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April 27, 2005

RECEIVED
D.C. OFFICE OF ZONING
2005 APR 27 PM 3:11

Jerrily R. Kress, AIA
Director, Office of Zoning
441 - 4th Street, N.W.
Suite 220 South
Washington, DC 20001

Re: BZA Application No. 17316: Randle Highlands

Dear Ms. Kress:

Attached are twenty (20) copies of the applicant's final statement in support of the above-referenced application. Please note that the site plan and zoning relief being requested have changed (since the original application) as follows:

- Approval is sought for 10 residential dwellings instead of 11
- The originally proposed theoretical lots have been eliminated thus, eliminating the need for a special exception under Section 2516 of the Zoning Regulations
- The need for a lot occupancy variance has been eliminated
- The need for a rear yard variance has been eliminated
- A lot area variance from the requirements of Section 401.3 is added
- A side yard variance from the requirements of Section 405.2 is added

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17316
EXHIBIT NO. 23

Board of Zoning Adjustment
District of Columbia
CASE NO. 17316
EXHIBIT NO. 23A1

The changes to the site plan were made in sufficient time to include a description of the amended zoning relief on the public notice signs that were posted on the site on April 25, 2005. In addition, the D.C. Office of Planning, The D.C. Department of Transportation and Advisory Neighborhood Commission 7B have been advised of the changes in the site plan and zoning relief being requested.

Thank you.

Sincerely,

Jerry A. Moore III

Attachments

cc: Mike Wallach
Matt Wallach
D.C. Office of Planning (Joel Lawson)
Advisory Neighborhood Commission 7B

Before the
D.C. Board of Zoning Adjustment

Statement in Support of the Application of the
Randle Highlands Manor Limited Partnership

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I. ACTION REQUESTED

Randle Highlands Manor Limited Partnership (hereinafter "Randle Highlands") requests relief under Sections 353 and 3104.1 of the D.C. Zoning Regulations for a Special Exception Site and variances from Sections 401.3, and 405.2 as provided by Section 3103.2 to allow the development of ten dwellings in an R-5-A district at premises 2700 R Street, S.E., lot 812 in Square 5585.

Sections 353 and, by reference § 410.12, require all new residential developments, except one-family detached and semi-detached dwellings, to be reviewed by the Board of Zoning Adjustment to determine the appropriate lot area and lot widths as well as to consider the impact that the proposed development could have on the present character or future development of the neighborhood.

The proposed development complies with the substantive provisions of Sections 353, 410.12 and 3104.1 but requires variance relief from certain minimum area requirements:

- Lot Area (Section 401.3) – The Zoning Regulations direct the Board of Zoning Adjustment ("BZA") to prescribe the area of each lot. Section 401.5 permits each home site to provide less than 1800 square feet of area, provided that the entire development averages 1800 square feet per lot area, including common areas. The

development plan averages 1541.2 square feet per lot, thus requiring an area variance. Lot 1 contains 2112 sq. ft.; lots 2-7 contain 1340 sq. ft.; lot 8 contains 1423 sq. ft.; lots 9 and 10 provide 1921 sq. ft.

- Side yards (Section 405.2) – The regulations require an 8 foot side yard for end units. End lot 7 does not provide a side yard; end lots 8, 9 and 10 provide side yards of .2; and end lot 1 provides a side yard of .8 ft.;

Nonetheless, the merits of this project are both enormous and important to this neighborhood and will improve on the present character and future development of the neighborhood and is in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map. There are adequate public facilities and infrastructure available.

II. DESCRIPTION OF THE PROJECT

The site is a corner lot that is horizontally sloped downward from the east to the west. It consists of a total of 15,414.7 sq. ft. of lot area. The applicant proposes to subdivide and improve the vacant property with 10 one - family, row type dwellings, eight (1 through 8) fronting on 27th Street, SE and two (9 & 10) fronting on R Street, S.E. The maximum building height in the R-5-A district is 40 feet and three stories. All of the homes will be 19 feet in height and two stories.

Each of these wonderful new houses will have a basement, first floor and second floor. The basement in houses 1 through 8 will consist of a family room, bedroom, bathroom, a mechanical room and a laundry room. The first floor plan

consists of a living room, a powder room, a kitchen and a dining area. The second floor plan consists of 3 bedrooms and a bath. The ground floor in houses 9 and 10 will consist of a one car garage, a bedroom, a bathroom and a mechanical room. The first floor will consist of a living room a powder room and a kitchen and dining area. The second floor will consist of 3 bedrooms and a bathroom.

One new, off-street parking space will be provided for each of the units for a total of 10. The project will be landscaped, graded and constructed according to code.

The parking access will be 20 feet wide, have curb cuts from R Street and be paved with an all weather impervious surface.

A driveway that provides access to the required parking spaces provides:

- A maximum grade of less than 12% with a vertical transition at the property line;
- Is more than 7 feet in width;
- Is more than 28 feet from all adjacent driveways that provide access directly from a street, as measured from the nearest edge of the driveway opening. Section 2117.8

All of the parking spaces, including access isles and driveways will be paved and maintained with materials approved by the D.C. Department of Transportation. Parking spaces will be screened in accordance with Section 2117.12 and no lighting will be provided. Access to lots 9 and 10 will be from a

10 foot alley which will be paved in compliance with the standards of the D.C. Department of Transportation. Section 2117.4.

The new homes will be ideal for moderate income families with children.

III. THE SITE AND AREA

The immediate area is developed with mixed density residential uses in all directions. Older multifamily buildings – much like the one that was razed on this site[1] – are interspersed with newer detached semi-detached single family dwellings. Some of the multifamily units are in disrepair, others are maintained. There are vacant lots where some older multifamily buildings have been demolished. Low rise moderate density buildings predominate in the area.

Pennsylvania Avenue Southeast and Naylor Road Southeast provide the major transportation access to the 27th and R Streets intersection.

The site was formerly occupied by a multi-unit apartment building (See Exhibit "A") which became vacant and later abandoned by the owner.[2] Subsequently, the property was acquired by the D.C. Government and then sold to the Applicant for the express purpose of developing a senior citizens' facility. The abandoned apartment building, a community eye sore, has been razed and the site has now been vacant for a number of years.

This application represents yet another effort of many to develop this property.[3] In 2001, this Applicant requested special exception and variance relief

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1 See: Exhibit "A"

2 That building, at 21,057 sq. ft., contained 50% more FAR than the zoning envelope permits. On information and belief, it contained 39 apartment units.

3 In BZA Case No. 16896, Lynn C. French, then the District's Homestead Program Administrator submitted written evidence and gave sworn testimony on the District's Multiple

to permit a low and moderate income community residence facility to be built and operated on the site to address a demonstrated need for assisted living residence facilities for seniors and other qualified residents east of the Anacostia River. It was uncontested that the site was acquired from the District of Columbia government specifically for that purpose.

The community residence facility that was proposed was a permitted use in the R-5-A District. However, special exception approval was required in order for the facility to exceed the matter of right limitation of 15 units. An area variance was also required to permit an increase in the maximum allowable floor area.

The application was strongly supported by the Executive Branch of the D.C. Government, Advisory Neighborhood Commission 7B, D.C. Council members, city officials and numerous citizens of the area.[4] Letters and other record expressions for support from the surrounding community were presented into the record.

In sum, that case was based on five themes:

1. That the assisted living facility proposal was in direct response to a city need for low and moderate assisted living facilities in the Randle Highlands community.

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efforts to offer the property for residential development. None of those efforts were successful. See Exhibit "B".

[4] The application was opposed principally by Ms. Geraldine Marshall, acting on behalf of the Randle Highlands Civic Association. Her primary contentions were that an assisted living facility would diminish the value of single family homes and increase traffic and trash in the neighborhood. She presented no tangible evidence to support her views.

2. The size of the facility that is proposed was the absolute minimum as to the number of units, and size of building that a low and moderate income facility requires.

3. That there is a dearth of suitable sites in the Randle Highlands neighborhood to practically develop a low and moderate income assisted living residence.

4. A facility of a lesser size is undevelopeable, resulting in the frustration of a program goal objective of the District of Columbia.

Nonetheless, despite the significant and substantial need and support that was expressed in the record by both the D.C. government and community leaders, the Board voted 3 to 2 to deny the application by the closest of votes: 3-2-0. The property has continued as a vacant eyesore since that March 2003 Order.

