The Non-Profit Community Development Corporation of Washington, D.C., Inc.

Petition before the Board of Zoning Adjustment, District of Columbia, for a Height Variance at 2750 14th Street, N.W., Washington, D.C.

April 12, 2005

I. Background.

The Non-Profit Community Development Corporation of Washington, D.C., Inc. ("NPCDC") is a District of Columbia not-for-profit corporation engaged in urban and neighborhood revitalization through the construction and renovation of housing in neighborhoods at risk throughout the District of Columbia. Since its inception in 1994, NPCDC has built and renovated over 350 units of housing, including apartments and single family houses, in such neighborhoods as Anacostia, Columbia Heights, Petworth, and upper Georgia Avenue. NPCDC prides itself on undertaking construction and social challenges that intimidate conventional for-profit developers. By growing the base of clean, attractive, affordable housing in the District of Columbia, NPCDC is building better homes and better neighborhoods for the citizens of the District of Columbia.

II. The Development at Parcel Five.

NPCDC's current project is the development of Parcel Five in the Fourteenth Street Redevelopment Corridor. Parcel Five, located at 2750 14th Street, N.W., in Columbia Heights, is being developed under the auspices of the District of Columbia's RLA Revitalization Corporation (the "RLARC"), which sold the land to NPCDC. NPCDC's vision for the development of Parcel Five includes 77 parking spaces in a subsurface parking deck, 19,770 square feet of ground level commercial space, and 56 residential condominium units in a seven story building. The property is currently zoned "C-2-B" per the Zoning Map (#6) for the District of Columbia, has 24,000 square feet of area, and a height limitation of 65 feet. NPCDC is in the process of building a structure of contemporary design that will provide a dynamic location for living and working while helping to revitalize a neighborhood in transition

In order to purchase the land from the RLARC, NPCDC had to consent to submitting the land to the RLARC's Land Development Agreement (the "LDA"). The LDA is a set of restrictive covenants that strictly govern the development of Parcel Five. Under the LDA, NPCDC has committed to selling half (50%) of the residential condominiums as Affordable Dwelling Units ("ADUs") to households earning below the Area Median Income as defined by U.S. Department of Housing and Urban Development and adopted by the District of Columbia Department of Housing and Community Development and the RLARC. This is the highest percentage of ADUs in any project overseen by the RLARC. Additionally, NPDCDC has committed to lease 8,000 square

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feet of the commercial space for a child care center. These features are essential features of the development at Parcel Five and a part of NPCDC's commitment as a non-profit developer to socially responsible development.

III. The Request for a Variance.

A. The Challenge Prompting the Request: Prospective Quality Commercial Tenants Want Twelve Foot Ceilings in the Commercial Space.

NPCDC is now in the process of constructing the building at Parcel Five, including pre-selling and pre-leasing the residential and commercial units. In the process, NPCDC has encountered a serious practical difficulty. In order to fit all of the commercial space and 54 residential units into seven floors, NPCDC had to design the ground floor commercial spaces with eight foot high ceilings. Unfortunately, NPCDC, who focused principally on creating the residential units and creating the affordable mix, is now discovering that the majority of the premier commercial tenants desire commercial spaces with twelve foot ceilings. Attached is a letter from Vanguard Realty Group, the retail broker for the property. As the letter indicates, many major market coffee shops, restaurants, dry cleaners, and retailers have been unwilling to consider leasing the commercial spaces at Parcel Five. Alternatively, they have been willing to sign leases only on the condition that the spaces be redesigned with twelve foot ceilings. Given the eight foot ceiling limitation, the only serious interest NPCDC has had is from liquor stores, pawn shops, and check cashing establishments. Clearly, though, these establishments are lower quality tenants and are less than what NPCDC desires from an urban redevelopment and social revitalization perspective. Indeed, one could reasonably argue that if NPCDC has to rely on such establishments to make the project economically viable, then NPCDC will fail in its social mission to bring a positive catalyst for social change to the neighborhood.

B. A Height Variance Provides the Only Solution.

As a result of the foregoing, NPCDC has applied for a variance to add eight feet to the overall height of the building on Parcel Five. Of the eight feet in additional height, four feet would be added to the ground floor to create the twelve foot ceilings in the commercial space desired by premier grade tenants. Additionally, four other feet would be distributed among the residential floors to create higher ceilings in the residential units. The higher ceilings in the residential units would add additional vibrancy to the units to help attract market rate unit purchasers who may otherwise be reluctant to live in a building with 50% ADUs.

