1.**[2] RLA explained that, in order to reduce the calculation of gross floor area from 516,949 square feet to 480,611 square feet, "appropriate elements are excluded from the calculation".[3] However, throughout these proceedings, RLA deliberately misrepresented the floor area measurements calculable for purposes of off-street parking requirements at the proposed DC USA Mall.[4] As a consequence, RLA misrepresented the number of off-street parking spaces mandated for the mall by **11 DCMR 2101.1.**

Oddly enough, on December 7, 2004, RLA filed architectural plans and drawings that wrongly described the DC USA Mall "building total" as equaling 886,615 square feet.[5] The architectural drawings described the mall's alleged 886,615 square feet of floor area as being comprised of 389,662 square feet of underground garage parking, 398,474 square feet of retail space, 40,000 square feet for a "health club" (the Washington Sports Club), and

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[2] **Glasgow & Freeman** (Dec. 7, 2004), p. 5.
[3] **Glasgow & Freeman** (Dec. 7, 2004), p. 5.
[4] *See* **Norman Glasgow & Kyrus Freeman**, *Statement of the Applicant* (BZA Application #17232)(Nov. 2, 2004), p. 3 (false description of proposed DC USA Mall as "approximately 486,729 square feet of gross floor area"); *see also* **Bower, Lewis & Thrower**, *DC USA Architectural Plans & Drawing* (BZA Application #17232)(Oct. 29, 2004), p. Z102A (implying gross floor area equaled what architects called "Zoning F[loor] A[rea]" of 532,776 square feet).
[5] **Bower, Lewis & Thrower**, *DC USA Architectural Plans & Drawings* (BZA Application #17232)(Dec. 7, 2004), p. Z102A; *compare* **Bower, Lewis & Thrower** (Oct. 29, 2004), p. Z102A (similar disclosures of 897,850 square feet for the mall's proposed "building total").

58,479 square feet for "service" sector space.[6] However, RLA miscalculated the total floor area for purposes of off-street parking by excluding most or all of the 389,662 square feet for the underground parking garage and the 19,558 square feet for what RLA called "closed court" areas within the mall.[7]

Since RLA's miscalculations of the total floor area for purposes of off-street parking have no legitimate basis in the law, and since these miscalculations would materially affect the outcome of these proceedings, Kelsey Temple Church and TCBEDC dispute these measurements presented by RLA. In fact, since the floor area for purposes of off-street parking at the proposed mall would be about 906,173 square feet, that is, since the mall's aggregate gross floor area and cellar floor area would equal about 906,173 square feet, the DC USA Mall would be required by **11 DCMR 2101.1** to provide at least 3,011 off-street parking spaces,[8] not the 1,592[9] or the 1,599[10] off-street parking spaces which RLA claims to be its obligation

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[6] **Bower, Lewis & Thrower** (Dec. 7, 2004), p. Z102A.
[7] *See* **Bower, Lewis & Thrower** (Dec. 7, 2004), p. Z102A.
[8] *See* **11 DCMR 2101.1** ("Retail or service establishment …: … C-3-A -- In excess of 3,000 square feet, 1 [off-street parking space] for each additional 300 square feet of gross floor area and cellar floor area").
[9] **Glasgow & Freeman** (Dec. 7, 2004), p. 5.
[10] **Norman Glasgow & Kyrus Freeman**, *Letter: Amendment to the Application to Add Alternative Parking Relief* (BZA Application #17232)(Dec. 22, 2004), p. 1 (attached as **EXHIBIT #1**).

under District of Columbia regulations. As authority for these arguments, Kelsey Temple Church and TCBEDC offer the following analysis.