IV. THE APPLICABLE ZONING STANDARDS ARE MET

A. The Applicant is Entitled to Special Exception Relief under Section 353 of the Zoning Regulations.

Special exception uses that are deemed compatible with other uses that are permitted in the particular zoning category provide strong evidence that the special exception requirements have been. If the applicant meets that burden, the zoning authority ordinarily must grant the application. First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment, 432 A.2d 965 (1981). The proposed housing plan strongly resembles the pattern of low rise single and multifamily buildings that occupy and predominate the area. Randle

Highlands Manor further meets the requirements for special exception approval as follows:

1. Subsections 353 and 410. The application has been referred to the D.C. Board of Education, the D.C. Department of Transportation and the D.C. Office of Planning for review and report. Twenty sets of site plans, typical floor plans, elevations, landscape and grading plans for the project have been submitted to the Office of Zoning. No rear or service entrance abuts a street front yard, or front court. No exterior stairway will be constructed above the level of the main floor joists.

2. Subsection 3104.1. The granting of the special exception for this permitted, low intensity use will be in harmony with the general purpose and intent of the Zoning Regulations and zoning maps and will not tend to affect adversely the use of neighboring property in accordance with the zoning regulations and zoning maps.

B. Applicant is entitled to zoning relief under Section 3103.2 of the Zoning Regulations.

1. Practical - difficulty and Uniqueness. The D.C. Court of Appeals has repeatedly held that the nature of the burden that would warrant an area variance is best left to the facts and circumstances of each particular case. Palmer v. D.C. Board of Zoning Adjustment, 287 A.2d 535 (D.C. App. 1978). In the instant application it is a confluence of facts which serve to create a practical difficulty on the subject site. See Gilmartin v. D.C. Board of Zoning Adjustment, 579 A.2d 1164, 1168 (D.C. App. 1990).

The first factor which, when combined with the other facts and circumstances of this case, creates a practical difficulty is a beneficial use of the property to the owner and to the community. As aforesaid, this property was occupied by a multi-unit apartment building which was abandoned and then sold to the Applicant for the purposes of developing the use that is proposed. Upon inspection and after professional review, it was determined that the existing structure was physically infirm and not suitable to be used for that purpose. As a consequence, it was razed.

In Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment, 320 A.2d 291 (D.C. App. 1974). The petitioners there sought a (use) variance to allow them to convert an existing religious seminary to a nursing home. They argued that the existing facility, once the residence of over 30 seminarians to the present enrollment of two, was no longer a beneficial use of the land and sought zoning approval to convert that building to a nursing home. The Board of Zoning Adjustment declined to grant the application but the District of Columbia Court of Appeals reversed that order, finding that all petitioners needed to show was their inability to make a reasonable disposition of their property for a permitted use.

The facts are similar here. The size of and the contour of the existing lot does not permit any owner to use the property for the residential purposes for which the D.C. government sold it. The modern economics of residential development make it financially impossible to construct an attractive development for moderate income individuals without a minimum of area variance relief to offset the small size and sloping topography of the lot. In this

case, the site continues to be vacant after more than 5 years of development planning. In case no. 16896 those who opposed the assisted living facility that was then proposed did so claiming that single family homes were the highest, best and most acceptable use of the site. That is the use that is now before the board.

The Board should also consider a uniqueness in the inter-relationship among the size of this property, the non-availability of larger tracts in this area and the resulting need for new moderately priced residential stock in this area. Among the chief reasons this site has not been developed in this area despite the acknowledged need for moderately price housing is the unavailability of tracts of sufficient size to economically justify such a project. The site that is now before the Board has been planned and replanned; from buildings that require multiple special variances and variances to the one that requires two special exceptions and two relatively small variances. The Applicant has done all that it can to make this site work in the programs of the District of Columbia and within the limits of the Zoning Regulations.

For the record, in recent history, the Board has approved applications requesting multiple variances. See, for example, Applications No. 16131, 16641, 16744 and 16754. In addition, there are at least seven cases now pending in which four or more variances are requested (Application Nos. 16801, 16288, 16775, 16360, 16537, 16315 and 16792). In application No. 16860 of the D.C. Department of Housing and Community Development, the Board granted a special exception and five area variances (lot width, lot area, lot occupancy, rear

yard, off-street parking) presumably to facilitate the programs of the District of Columbia.

The D.C. Court of Appeals in Draude v. District of Columbia Board of Zoning Adjustment, quoting Monaco v. Board of Zoning Adjustment affirmed the BZA's approval of area variance relief stating: "when a public service has inadequate facilities and applies for a variance to expand it to an adjacent area in common ownership which has long been regarded as part of the same site, the Board of Zoning Adjustment does not err in considering the need of the organization as possible other extraordinary and exceptional situations or conditions of a particular property." 407 A.2d 1091, 1092.

The Applicant wishes to emphasize that the request for area variance relief is not made as a matter of convenience or as a matter of cost. Nor is it an attempt by the Applicant to make the most profitable use of the land. Instead, this application amounts to an honest second endeavor to create the most reasonable and efficient use of a permitted use in a timely manner.

In sum, there are significant and substantial inherent factors both in the land, and extraneous to the land, which sustain a finding of extraordinary or exceptional situation or condition that results in peculiar and exceptional practical difficulties. DeAzarcarte v. D.C. Board of Zoning Adjustment, 388 A.2d 1233 (D.C. App. 1978).

2. The Practical Difficulty can be Remedied Without Substantial Detriment to the Public Good and Without Substantially Impairing the intent, Purposes and Integrity of the Zone Plan as Embodied in the Zoning Regulations

and Map. The Comprehensive Plan of the District of Columbia (Title 10 DCMR) clearly states the public policies in favor of the development of Randle Highlands Manor:

> Section 1807.1: "Ward 7... has some of the finest neighborhoods of quality housing in the city ... still, there are area like Deanwood, Northwest Boundary, Benning Heights and Randle Highlands (south of Pennsylvania Avenue, S.E.) where housing and other neighborhood services must be improved."
>
> Section 1807.3: The overall housing objective in Ward 7 is to Stimulate development of new and rehabilitated housing at affordable rates to meet the needs of all income levels, particularly good housing at affordable rates for low and moderate incomes. The city, through appropriate public actions, will need to provide the stimulus and support to provide activity in order to meet the current and future needs of market rate housing.
>
> Section 1808.1(g): The objective for housing are [to] provide for the housing needs of the elderly and to redirect their overall housing cost.

V. COMPREHENSIVE PLAN

The Comprehensive Land Use Map of the District of Columbia designates this site for row houses and multi-family garden apartments. Instead of building a multi-family structure, however, the owner has responded to the community's wish that single family housing be developed on this site. Despite being severely restrained by contour, grading and size, the site will accommodate 10 single family residences with variances from the lot occupancy lot areas and side yard requirements as indicated.

VI. SUMMARY

This exciting new housing development is planned on an unimproved lot and a multifamily moderate density zone district. It is new construction on a site

that was formally occupied by an abandoned apartment building and has been an eyesore to the community for the past 5 years. There is an extreme shortage of developable sites in the Randle Highlands neighborhood for economically feasible, moderately priced, residential development.

Consistent with the D.C. Court of Appeals ruling in Tyler v. Board of Zoning Adjustment, (attached) this Applicant is not merely seeking the most profitable use of its land but, has demonstrably experienced great difficulty financing any development of the property without some level of variance relief.

No one has contested the need for new, affordable housing development project in Randle Highlands. There are professional and functional reasons why the proposed development requires a small lot occupancy variance and a variance from the minimum rear yard requirement. With the variances, the proposed development will not be out of context with the existing buildings in the neighborhood.

Thus, it is for these reasons, including the long and unfortunate history of this site, that the applicant strongly believes that it has qualified for this special exception and area variance relief that is requested. An Order granting that relief is a portable in this record and appropriate.

Respectfully submitted,

Jerry A. Moore III
Venable LLP
575 – 7th Street, N.W.
Washington, D.C. 20004
(202) 344-4763
(202) 344-8300 (fax)
jamoore@venable.com

Attachments

Exhibit A



Exhibit B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
WASHINGTON, D.C.