Before making this request, NPCDC considered other alternatives for creating the additional ceiling height. In order to fit all of the various units required by the restrictive covenants of the LDA, the building is already at its maximum volume. NPCDC could raise the ceiling height of the first floor only by eliminating a floor of residential condominium units. Unfortunately, though, this would make it impossible to build all of the units required by the restrictive covenants of the LDA. Adding height to the building

is the only way to address this situation and still conform to the restrictive covenants of the LDA.

Additionally, in its Memorandum of March 29, 2005, the Office of Planning (the "OP") has suggested that NPCDC could achieve the same result by applying for a Planned Unit Development ("PUD") through the Zoning Commission. In doing so, the OP has not recognized the practical limitations of the PUD process. Obtaining PUD approval would take anywhere from six to twelve months in a best case scenario. Meanwhile, the improvements at Parcel Five are already under construction. By the time the PUD process is complete, NPCDC expects to have completed the building through the fourth floor, rendering any PUD approval moot. Further, any halt in construction to wait for the PUD process would be so costly that the project (and indeed the entire NPCDC) would be bankrupted. Thus, while the OP has suggested a remedy that is theoretically possible, their proposal is not practically possible at this time. The height variance is the only way for the NPCDC to achieve its desired goal.

C. The Property Meets the Criteria for a Variance.

1. The Criteria for a Variance.

Pursuant to D.C.M.R. § 3103.2, the Board of Zoning Adjustment has the power to enact a variance, "[w]here by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under D.C. Official Code §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship; provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map."

In this instance, the property meets each of the criteria necessary for the Board of Zoning Adjustment to grant the requested variance.

2. The Property Is Subject to an Exceptional Situation or Condition because of the Combination of the Restrictive Covenants of the LDA and the Non-Profit Purpose of the Developer. This Results in 50% ADUs, which Makes the Property Unique.

In order to qualify for the variance, the property must exhibit, ". . . exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions ***or other extraordinary or exceptional situation or condition*** . . . ." (emphasis added)

In this case, the property is subject to exceptional situation or condition from the combination of two circumstances. First, the property is subject to the restrictive covenants imposed by the LDA. Second, the property is being developed by a non-profit developer with a non-profit mission. Together, the combination of the restrictive covenants *and* the non-profit mission create a unique property and an exceptional situation or condition. This situation or condition is manifested in the 50% ADU requirement and the child care center. The restrictive covenants are a unique feature of the land because they are recorded in the land records, run with the land, and are inseparable from the land. Additionally, since the property is being developed by a non-profit developer, the developer has a charitable mission to fulfill by providing a socially beneficial development that contributes to urban revitalization.

NPCDC recognizes that it must present proof that "the circumstances which create the hardship *uniquely* affect the *petitioner's property* . . . ." *Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939, 941-42 (D.C. 1987), quoting *Taylor v. District of Columbia Bd. of Zoning Adjustment*, 308 A.2d 230, 234 (D.C. 1973) (emphasis in original). The circumstances affecting Parcel Five are unique to Parcel Five. While there are other properties subject to restrictive covenants from RLA's imposed by the RLARC, no other such properties are being developed by a non-profit developer with a non-profit, social mission. No other LDA requires as many as 50% of the residential units to be designated as ADUs. Instead, comparable LDAs from the RLARC require 10%-20% ADUs. As a result, the restrictive covenants imposed by the LDA combined with the non-profit mission of the developer, NPCDC, create an exceptional situation or condition that is unique to Parcel Five.

In its Memorandum of March 29, 2005, the OP has asserted that Parcel Five lacks physical uniqueness or an exceptional situation. The OP has alleged that the restrictive covenants of the LDA alone do not create physical uniqueness or an exceptional situation. This addresses only half of Parcel Five's situation, though. While other properties may be subject to restrictive covenants similar to those of the LDA, the combination of the restrictive covenants and the non-profit purpose of NPCDC, resulting in 50% ADUs and a child care center on the property, create an exceptional situation. No other property has this combination. This is an exceptional situation that makes Parcel Five unique.

3. The Exceptional Situation or Condition Would Result in Peculiar and Exceptional Practical Difficulties upon the Owner because It Would Impair the Owner from Creating a Development that Enhances the Quality of Life in the Neighborhood.