ANALYSIS

Under local law, the DC USA Mall must include one off-street parking space "for each additional 300 square feet of gross floor area and cellar floor area" in excess of 3,000 square feet.[11] In District of Columbia regulations, the term "gross floor area" as referred to in **11 DCMR 2101.1** means "the sum of the gross horizontal areas of the several floors of all buildings on the lot, measured from the exterior faces of exterior walls and from the center line of walls separating two buildings".[12] According to local zoning regulations, the gross floor area of the DC USA Mall

> shall include basements, elevator shafts, and stairwells at each story; floor space used for mechanical equipment (with structural headroom of six feet, six inches, or more); penthouses; attic space (whether or not a floor has actually been laid, providing structural headroom of six feet, six inches, or more); interior balconies; and mezzanines.[13]

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[11] **11 DCMR 2101.1** (for "retail or service establishment[s]" in a C-3-A district).
[12] **11 DCMR 199.1; Brown v. D.C. Board of Zoning Adjustment**, 486 A.2d 37, 54, n. 21 (D.C. 1984)(*en banc*).
[13] **11 DCMR 199.1.**

With regard for the term "cellar floor area" in **section 2101.1**, the local regulations define "cellar" as "that portion of a story, the ceiling of which is less than four feet above the adjacent finished grade".[14] The District of Columbia Court of Appeals confirmed this definition in **Brown v. D.C. Board of Zoning Adjustment**[15] where the court described a "cellar" as "any area 'the ceiling of which is less than four feet above the adjacent finished grade'".[16] The court in **Brown** stressed the point that "any below grade area with a ceiling that is less than four feet above grade will not be included in a calculation of the gross floor area", but rather should be included in calculations of a building's "cellar floor area"[17]

This definition applied on November 2 and December 7, 2004, to the underground parking garage at the proposed mall. In this respect, the DC USA Mall underground parking garage, that is, "Parking Level 1" and "Parking Level 2", will have ceilings "less than four feet above" or actually below "the finished grade".[18] Hence, the underground garage

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[14] **11 DCMR 199.1.**
[15] **Brown**, 486 A.2d 37 (D.C. 1984).
[16] **Brown**, 486 A.2d at 54.
[17] **Brown**, 486 A.2d at 54.
[18] *See* **Bower, Lewis & Thrower** (Dec. 7, 2004), pp. Z302, Z304, and Z305 (RLA architectural drawings illustrate Parking Level 1 with a 12'6" ceiling and parking garage area below the finished grade and Parking Level 2 with a 10' ceiling and parking garage area below the finished grade).

will have ceilings and other areas that fit within the description of "below grade" cellars for purposes of local law. Hence, the underground parking garage at the DC USA Mall should be measured for purposes of "cellar floor area" in calculating off-street parking requirements for this project.[19]

According to these rules, when RLA excluded the square footage of the underground garage and the square footage of the "closed courts" from the mall's gross floor area calculation, RLA had no legitimate basis for excluding these measurements. To be sure, the so-called "closed courts" could not rightly be regarded as "balconies" excludable under **11 DCMR 199.1** from a gross floor area calculation for purposes of determining off-street parking requirements. Moreover, since local law obliged the Board to set aside off-street parking spaces according to the "gross floor area and cellar floor area"[20] of the proposed DC USA Mall, then the entire 906,173 square feet of total gross and cellar floor area, including the underground garage, should have been factored into the RLA calculation of off-street parking spaces at the mall. Indeed, the RLA had an obligation to include the square footage of all

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[19] *See* **11 DCMR 199.1** and **2101.1.**

[20] **11 DCMR 2101.1** (regarding "retail or service establishment" in C-3-A districts for "commercial buildings").

areas not excluded specifically by the statute or by local regulations from the formula for determining parking requirements.