Reply To

HOMESTEAD PROGRAM ADMINISTRATION
51 "N" Street, N.E., #514
Washington, D.C. 20002
September 10, 1998

Mr. Albert Hopkins
President & CEO
Anacostia Economic Development Corporation
2019 Martin Luther King Avenue, SE
Washington, D.C. 20020

Dear Mr. Hopkins:

Congratulations! The Anacostia Economic Development Corporation has been selected to develop the District's Homestead property located at 1624,-26,-28 27th Street, S.E.

The purchase price for the property is $6,750. If you wish to accept this offer, a $250 deposit must be paid by cashier's or certified check, payable to the District of Columbia Treasurer, no later than Thursday, September 17, 1998, at 4:00 p.m., at the Homestead Program Administration, D.C. Department of Housing and Community Development, 51 "N" Street, N.E., Room 514. You also must submit the enclosed affidavit -- signed and notarized -- at that same time.

If you wish to inspect the properties prior to payment, you may contact Ms. Barbara Cannady-Masimini, on 535-1307, to arrange an appointment.

As developer of the properties, you would be required to:

1. Rehabilitate the property and ensure that each meets housing code standard or raze it;
2. Secure the property prior to and during rehabilitation, Homesteader selection and occupancy;
3. Sell each unit to a first time homebuyer who will live in it for at least five years; and
4. Ensure that the Homesteaders enroll in and successfully complete our homeownership training course.

Albert
293 6511

AFFIDAVIT

This is to certify that the **ANACOSTIA ECONOMIC DEVELOPMENT CORPORATION ("AEDC")** hereby accepts the option to purchase and develop the **District of Columbia Homestead Program Administration's ("HPA")** property located at **1624,-26,-28 27th Street, S.E.** ("the property"). Attached is a cashier's or certified check, or money order, for $250, payable to the **D.C. TREASURER,** which is posted as a deposit on said property.

AEDC acknowledges that title to said property will be transferred at the time of closing, which shall take place no later than **September 30, 1998.** AEDC is aware that if closing does not take place within the agreed upon period of time, it could forfeit the property.

As developer of 1624,-26,-28 27th Street, S.E., AEDC acknowledges and agrees to fulfill the below-stated requirements of the **Homestead Housing Preservation Program.**

1) AEDC shall rehabilitate the property (or raze it) and ensure that it meets housing code standards.
2) The property shall be secured from purchase until sale.
3) AEDC will sell the resultant units to first time homebuyers who will live in it for five years.
4) AEDC shall ensure that the Homesteaders shall enroll in and successfully complete HPA's Homeownership Training Course.

ANACOSTIA ECONOMIC DEVELOPMENT CORPORATION

By, _____
Albert Hopkins, President & CEO

Sworn to and subscribed to before me this ____ day of _____, 1998.

_____
Notary

My commission expires:

Closing must take place no later than Wednesday, September ~~30, 1998~~. The Homestead Program Administration will lend you $10,000 per ~~property~~ unit for construction and closing costs.

Please contact Mrs. Jenell Pitts, of my staff, on 535-1307, as soon as possible, to advise her as to which settlement company you will be using. This will enable her to submit the requisite paperwork to ensure our having a check for you at the settlement table.

The University of the District of Columbia's Architectural Research Institute (UDC/ARI) is available to provide the needed rehabilitation work write-ups, drawings, technical assistance and building permits. We would require architectural plans that have been approved by UDC/ARI, a mutually agreed upon draw schedule and evidence of financing prior to settlement.

It is my genuine hope that you will be able to transform the property into homes in which Homesteaders and their families will be able to live and thrive for many years to come.

Sincerely,

Lynn C. French
Homestead Program Administrator

indication we are at about 5:15. We will be closing this hearing at 6:00 o'clock. So I would anticipate we would probably get through one more witness from your side, and then we will clear up on when we continue this case in the next date.

MR. MOORE: Hopefully, we can get through more than one, because I'm going to vary my scheduled witnesses to bring up several witnesses that won't be long.

CHAIRPERSON GRIFFIS: Okay.

MR. MOORE: But they have very specific purposes here. With the leave of the Board I'll call Lynn French, please.

Ma'am, would you state your name for the record, please.

MS. FRENCH: Good afternoon. I'm Lynn French. I'm the senior policy advisor in the Office of the Deputy Mayor for Children, Youth, Families and Elders.

MR. MOORE: Are you aware of the circumstances that led to the sale of this property and the ultimate use of this property?

MS. FRENCH: Yes, I am.

MR. MOORE: Would you advise the Board of your knowledge on that subject, please?

MS. FRENCH: Well, I actually -- I have a dual role here, because prior to the position I now hold I was the Homestead Program Administrator at the Department of Housing and Community Development for 15 years.

During the period we had title to the property in question. We tried from 1992 until 1998 to market it. Several nonprofit groups tried to make a go of it as residential property. There was no one who could find a market for it, find financing for it.

And in 1998, we were delighted when we put it up for bid once more and Anacostia Economic Development Corporation came forward and submitted a proposal to demolish the by then very, very awful buildings, and build an assisted living facility.

And we were anxious to get rid of the property. We had been getting many complaints from the neighbors over the years because it was sitting there boarded up, and we knew that there was a need in the city for assisted living.

MR. MOORE: And let me make sure that I get your point, and the Board gets your point, that you had several residential property developers who became interested in this site. Is that correct?

MS. FRENCH: Over the years, four or five

different groups actually tried to make a go of it and were unable to get financing or come up with numbers that would work for residential property in that location.

CHAIRPERSON GRIFFIS: Do you recall those groups?

MS. FRENCH: I do, and I'd be happy to submit the names in writing to you, since I don't have total recall, but several -- there were several well-known, nationally-recognized nonprofit groups.

And what they found was that if they were to spend what would be required to put the residential facility there, that no one who could afford to pay the cost of that would be willing to live at that address. So it went untaken, time and again.

MEMBER ETHERLY: Mr. Chair, if I may, just a very short interruption just to make sure I understand where Mr. Moore is heading with Mr. French, t least in terms of a portion of her testimony, so we can understand that Ms. French will have had personal and direct knowledge about how the property was eventually disposed of and came into possession of the applicant. Is that correct?

MR. MOORE: Do you have that personal knowledge?

MEMBER ETHERLY: In your former, official capacity at Homestead.

MS. FRENCH: Yes, absolutely. And I have submitted for the record a letter -- I did not -- I had no idea that this much detail would be required by this group. I really thought I was coming in here for a half hour, 1:00 o'clock, and getting back to some other appointments.

So I did bring a one-page letter and I attached a copy of a memo from the then director of the department to the city's CFO outlining that proposed use. I would be happy to provide another more detailed description of the various groups that we went through, and any other information you'd like to have on those transactions.

MEMBER ETHERLY: Thank you. Thank you, Mr. Chair.

MR. MOORE: Ms. French, how are you currently employed?

MS. FRENCH: I currently am the Senior Policy Advisor to the Deputy Mayor for Children, Youth, Families and Elders.

MR. MOORE: As the deputy -- Senior Policy Advisor to the Deputy Mayor, elderly people come under your jurisdiction. Is that correct?

MS. FRENCH: Yes, under her jurisdiction.

MR. MOORE: Under her jurisdiction, with you assisting and advising, absolutely. Ms. French, do you have knowledge about the need for low and moderate income assisted living facilities in Office of Planning?