In order to qualify for the variance, the exceptional situation or condition must be one that ". . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property . . . ." (emphasis added)

NPCDC recognizes that in cases such as this, where an area variance is requested, the "practical difficulties" standard applies, with the "undue hardship" standard applying

only when an applicant requests a use variance. *Palmer v. Board of Zoning Adjustment*, 287 A. 2d 535, 542 (D.C. App. 1972). In this case, NPCDC is not suffering any undue economic hardship. Rather, NPCDC has discovered that it subject to a practical difficulty because is unable to construct the quality improvements required by the restrictive covenants and still provide the kind of socially beneficially structure required by the NPCDC's non-profit, charitable purpose. If the NPCDC constructs the building with eight foot ceilings in the commercial space, it will lose the opportunity to have the high quality tenants and provide the quality of life that the neighborhood deserves. This is not only undesirable from an urban revitalization perspective, but it is also undesirable to NPCDC from the perspective of a non-profit organization.

4. The Relief Can Be Granted without Substantial Detriment to the Public Good, as Agreed by the ANC and the OP.

In order to qualify for the variance, the Board of Zoning Adjustment must determine that ". . . the relief can be granted ***without substantial detriment to the public good*** . . . ." (emphasis added)

The Board of Zoning Adjustment may unequivocally grant the requested height variance without any detriment to the public good. Granting the height variance would be a substantial improvement to the public good by creating a better neighborhood with better retail venues that foster positive social change in the community. Conversely, failing to grant height variance incurs a detriment to the public good. If NPCDC is required to develop Parcel Five with eight foot ceilings in the commercial space, the substandard tenants that will front 14th Street and Girard Avenues will not be capable of making a positive contribution to the Columbia Heights neighborhood.

NPCDC notes that it is not alone in making this assessment. As the attached letter from the Advisory Neighborhood Commission ("ANC") illustrates, the ANC agrees that the additional height "will positively affect [NPCDC's] ability to attract retail tenants more in harmony with the surrounding residential community." Additionally, NPCDC notes that the OP, in its Memorandum of March 29, 2005, also agreed that "[f]rom the perspective of effects on the surrounding neighborhood, the project would have no substantial detriment."

5. Due to the Minor Change to the Building, the Relief Can Be Granted without Substantially Impairing the Intent, Purpose, and Integrity of the Zone Plan.

In order to qualify for the variance, the Board of Zoning Adjustment must determine that ". . . the relief can be granted . . . ***without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map***." (emphasis added)

In this case, the relief granted would be minor enough not to impair the integrity of the zone plan. The variance requested is for a mere eight foot addition to the height of

the building. This addition would not render the building unusual or inconsistent with the surrounding structures. The additional height will not change the character of the building or the character of the neighborhood. The property is bordered by a six story brick building to the south and a five story brick building to the west. As a result, a seven story building with an additional eight feet in height will not radically alter the profile of rooflines in the neighborhood.

Finally, NPCDC notes that the OP has charged that granting NPCDC's request for a variance would weaken the Zoning Regulations by weakening the standards for a variance. NPCDC strongly disagrees because the OP did not acknowledge all of the criteria which make this property unique. Additionally, the OP has claimed that NPCDC's failure to seek relief through the PUD process weakens the PUD process, this claim does not acknowledge, though, that the PUD process cannot be accomplished on a time line consistent with NPCDC's construction schedule. As such, the variance is NPCDC's only practical and meaningful opportunity for relief, which is exactly why variances exist. The Board of Zoning Adjustment, which is charged with the responsibility to police the land and improve the quality of life in the District of Columbia, should find this to be an ideal case for which a variance is suited.

IV. The Unique Circumstances of Parcel Five Will Not Create an Unwanted Precedent for Future Variances.

NPCDC recognizes that the Board of Zoning Adjustment will be concerned with setting an undesirable precedent with this variance. However, NPCDC suggests that the qualities which make Parcel Five a unique property also make it unlikely that its variance would set an undesirable precedent for future variances. Parcel Five is unique because of the combination of restrictive covenants from the LDA and the non-profit purpose of the developer, NPCDC. The combination of these things creates a unique property supporting 50% ADUs and a child care center. No other developer developing property under the auspices of the RLARC has committed to designating at least 50% of the residential units in a project as ADUs. If the Board of Zoning Appeals were to recognize these factors as making the property unique while ruling affirmatively in favor of the requested variance, then it is unlikely that other developers would be able to claim this variance as precedent for other variance requests

V. NPCDC Will Not Profit from the Variance.

Finally, NPCDC notes that while other developers' variance applications are motivated by the ability to wring additional profits from their developments, NPCDC's variance application is motivated solely from its desire to build a higher quality development in Columbia Heights. NPCDC will not recognize any additional profit from a successful decision on this request. Rather, granting this variance will merely allow NPCDC to stay true to its non-profit mission. NPCDC's situation is unique to NPCDC as a non-profit developer with a non-profit mission as it struggles to create a better living environment in the neighborhood of Columbia Heights.