As a matter of fact, in **Citizens Ass'n of Georgetown, Inc. v. D.C. Board of Zoning Adjustment,**[21] the court literally interpreted the zoning definitions of "gross floor area" and "building" for purposes of determining off-street parking requirements.[22] As noted by the court in **Citizens Ass'n of Georgetown,** the term "building" means "a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel".[23] As for the term "gross floor area", it applies to an area that "shall include basements, elevator shafts, and stairwells at each story".[24] At the end of the day, these definitions of a "building" and of "gross floor area" inform the calculation of off-street parking spaces under **11 DCMR 2101.1.**

After all, under the terms of **11 DCMR 2101.1,** off-street parking spaces must be set aside in sufficient number for "all buildings and structures", including those

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[21] **Citizens Ass'n of Georgetown, Inc. v. D.C. Board of Zoning Adjustment,** 337 A.2d 495 (D.C. 1975).
[22] **Citizens Ass'n of Georgetown, Inc.,** 337 A.2d at 496-97.
[23] **Citizens Ass'n of Georgetown, Inc.,** 337 A.2d at 497; **11 DCMR 199.1.**
[24] **11 DCMR 199.1.**

proposed for the DC USA Mall.[25] In other words, this **section 2101.1** imposes a formula for calculating required off-street parking spaces for "all buildings and structures", including the entire "structure", from the roof to the lowest basement level garage, of the proposed DC USA Mall.[26] In fact, since **section 2101.1** requires RLA to provide a sufficient number of off-street parking spaces as determined by the "gross floor area and cellar floor area",[27] this rule makes clear that the underground parking garage and the so-called "closed courts" should not be excluded from a calculation of parking requirements.

Apparently, the case law has consistently regarded underground parking garages as part of "buildings" for purposes of calculating total floor area as a factor in off-street parking requirements.[28] Moreover, in a separate

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[25] **11 DCMR 2101.1.**

[26] **Citizens Ass'n of Georgetown, Inc.**, 337 A.2d at 497.

[27] **11 DCMR 2101.1** (for "retail or service establishment[s]" in a C-3-A district).

[28] **Cathedral Park Condominium Committee v. D.C. Zoning Commission**, 743 A.2d 1231, 1235-36 (D.C. 2000)("204 fixed parking spaces in an underground garage … with capacity for an additional 96 spaces in the garage through attendant-assistant parking", albeit while "the R-5-D designation also imposes a density limitation, as measured by the floor area ratio, with which the proposed project would not comply"); **Draude v. D.C. Board of Zoning Adjustment**, 582 A.2d 949, 951 (D.C. 1990)(**Draude 2**)("Originally, two designs for the Addition [to George Washington University Medical School] were submitted to the BZA. The second design -- the one ultimately approved -- called for a structure of 121,923 square feet with eight floors above street level and four floors underground. Of the twelve levels, nine were to be used for medical-related activities and three for underground parking") and **Draude v. D.C. Board of Zoning Adjustment**, 527 A.2d 1242, 1246-49 (D.C. 1987)(**Draude 1**)(where the D.C. Court of Appeals reversed the BZA for

case where the District of Columbia Zoning Commission asked the Corporation Counsel whether "historic buildings" or "an interior arcade" could be excluded from calculations of a project's gross floor area, the Corporation Counsel firmly advised "that the Commission … may not order that historic buildings or an interior arcade shall be excluded from the calculation of gross floor area".[29] To be sure, the Corporation Counsel declared that excluding these structures from gross floor area calculations "would effect an improper amendment of those [D.C. Zoning Commission] regulations".[30] The same could be said in this case, that is, that a failure to apply the law would "effect an improper amendment" of the law, if this Board calculated off-street parking spaces without including both the underground garage "cellar floor area" and the additional square footage of the so-called "closed courts" proposed for the DC USA Mall.

Unfortunately, RLA ignored the authorities that required it to factor in the square footage for both the underground garage and the so-called "closed court" for purposes of calculating off-street parking requirements for

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not properly applying the rules for FAR to the circumstances as described more explicitly in **Draude 2**).

[29] **Louis P. Robbins**, *Office of Corporation Counsel*, CCO No. 2702, 1977 D.C. AG Lexis 40, 9 (April 11, 1977).