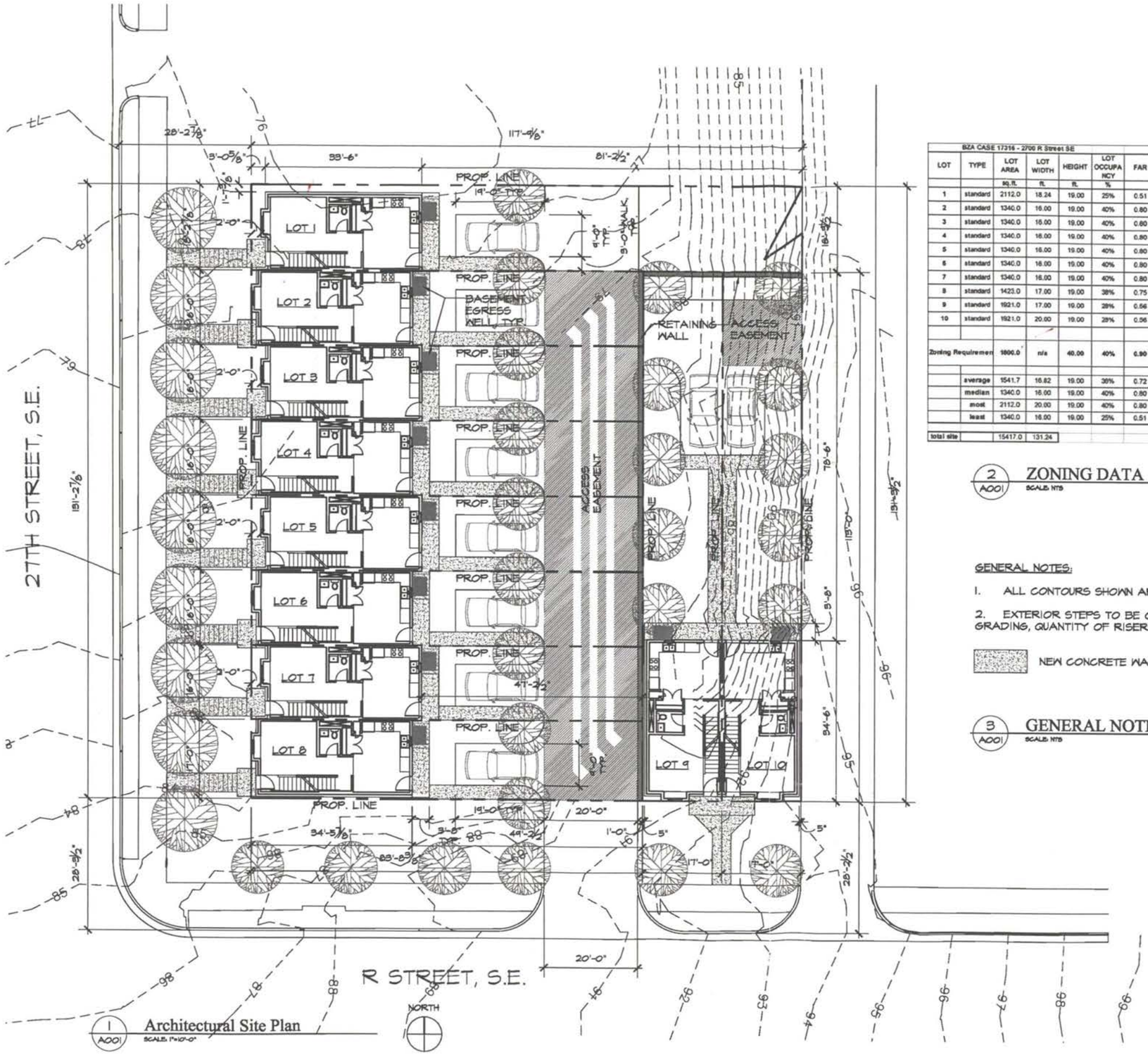
MS. FRENCH: Absolutely. In fact, we are -- there's a need in Randle Highlands. There's a need across the city. I was curious with the questions, the pointed questions about whether or not people from that neighborhood would move in there, when in fact what we find in our experience is that this is the first step in care for elderly people.

People are not really ready to give up control over their lives and go into a nursing home, and they want to be in the neighborhood that's near their friends where they can still have interactions with people.

So our goal is not just to see one built in Randle Highlands, but to see this notion replicated across the city.

MR. MOORE: Ms. French, is it the city's policy to have low and moderate income -- a supply of low and moderate income housing available to citizens of Randle Highlands?

Exhibit C



1 / A001 **Architectural Site Plan**
SCALE: 1"=10'-0"

BZA CASE 17316 - 2700 R Street SE													
LOT	TYPE	LOT AREA	LOT WIDTH	HEIGHT	LOT OCCUPANCY	FAR	Bldg Size	REAR YARD	FRONT YARD	SIDE YARD	COURTS	PARKING	ROAD WIDTH
		sq.ft.	ft.	ft.	%		sq.ft.	ft.	ft.	ft.	ft.		ft.
1	standard	2112.0	18.24	19.00	25%	0.51	1,074	77.0	2.00	0.8	n/a	1	n/a
2	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
3	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
4	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
5	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
6	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
7	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
8	standard	1423.0	17.00	19.00	38%	0.75	1,074	49.2	0.00	0.2	n/a	1	n/a
9	standard	1921.0	17.00	19.00	28%	0.56	1,074	78.5	0.00	0.2	n/a	1	n/a
10	standard	1921.0	20.00	19.00	28%	0.56	1,074	78.5	0.00	0.2	n/a	1	n/a
Zoning Requirement		1800.0	n/a	40.00	40%	0.90		20.0	0.00	5' (outside units)	na	1 / unit	na
	average	1541.7	16.82	19.00	36%	0.72	1,074	57.2	0.80	0.1	n/a	1.0	n/a
	median	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
	most	2112.0	20.00	19.00	40%	0.80	1,074	78.5	2.00	0.8	n/a	1	n/a
	least	1340.0	16.00	19.00	25%	0.51	1,074	47.2	0.00	0	n/a	1	n/a
total site		15417.0	131.24										

2 / A001 **ZONING DATA**
SCALE: NTS

GENERAL NOTES:

1. ALL CONTOURS SHOWN ARE EXISTING CONTOURS, U.O.N.
2. EXTERIOR STEPS TO BE COORINATED WITH FINAL GRADING, QUANTITY OF RISERS TO BE DETERMINED.

NEW CONCRETE WALK

3 / A001 **GENERAL NOTES**
SCALE: NTS

Zavos Architecture + Design

PRINTS ISSUED

1	BZA RESUBMISSION	4-28-08	TP

REVISIONS

NO	DESCRIPTION	DATE	BY

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RANDLE HIGHLANDS TOWNHOMES
NEW ROWHOUSES AT 27TH AND R ST SE
WASHINGTON, DC 20020
OWNER: Anacostia Economic Development Corporation

SHEET TITLE
ARCHITECTURAL SITE PLAN
CODE ANALYSIS

DRAWN	TP
CHECKED	RE
JOB NO.	2004-2005.00
ISSUED	2004_11-08
SCALE	AS NOTED
CADFILE	STR_A001

A0.0.1
DWG. NO.

P. 301.698.0020
F. 301.698.0920
323 WEST PATRICK ST.
FREDERICK, MD 21701

BZA CASE 17316 - 2700 R Street SE													
LOT	TYPE	LOT AREA	LOT WIDTH	HEIGHT	LOT OCCUPANCY	FAR	Bldg Size	REAR YARD	FRONT YARD	SIDE YARD	COURTS	PARKING	ROAD WIDTH
		sq.ft.	ft.	ft.	%		sq.ft.	ft.	ft.	ft.	ft.		ft.
1	standard	2112.0	18.24	19.00	25%	0.51	1,074	77.0	2.00	0.8	n/a	1	n/a
2	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
3	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
4	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
5	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
6	standard	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
7	standard	1340.0	16.00	19.00	40%	0.80	1,074	47.2	2.00	0	n/a	1	n/a
8	standard	1423.0	17.00	19.00	38%	0.75	1,074	49.2	0.00	0.2	n/a	1	n/a
9	standard	1921.0	17.00	19.00	28%	0.56	1,074	78.5	0.00	0.2	n/a	1	n/a
10	standard	1921.0	20.00	19.00	28%	0.56	1,074	78.5	0.00	0.2	n/a	1	n/a
Zoning Requirement		**1800.0**	**n/a**	**40.00**	**40%**	**0.90**		**20.0**	**0.00**	**8' (ouside units)**	**na**	**1 / unit**	**na**
	average	1541.7	16.82	19.00	36%	0.72	1,074	57.2	0.80	0.1	n/a	1.0	n/a
	median	1340.0	16.00	19.00	40%	0.80	1,074	49.2	0.00	0	n/a	1	n/a
	most	2112.0	20.00	19.00	40%	0.80	1,074	78.5	2.00	0.8	n/a	1	n/a
	least	1340.0	16.00	19.00	25%	0.51	1,074	47.2	0.00	0	n/a	1	n/a

total site		15417.0	131.24

4/26/2005

Exhibit D

Court Cases

District of Columbia Court of Appeals.

James T. DRAUDE, Phyllis Levine, Michele Bouquet, and Luzmila Cofre, Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,
George Washington University, Intervenor.