VI. Conclusion.

NPCDC desires to create a development that makes the best possible contribution to the quality of life in Columbia Heights. To do so, NPCDC needs a variance to add eight feet to the height of its building. Parcel Five qualifies for the variance because:

(a) It is subject to an exceptional situation or condition in the form of the restrictive covenants of the LDA and the fact that it is being developed by a non-profit developer with a social mission to fulfill, the combination of which results in 50% ADUs and child care center that make the property unique;
(b) The exceptional situation or condition would impose a practical hardship on NPCDC by impairing its ability to provide the highest quality of life possible for the neighborhood;
(c) The proposed additional height would not have an adverse impact on the neighborhood; and
(d) The proposed additional height is not inconsistent with the zoning plan.

Finally, NPCDC ask the Board of Zoning Adjustment to consider that NPCDC is a non-profit organization seeking its variance solely for the social good of the community. NPCDC will not profit from the granting of this variance. Since NPCDC is focused on neighborhood revitalization as part of its core mission, the building itself must be able to make a positive contribution to the urban landscape it which it resides. As such, NPCDC hopes that the Board of Zoning Adjustment will grant this request for a variance and allow NPCDC to develop the best possible building it can for the revitalization of Columbia Heights.

Vanguard
REALTY GROUP

March 7, 2005

Arnie Litman
Litman Development
3331 22nd Street ES
Suite A
Washington DC 20020

Re: Retail Ceiling Heights at the "Heights of Columbia"

Dear Arnie;

As your retail broker for the "Heights of Columbia" project I want to make you aware of the following with regards to the retail ceiling heights at your project.

On several occasions I have had retailers reject the retail spaces in your project due to the lack of adequate retail ceiling height within the space. I have had apparel users complain of the inability to double hang merchandise, as well as not being able to create displays which can be "flown in" from the ceiling. In the case of restaurateurs there are issues with the inability to hang a chandelier or have enough height to install creative lighting which needs enough height for the light's dispersal. I have also had issues with dry cleaners being unable to use the inadequate height to install carousels with enough space to inventory expected customer volume to make the space profitable. It is creating difficulties with leasing these spaces.

With these examples being typical of the complaints received with regard to the retail ceiling heights issue, I would suggest that if at all possible seek whatever remedy available to increase the buildings retail ceiling heights.

We are at a special moment in this city where we will be constructing a large volume of buildings in neighborhoods throughout the city. As a city we desire better retail goods and services everywhere. It would be shameful to know up front that there will be problems with certain building's ceiling heights and not move smartly to correct this issue. Please due whatever possible to find a creative solution to this problem.

Best Regards

Len Harris
Vice President, Retail Leasing

ANC1B
GOVERNMENT OF THE DISTRICT OF COLUMBIA
PO BOX 73710, WASHINGTON, DC 20056

Myla Moss, Phil Spalding, Catherine Hammonds, Deairich R. Hunter, Mike Smith, Tim Stephens, Lori Parker, Rosemary Akinmboni, Thomas K. D. Smith, Nate Matthews, Raymond Wright

5 March 2005

Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Suite 210 South, 441 4th Street NW
Washington, DC 20001

BZA Case No. 17302
Lofts at the Heights of Columbia

Dear Chairman Griffis:

At its regularly scheduled meeting on March 3, 2005 (notice of which was properly given, and at which a quorum of ten of eleven members was present) ANC1B voted unanimous (10-0-0) support for variance from DCCMR 11, Section 770.1 as applied for by Non Profit Community Development corporation of Washington DC on NCRC Parcel 5 located at 2750 14th Street NW. While cognizant of the reasons for limiting height, the Commission does not feel that the additional height requested will have lasting impact on its neighboring community. The Commission does believe the applicant's argument that the additional ceiling height allowed to the ground level commercial floor will positively affect their ability to attract retail tenants more in harmony with the surrounding residential community. The Commission was also favorably impressed by this applicant's ability to achieve a fifty percent mix of affordable residential units which the Commission believes to be critical to the future health of our neighborhood. In its vote the Commission did also delegate Commissioners Philip Spalding and Thomas Smith to represent ANC1B before the Board on this application. We ask the Board to give great weight to our support for Application 17302.

Sincerely,

Deairich R. Hunter, Chairperson

Philip C. Spalding, Secretary

CC Litman Development
Councilmember Jim Graham
South Columbia Heights Neighborhood Association