[30] **Robbins**, *Office of Corporation Counsel*, 1977 D.C. AG Lexis 40, 9.

the mall. As a matter of fact, RLA inaccurately applied the term "closed court" when it described some portions of the mall that RLA hoped to exclude from off-street parking calculations. After all, according to local regulations, a "court", whether closed or open, must be "open to the sky".[31] Yet, in the RLA mall proposals, the architects described the "closed court" as sheltered from the sky by a second floor, by a third floor, and by the mall's roof.[32] In other words, the so-called closed court will not be "open to the sky" and, hence, cannot rightly be regarded as a "court" or as a "closed court". Indeed, under any circumstance, the "closed court" should be included in "the sum of the gross horizontal areas of the several floors of all buildings" for purposes of determining the gross floor area in the off-street parking calculation.[33]

In this regard, RLA has a firm obligation to apply the local zoning regulations and the District of Columbia statute without misinterpretation. While some may regard any RLA oversight in calculating off-street parking requirements as inadvertent, and while others may regard the "closed court" mischaracterization as similarly

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[31] **11 DCMR 2101.1** (defining "court" as "an unoccupied space, not a court niche, *open to the sky*, on the same lot with a building …") (emphasis mine).

[32] **Bower, Lewis & Thrower** (Dec. 7, 2004), pp. Z002, Z102B, Z103A and Z103B.

[33] *See* **11 DCMR 199.1.**

inadvertent, this view appears to be ironic. After all, the harm that arises from these deliberate miscalculations appears to be terribly unfortunate. Simply put, the DC USA Mall with a proposed gross and cellar floor area of 906,173 square feet must provide 3,011 off-street parking spaces[34] unless this Board lawfully grants a variance on off-street parking requirements. If this Board denies the variance, the mall as proposed cannot lawfully be constructed.[35]

At present, RLA has no application for a variance that would permit the construction of the mall without providing the 3,011 off-street parking spaces; indeed, the present RLA application requests a variance or an exception from providing 1,592 or 1,599 off-street parking spaces, not a variance from setting aside 3,011 parking spaces. Because the original RLA application wrongly calculated floor areas and parking space requirements, it failed to inform properly this Board's judgment about whether a variance from 3,011 parking spaces would bring about a "substantial detriment to the public good" or would substantially impair "the intent, purpose, and integrity of the zone plan".[36] In a word, the RLA application so terribly failed to address legal norms in the District of Columbia that these

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[34] *See* **11 DCMR 2101.1.**

[35] **D.C. Code, section 6-641.07(g)(3)** ("to authorize … a variance from such strict application" of the law); **11 DCMR 3103.2.**

[36] *See* **D.C. Code, section 6-641.07(g)(3)**; *see also* **11 DCMR 3103.2.**

proceedings as initiated by RLA appear to be a nullity. If nothing else, since RLA has already presented its case-in-chief,[37] and since RLA has "the burden of proof"[38], RLA's failure to provide an accurate statement about the DC USA Mall's off-street parking requirements has undermined its ability to prevail in these proceedings.

Accordingly, RLA should withdraw its application. If it refuses to do so, then this Board should render a final decision denying the RLA application. Amending the application would be ineffective since RLA has already presented and closed its case-in-chief. Moreover, amending the application would never restore RLA's lost credibility which perished as a result of RLA's false statements about the off-street parking requirements for the proposed DC USA Mall.

WHEREFORE, the intervenors ask this Board to render a final decision denying the RLA application for both a

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[37] *See* **11 DCMR 3117.11(b)(1)** ("Applicant's case").

[38] **11 DCMR 3119.2** ("In all … applications, the burden of proof shall rest with the … applicant").

variance and an exception in this case.

Respectfully submitted,

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Certificate of Service

I, Thomas Ruffin, Jr., certify that, on January 4, 2005, I mailed a copy of this motion to the offices of Norman M. Glasgow, Jr., Esquire, and Kyrus L. Freeman, Esquire.

Thomas Ruffin, Jr.