No. 88-264.

Argued Nov. 21, 1989.
Decided Nov. 29, 1990.

Property owners sought review of order by Board of **Zoning** Adjustment granting university's application for special exceptions and **variances** that allowed for addition to university medical building. The Court of Appeals, 527 A.2d 1242, reversed and remanded for further proceedings. After further proceedings, Board again ruled in university's favor, and review was against sought. The Court of Appeals, Terry, J., held that Board was justified in granting special exceptions allowing alteration of university's campus plan, addition to exceed floor area ratio requirements, and nonconforming roof structures, and in granting **variances** that allowed extending nonconforming floor area ratio of existing building and nonconforming open court.

Affirmed.

West Headnotes

[1] Zoning and Planning ⇐703
414k703

Decisions made by Board of **Zoning** Adjustment must be upheld on appeal if they rationally flow from findings of fact supported by substantial evidence in record as a whole. D.C.Code 1981, §§ 1-1509(e), 1-1510(a)(3)(E).

[2] Zoning and Planning ⇐361
414k361

Findings made by Board of **Zoning** Adjustment must be sufficiently detailed and comprehensive to permit meaningful judicial review of its decision.

[3] Zoning and Planning ⇐508
414k508

[3] Zoning and Planning ⇐538
414k538

Board of **Zoning** Adjustment's decision to grant university special exception to permit change in its campus plan to allow for addition to medical building was consistent with **zoning** regulation and supported by substantial evidence, despite property owners' contention that addition could have been located elsewhere and was barely adequate for its intended purpose.

[4] Zoning and Planning ⇐508
414k508

Extraordinary conditions justified **variance** that allowed university to build addition that extended building's nonconforming floor area ratio for purposes of consolidating university's medical facilities, notwithstanding that campus plan designated another site for medical facility expansion; in addition to added expense of expansion at other site, lot on which existing building was located was of irregular shape, and it was institutional necessity that university expand medical facilities and that such expansion involve physical linkage with existing structure.

[5] Zoning and Planning ⇐508
414k508

Possibility that addition that extended nonconforming floor ratio of university medical building might adversely affect owners of adjacent condominium did not mandate finding that granting **variance** would be detrimental to public good.

[6] Zoning and Planning ⇐518
414k518

Although one established purpose of **zoning** regulations is gradual elimination of nonconforming structures, Board of **Zoning** Adjustment is empowered to grant **variances** from nonconforming use and structure regulations as long as standards required for each particular **variance** are met.

[7] Zoning and Planning ⇐538

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414k538

Evidence supported finding by Board of **Zoning** Adjustment that addition to university medical building that would exceed floor area ratio requirements was consistent with policy of avoiding unreasonable campus expansion into improved low-density districts, notwithstanding contention by owners of adjoining condominium that addition would generate unacceptably high levels of traffic and would otherwise negatively impact on residential use.

[8] Zoning and Planning ⚿538
414k538

Evidence supported finding by Board of **Zoning** Adjustment that addition to university medical building would not have adverse effect on fair market value of units in adjoining condominium, notwithstanding unit owners' contention that addition meant that some units faced blank wall with sunlight blocked.

[9] Zoning and Planning ⚿538
414k538

Evidence supported findings by Board of **Zoning** Adjustment that special exception allowing nonconforming roof structures for addition to university medical building would not adversely affect light and air of adjacent condominium, would not materially impair intent and purpose of **zoning** regulations, and would not likely become objectionable to neighboring property owners; architectural expert testified as to difference between direct light and reflected light and that there would be no adverse impact on reflected light because of penetration of direct sunlight between buildings and color of building materials, and further opined that addition's "penthouse" was necessary for mechanical equipment.

[10] Zoning and Planning ⚿538
414k538

Evidence justified grant of **variance** to university to allow nonconforming open court on one side of addition to medical building, reducing open court area between addition and adjoining condominium from 29 feet to 21 feet; proximity to existing building and irregular dimensions of lot satisfied requirement that there be extraordinary or exceptional condition, and experts opined that strict application of regulations regarding open courts would result in peculiar and exceptional practical difficulties for university; moreover, since width of court affected only condominium, **variance** was not detrimental to public good, and narrower court would not impair intent of **zoning** regulations despite alleged impact on condominium owners.

[11] Zoning and Planning ⚿518
414k518

Board of **Zoning** Adjustment was justified in granting **variance** from regulation that prohibited addition to nonconforming structure that created new nonconformity when it granted open court **variance** as part of addition to already nonconforming university medical building; architectural expert opined that, without open court **variance**, addition would not have been acceptable building for university medical purposes, and narrower open court did not appear to create substantial detriment to public good or impair intent of zone plan.

[12] Zoning and Planning ⚿541
414k541

As required by ordinance, Board of **Zoning** Adjustment properly accorded "great weight" to positions of advisory neighborhood commission in considering university's request for **variances** and special exceptions to allow for addition to medical building by considering written submissions and live testimony either from commission or from property owners whose positions were identical to those raised by commission. D.C.Code 1981, § 1-261(d).

***950** James T. Draude, for petitioners.

Norman M. Glasgow, with whom C. Francis Murphy and Louis P. Robbins were on the brief, for intervenor.

Frederick D. Cooke, Jr., Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, filed a statement in lieu of brief on behalf of respondent.

Before TERRY, SCHWELB and FARRELL, Associate Judges.

***951** TERRY, Associate Judge:

Petitioners seek review of an order by the Board of **Zoning** Adjustment (BZA) granting the application

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of George Washington University (GWU) for three special exceptions and three **variances** which allowed it to build an extension ("the Addition") to the H.B. Burns Memorial Building at 2150 Pennsylvania Avenue, N.W. Petitioners, four owner-residents of condominium units in an apartment building next door to the Addition, make six claims of error. They contend (1) that the BZA erred when it granted GWU a special exception to alter its campus plan; (2) that the BZA erred when it granted GWU a **variance** to build the Addition because the Addition extended the non-conforming floor area ratio (FAR) of the Burns Building; (3) that the BZA erred when it granted a special exception allowing the Addition to exceed a 3.5 FAR; (4) that the BZA erred when it granted GWU a special exception allowing a non-conforming roof structure; (5) that the BZA erred when it granted GWU **variances** allowing a non-conforming open court on the east side of the Addition; and (6) that the BZA's decision-making process was flawed because it did not give sufficient weight to the concerns voiced by the Advisory Neighborhood Commission.

The case is here for the second time. In *Draude v. District of Columbia Board of* **Zoning** *Adjustment*, 527 A.2d 1242 (D.C.1987) (*Draude I*), we reversed the BZA's original decision in favor of GWU and remanded the case for further proceedings. After those proceedings were completed, the BZA ruled again in GWU's favor. Petitioners filed the instant petition for review (*Draude II*), seeking reversal of that ruling. We are satisfied, however, that the several decisions made by the BZA after the remand are supported by both the law and the facts, and that each decision rationally flows from the evidence of record. We therefore affirm the BZA's order in all respects. [FN1]

FN1. While this case was making its way through the administrative and judicial process, construction began on the Addition. After the BZA made its final ruling, the building was completed and is now fully operational, primarily as an ambulatory care facility.
We mention this only as a historical fact, for it has no effect on our decision. Indeed, if we were to conclude that the BZA had erred in allowing the Addition to be built, we would not hesitate to order appropriate relief, which might include requiring GWU to make modifications in the Addition or even, conceivably, to tear it down.

I

In late 1984 GWU developed a plan to build an extension to the H.B. Burns Memorial Building. The Burns Building, located at the southeast corner of Pennsylvania Avenue and 22nd Street, N.W., was principally used at that time to provide faculty offices for the GWU Medical School. The proposed Addition was designed to relieve overcrowding in these offices. GWU also intended to consolidate in it various medical functions spread out among several buildings, both on and off the university campus, so that the Addition might serve as a comprehensive outpatient or ambulatory care facility.

Originally, two designs for the Addition 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.

The property on which the Addition now stands (see note 1, *supra*) is almost entirely in an R-5-C ("medium-high density" residential) **zoning** district. The site is long, narrow, and irregular in shape, although generally rectangular. It is bordered by the Burns Building on the north, 22nd Street on the west, I Street on the south, and a restaurant, a public alley, and a condominium apartment building, the President, on the east. Before the construction of the Addition, the southern portion was used by the university as a parking lot. The Addition itself is attached to the Burns Building, which is in a C-3- C ("high-bulk" commercial) **zoning** district. As a university***952** structure, the Burns Building is located there as of right. [FN2] However, because its FAR and height exceed prescribed limits for buildings in a C-3-C district, it is a non-conforming structure. [FN3]

FN2. *See* 11 DCMR §§ 701.6(f), 721.1, 741.1 (1987).

FN3. The Burns Building is 124.5 feet high, and its gross floor area is 80,585.5 square feet, yielding a FAR of 9.47. The maximum permissible height in a C-3-C district, however, is 90 feet, and the maximum permissible FAR is 6.5. *See* 11 DCMR §§ 770.1, 771.2 (1987).

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After the BZA issued its first order granting GWU's request for permission to build the Addition, James Draude and other unit owners in the President (hereafter "the Condominium") petitioned this court for review of that decision. Some of the other petitioners withdrew from the case, but Mr. Draude remained an active litigant, filing a brief and presenting oral argument before the court. Our opinion in *Draude I* followed in due course, reversing the BZA's decision and remanding the case for further proceedings. We concluded that a number of the BZA's findings were not adequately supported by the evidence of record. On remand, the BZA readvertised GWU's application for special exceptions and **variances.** In a "Statement of the Applicant" filed December 2, 1987, GWU outlined the relief it was seeking: (1) a special exception allowing it to change the approved campus master plan by building an extension to the Burns Building; [FN4] (2) a special exception for permission to exceed a 3.5 FAR on the residentially zoned site; [FN5] (3) a **variance** from the open court width requirements; [FN6] (4) a **variance** from the prohibition on building an addition to an existing structure with a non-conforming FAR that extends the non-conformity; [FN7] and (5) a **variance** from the prohibition on building an addition to an existing non- conforming structure that creates a new non-conformity (the open court). [FN8] GWU's statement also included a witness list, an outline of the case in chief to be presented, and a summary of the testimony to be offered. A week later, on December 9, Advisory Neighborhood Commission (ANC) 2-A filed two reports stating its concerns with respect to each of the requested special exceptions and **variances.** Included in these reports was a recommendation that GWU's application be denied.

FN4. *See* 11 DCMR § 210 (1987).

FN5. *See* 11 DCMR § 210.3 (1987).

FN6. *See* 11 DCMR § 406.1 (1987).

FN7. *See* 11 DCMR § 2001.3(c) (1987).

FN8. *See* 11 DCMR § 2001.3(c) (1987).

On December 16, 1987, the originally scheduled hearing date, the BZA ruled that a proposed roof structure on the Addition could not be built as a matter of right. Consequently, GWU had to resubmit its application and include in it a request for an additional special exception regarding the proposed non- conforming roof structure. [FN9] Accompanying this request were the full written testimony of GWU's witnesses, supporting exhibits, and proposed findings of fact and conclusions of law, all of which were entered into the record.

FN9. *See* 11 DCMR §§ 400.8, 770.7 (1987).

The BZA held a hearing in February 1988 to consider GWU's requests in light of our decision in *Draude I.* In support of its requests, GWU offered the testimony of several experts to help resolve contested issues. [FN10] In all, fifteen witnesses testified. The District of Columbia Office of Planning also supported the application, both at the hearing and in written reports. After both sides submitted proposed findings of fact and conclusions of law, the BZA issued a lengthy order on February 25 granting GWU's application. [FN11] In doing so, it approved ***953** the three special exceptions and the three **variances** requested by the University.

FN10. GWU's witnesses included Dr. L. Thompson Bowles, Acting Vice President for Medical Affairs, Dean for Academic Affairs, and Professor of Surgery at the GWU Medical Center; Charles E. Diehl, Vice President and Treasurer of GWU; E.M. Knowles, Jr., a health care planning consultant and National Director of Facilities Planning for Hamilton/KSA; Avery C. Faulkner, an architect and specialist in the design of health care buildings; William S. Harps, an expert real estate appraiser; and John F. Callow, an expert traffic consultant.

FN11. The BZA's order consisted of two sections of separately numbered paragraphs entitled "Findings of Fact" and "Conclusions of Law," which we shall cite as "BZA FF" and "BZA CL," respectively.

The Addition has now been built. It stands just west of the Condominium, an eight-story residential building with seventeen one-bedroom units and 108 efficiencies. The lower portion of the west wall of the Condominium, which faces the Addition, contains only small windows which serve bathrooms, kitchens, and closets. The upper portion of the west wall, which is stepped back, contains windows serving the living areas of forty-eight residential units. Whereas the roof of the Condominium is eighty feet above street level, the

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east wall of the Addition--which faces the Condominium--rises 118.5 feet above the ground, including the penthouse structures. Although the Addition has a FAR in excess of that permitted by the **zoning** regulations, it does conform to applicable height limits. [FN12]

FN12. *See* 11 DCMR §§ 400.1, 402.4 (1987).

Petitioners' arguments as to why the Addition was improperly approved are legion. There are, however, four main contentions: (1) that the Addition is contrary to the intent and purpose of the **zoning** regulations because extraordinary circumstances, which would justify **variances,** are not present; (2) that the Addition creates objectionable conditions for the residents of the Condominium and tends to affect adversely the use of their property; (3) that the light and air of the Condominium are adversely affected because the BZA failed to require the normal roof structure setback on the Addition; and (4) that GWU failed to justify the granting of a **variance** for a substandard open court on the east side of the Addition.

II

[1] The questions that now confront us are whether the final decision of the BZA comports with applicable **zoning** statutes and regulations, and whether it is supported by case law and the evidence of record. We must uphold decisions made by the BZA if they rationally flow from findings of fact supported by substantial evidence in the record as a whole. *Foxhall Community Citizens Ass'n v. District of Columbia Board of* **Zoning** *Adjustment,* 524 A.2d 759, 761 (D.C.1987); *George Washington University v. District of Columbia Board of* **Zoning** *Adjustment,* 429 A.2d 1342, 1345 (D.C.1981); *Citizens Ass'n of Georgetown v. District of Columbia* **Zoning** *Commission,* 402 A.2d 36, 41-42 (D.C.1979); *see* D.C.Code §§ 1-1509(e), 1- 1510(a)(3)(E) (1987). As we said in *Citizens Ass'n of Georgetown,* "when the findings of basic facts are each supported by sufficient evidence and, when taken together, rationally lead to conclusions of law and an agency decision consistent with the governing statute, we shall affirm that decision." 402 A.2d at 47. This is also the message of *Draude I,* which examined the petitioner's objections to the BZA's earlier order of December 20, 1985, and painstakingly pointed out where the BZA had failed to meet its responsibilities.

[2] Our review must also consider whether the findings made by the BZA are sufficiently detailed and comprehensive to permit meaningful judicial review of its decision. *A.L.W., Inc. v. District of Columbia Board of* **Zoning** *Adjustment,* 338 A.2d 428, 430 (D.C.1975). "Generalized, conclusory, or incomplete findings are not sufficient." *Dietrich v. District of Columbia Board of* **Zoning** *Adjustment,* 293 A.2d 470, 473 (D.C.1972). Furthermore, the BZA must give "great weight" to the issues and concerns raised by the ANC, D.C.Code § 1-261(d) (1987), although "it is not obliged to follow the ANC's recommendations or adopt its views." *Upper Georgia Avenue Planning Committee v. Alcoholic Beverage Control Board,* 500 A.2d 987, 993 (D.C.1985) (citations omitted). Taking all of these factors into account, we affirm the BZA's final decision.

A. The Special Exception Allowing GWU to Alter Its Campus Plan

[3] The BZA's order states that GWU "qualifies as a university under the **Zoning** ***954** Regulations, and the Campus Plan approved by the Board in 1970 ... governs its development." BZA FF ¶ 3. The original campus plan [FN13] did not specifically provide for an extension to the Burns Building; consequently, GWU first had to obtain a special exception [FN14] to permit a change in its campus plan. The BZA's order recognized the need for a special exception and found justification for it:

> FN13. 11 DCMR § 210.4 (1987), which governs university development, states:
> The [university] shall submit to the Board a plan for developing the campus as a whole, showing the location, height, and bulk, where appropriate, of all present and proposed improvements....
>
> FN14. 11 DCMR § 3108.1 (1987) authorizes the BZA "to grant special exceptions ... where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the **Zoning** Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the **Zoning** Regulations and **Zoning** Maps...."

The proposed Addition is located within an area of the approved 1970 Campus Plan designated "Medical School-Hospital." This use has been expressed in the Plan since at least 1970. GWU

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> owned slightly over half of the site when the 1970 Plan was approved. Thereafter, it acquired the remainder. Further, the Illustrative Site Plan shows this site for an extended medical care center. Ambulatory care services are similar to the intent of the Illustrative Site Plan. Emphasis on short hospital stays has replaced the extended medical care centers. Thus, the spirit of flexibility provided in the Plan fits well with the proposed use. The Board notes that, as stated in the approved 1970 plan:
>
> The Campus Plan must, like a city plan, be expressed in terms of policies. A plan only in terms of specific building projects would be of limited value.... Therefore, the campus plan itself is in terms of locational and design policies.
>
> The Board finds that the proposed Addition is consistent with what is shown on the 1970 campus master plan. The 1985 Campus Plan contains no amendments which would materially affect this finding.

BZA FF ¶ 25. This decision is consistent with the testimony and with an analysis of the original campus plan and its subsequent amendments. Although petitioners argue at length that the Addition might have been located elsewhere and that it is barely adequate as an ambulatory care center, they offer no persuasive reasons why the Addition is inconsistent with the campus plan. Thus there is no articulable argument that either the 1970 campus plan or the relevant regulation, 11 DCMR § 210, is incompatible with the Addition. Furthermore, the excerpt from the BZA's order which we have just quoted shows that this issue was specifically considered. We hold that the BZA's decision to grant this exception is consistent with the governing regulation and is supported by substantial evidence.

B. The **Variance** Allowing GWU to Build an Addition Extending the Non-Conforming FAR of the Burns Building

The FAR of the Burns Building makes it a non-conforming structure, so that any addition to it would be subject to the restrictions of 11 DCMR § 2001.3(c) (1987):

> Enlargements or additions may be made to the structure; Provided, that the following requirements shall be met:
>
> * * * * * *
>
> (c) The addition or enlargement itself shall not increase or extend any existing nonconforming aspect of the structure, and shall not create any new nonconformity of structure and addition combined.

Because the Addition would increase what is already a nonconforming FAR, GWU could not build the Addition without a **variance**. To obtain one, GWU was required to show--and did show to the BZA's satisfaction--that strict application of the **zoning** regulations would result in extraordinary and exceptional practical difficulties, and that the proposed non-conformity would not be detrimental to the public good, nor ***955** would it substantially impair the intent, purpose, and integrity of the already approved **zoning** scheme. *See* D.C.Code § 5-424(g)(3) (1988). [FN15] Petitioners contest the BZA's ruling on this point in favor of GWU. We find no error in the granting of this **variance**.

> FN15. Section 5-424(g)(3) empowers the BZA to grant a **variance** from the "strict application" of the **zoning** laws on a showing that "by reason of exceptional narrowness, shallowness, or shape ... or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any **[zoning]** regulation ... would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property," provided that the **variance** 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...." The entire text of section 5-424(g)(3) is reproduced verbatim in the relevant regulation, 11 DCMR § 3107.2 (1987).

1. *Extraordinary Conditions Justify This Particular Variance*

[4] Petitioners argue that the BZA should not have approved a **variance** that increased what was already a non-conforming FAR. In support of their argument, they note that the 1970 campus plan designated a site for medical facility expansion ("Square 40") and that the principal reason for adding to the Burns Building instead of building on Square 40 was financial. For an additional $12,000,000, they maintain, GWU could have used Square 40 to build a structure comparable to the Addition. Petitioners contend that "[t]he BZA is not authorized to grant an area **variance** merely to avoid the added expense or inconvenience inherent

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in alternative methods of construction or merely to allow the most profitable use of the land." Their argument, in essence, is that financial considerations do not give rise to extraordinary or exceptional circumstances justifying a **variance**. Even assuming the correctness of this argument, we reject it--as did the BZA--because it does not apply to this case, which involves much more than "added expense or inconvenience" or an attempt to make "the most profitable use of the land."

The BZA stated in its order:

> [T]he Board concludes that the irregular shape of the lot, the narrowness of its southern portion, and the pre-existing Burns Building constitute an extraordinary or exceptional situation or condition of the subject site, and that strict application of Subsections 506.1 and 2001.3(c) would result in peculiar and exceptional difficulties to or exceptional and undue hardship upon the owner.

BZA CL ¶ 17. The first factor considered by the BZA was the irregularity of the site upon which the Addition is built. Although petitioners dismiss this factor without comment, it was specifically addressed in the testimony before the BZA. [FN16] Thus there is support in the record for the conclusion that the nature of the site itself serves to justify the **variance**. Even more important is the proximity of the Burns Building, as the BZA recognized:

> The Board concludes that it is an institutional necessity for GWU to expand its ambulatory health care facilities and that such expansion requires that the Addition be physically linked to and interconnected with the Burns Building. This, in turn, requires that a portion of the Addition be constructed on the C- 3-C portion of the site, thereby requiring the granting of this **variance**.

BZA CL ¶ 20. This conclusion logically follows from paragraph 35 of the BZA's factual findings:

> GWU was required to use this particular site for an addition to the Burns Building for a variety of reasons. First, this site allows GWU to continue to use the valuable asset of the pre-existing Burns Building, which is already devoted to ambulatory care. Second, a successful ambulatory care center requires proximity to the hospital, due to the extensive interaction between the medical staff and ***956** the hospital. Third, any new addition must comply with the George Washington University Campus Plan. Fourth, the expansion of the Burns Building on the subject site is the only economically feasible location for the required consolidated ambulatory care facility. Granted, Square 40 is also in reasonable proximity to the Hospital and is identified for that reason as the site for further medical facilities. However, it would be unreasonable to require GWU to convert a valuable resource, that is, the existing Burns Building, to other medical, or to other than medical, use at this time, in order to locate a comparable ambulatory care facility on Square 40.

BZA FF ¶ 35. Again, these findings are supported by the evidence of record. Through the testimony of Charles Diehl, its Vice President and Treasurer, GWU demonstrated that it could not expand and consolidate its inadequate outpatient facilities unless it could build an Addition to the Burns Building. Furthermore, Mr. Diehl explained that the use of Square 40 for the Addition had in fact been considered; it was rejected, however, not only for fiscal reasons, but because it was "reserved for a future hospital as a possible site." [FN17]

> FN16. For example, Mr. Faulkner stated that the narrowness of the site made it difficult to design an adequate outpatient care facility there. He also pointed out that the site grade rises one full story from the south end at I Street to the north end at Pennsylvania Avenue.

> FN17. Other witnesses testified that it was necessary to link the Burns Building to the expanded ambulatory care facility. Mr. Knowles, a health care planning consultant, emphasized the need for a centralized facility. He also testified that such a facility could not be made smaller or rearranged without adverse impact upon its operation. Dr. Bowles, GWU's Acting Vice President for Medical Affairs, also stressed the need for proximity between the Burns Building and the new facility.

In *Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 291 (D.C.1974), we considered whether the reasons for granting a **variance** must be related to the characteristics of the land itself. We declined to establish such a requirement, stating that the BZA "is in error when it takes the position that a **variance** may only be issued when the required hardship inheres in 'land' as opposed to 'property.' " *Id.* at 294. In the case at bar, the existence and purpose of the Burns Building qualifies as an "extraordinary

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or exceptional situation or condition" justifying the **variance**. While we reject any suggestion that added expense alone would entitle a property owner to a **variance**, *see Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C.1976), other significant factors are present in this case. The shape of the property, the proximity of the Burns Building, and the inadequacy of Square 40, taken together, support the BZA's conclusion that a **variance** is warranted. Furthermore, GWU presented evidence indicating that unless the Addition was built as an extension to the Burns Building, it could not undertake the project at all. In this particular context, the added expense may properly be deemed a factor, to be weighed along with all the other factors, in deciding whether to grant a **variance**. [FN18] Finally, as we said in *Monaco v. District of Columbia Board of Zoning Adjustment:*

> FN18. We recently observed in *Gilmartin v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C.1990), that "at some point" economic harm may become sufficient to justify a **variance**, "at least when coupled with a significant limitation on the utility of the structure." *Gilmartin* makes clear that it is for the BZA, in the first instance, to determine whether such a limitation is "significant."

> [W]hen a public service has inadequate facilities and applies for a **variance** to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of **Zoning** Adjustment does not err in considering the needs of the organization as possible "other extraordinary and exceptional situation or condition of a particular piece of property."

407 A.2d 1091, 1099 (D.C.1979). For all of these reasons, we affirm the BZA's decision to grant this particular **variance** as justified on the ground of exceptional circumstances.

2. *The Addition Is Not Detrimental to the Public Good*

[5] Although much of the BZA's order is devoted to showing that the Addition serves the public interest by enhancing the ***957** quality of health care services in the District of Columbia, petitioners argue that the **variance** flouts sound public policy and is therefore detrimental to "the public good," as that term is used in D.C.Code § 5-424(g)(3) and 11 DCMR § 3107.2. [FN19] Specifically, they contend that the BZA should protect and enhance the quality of existing residential property in the District of Columbia, and that it failed to live up to this obligation when it granted the **variance**. The reasoning behind this argument confuses the "public good" with the more narrow interests of the Condominium and its unit owners; what is beneficial to them, singly or as a group, is not necessarily synonymous with the public good. This does not mean, of course, that petitioners' interests are to be discounted; on the contrary, they must be fully considered by the BZA. It does mean, however, that to win reversal of the BZA's decision on this ground, petitioners must convincingly show that the enhanced outpatient care facilities provided by GWU will be detrimental to the public good. In their brief petitioners go so far as to say that "[t]he neighboring owners did not dispute that ambulatory health care services benefit the public good." Given this statement, the BZA's extensive factual findings regarding the beneficial nature of the Addition, and the evidence of record, it is clear to us that petitioners have not carried their burden of persuasion. Indeed, the BZA concluded as a matter of law that "[t]he granting of this **variance** will benefit the public good" (BZA CL ¶ 20). We have no reason to overturn that conclusion.

> FN19. See note 15, *supra*.

The possibility that the Addition may benefit the public and yet be unacceptable to its neighbors presents different issues. The questions of whether the Addition's impact on light and air, traffic patterns, and real estate values may have an adverse effect on the use of neighboring property-- all very important in the analysis of whether the **variances** and special exceptions were properly granted--are discussed later in this opinion. Here, however, we need only say that we agree with the BZA's conclusion that the granting of this **variance** will benefit the public good and that petitioners' assertion to the contrary is unpersuasive.

3. *The Addition Does Not Impair the Intent and Purpose of the Zoning Plan*

[6] Petitioners argue that "[a]n addition that more than doubles the size of an existing non-conforming structure not only substantially impairs the intent and purpose of the **Zoning** Regulations regarding non-

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conforming structures but completely vitiates that intent and purpose." To buttress their argument, petitioners point out that one established purpose of **zoning** regulations, widely recognized and upheld by the courts, is the gradual elimination of non-conforming structures. *See Lenkin v. District of Columbia Board of Zoning Adjustment,* 428 A.2d 356, 358 (D.C.1981). This argument, however, ignores the very purpose of special exception and **variance** relief. As we explained in *Palmer v. District of Columbia Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C.1972), the **variance** procedure is "designed to provide relief from the strict letter" of the **zoning** regulations. Given the shortage of substantive reasons for their contention that this **variance** impairs the intent of the **zoning** plan, petitioners' argument is tantamount to saying that **variances** should not be granted. That simply is not the law. Even the two cases on which petitioners rely [FN20] do not support their argument, for those cases expressly recognize that the BZA is empowered to grant **variances** from non-conforming use and structure regulations, as long as the standards required for each particular **variance** are met.

FN20. *Lenkin v. District of Columbia Board of* ***Zoning*** *Adjustment, supra; Silverstone v. District of Columbia Board of* ***Zoning*** *Adjustment,* 372 A.2d 1286 (D.C.1977), *opinion amended,* 396 A.2d 992 (1979).

C. The Special Exception Allowing the Addition to Exceed FAR Requirements

In granting GWU a special exception from the applicable FAR requirements, the ***958** BZA noted that the Addition was "in a highly urban area zoned R-5-C (medium-high density) and designated for institutional use by the Comprehensive Plan," [FN21] and concluded that "it is appropriate to exceed the 3.5 FAR at this site. This is consistent with the policy of avoiding campus expansion into low-density districts." BZA CL ¶ 11. Petitioners contend that the BZA erred in so ruling.

FN21. As to the Comprehensive Plan, *see generally Tenley & Cleveland Park Emergency Committee v. District of Columbia Board of* ***Zoning*** *Adjustment,* 550 A.2d 331, 335-341 (D.C.1988), *cert. denied,* 489 U.S. 1082, 109 S.Ct. 1539, 103 L.Ed.2d 843 (1989).

In *Draude I* we observed that "colleges and universities may locate in residential districts if, among other requirements, they have an approved campus plan and obtain a special exception." 527 A.2d at 1248. The **zoning** regulations contain a special rule for colleges and universities, which in *Draude I* we called the "aggregation rule." Under it, the BZA may authorize an exception to the FAR restrictions on a university structure in an R-5-C district as long as "the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-C district." 11 DCMR § 210.3 (1987).

The BZA, however, must also determine that any permitted structure is consistent with the policy of avoiding "unreasonable campus expansion into improved low-density districts," [FN22] and that the permitted structure "will not tend to affect adversely the use of neighboring property in accordance with the **Zoning** Regulations and **Zoning** Maps...." [FN23] We made this clear in *Draude I:*

FN22. 11 DCMR § 210.3 (1987) states:

In R-1, R-2, R-3, R-4, R-5-A, and R-5-B districts, the maximum bulk requirements normally applicable in the districts may be increased for specific buildings or structures; Provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-B district. In all other residential districts, similar bulk increases may also be permitted; Provided, that the total bulk of all buildings and structures on the campus shall not exceed the gross floor area prescribed for the R-5-C district. Because of permissive increases as applicable to normal bulk requirements in the low- density districts regulated by this title, it is the intent of this subsection to prevent unreasonable campus expansion into improved low- density districts.

FN23. 11 DCMR § 3108.1 (1987) states:

Pursuant to authority contained in the **Zoning** Act of June 20, 1938 (52 Stat. 797), as amended, the Board is authorized to grant special exceptions, as provided in this title where, in the judgment of the Board, those special exceptions will be in harmony with the general purpose and intent of the **Zoning** Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the **Zoning** Regulations and **Zoning** Maps, subject in each case to the special conditions specified in this title....

Universities cannot use the corporate FAR as a

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matter of right in residential **zoning** districts; they must obtain a special exception under 11 DCMR § 210.3. *See* 11 DCMR § 3108.1 (listing actions requiring special exceptions). Draude points out that the BZA orders do not address the special exceptions required before GWU can use the FAR aggregation rule in order to build the addition with an FAR substantially in excess of that normally permitted in an R-5-C district. Because we find no reference to this question in the BZA orders under review, the BZA on remand must determine whether such a special exception is justified.

* * * * * *

... Thus, before approving a university structure such as the Addition on the basis of the FAR aggregation rule, the BZA must find that the permitted expansion in the structure's bulk (1) is consistent with the policy of avoiding "unreasonable expansion into improved low-density districts" and (2) "will not tend to affect adversely the use of neighboring property."

527 A.2d at 1249. Because the BZA had not made such findings in *Draude I*, we directed it to do so on remand. Now, in *Draude II*, we must determine whether the BZA followed the instructions we gave it in *Draude I*. We conclude that it did, and ***959** hence we affirm the granting of the special exception to the 3.5 FAR requirement.

1. *The Addition Is Consistent with the Policy of Avoiding "Unreasonable Campus Expansion into Improved Low-Density Districts"*

[7] In *Draude I* the petitioner argued that the Addition constituted an unreasonable expansion into an improved low-density neighborhood because it would generate unacceptably high levels of traffic. He further maintained that the BZA's finding on traffic impacts was not based on substantial evidence in the record. We accepted these assertions, stating, "We agree that the BZA did not adequately justify its traffic finding...." 527 A.2d at 1250. On remand, however, the BZA received further evidence on this subject. Thereafter, in its final decision, the BZA found (1) that existing levels of traffic would not change as a result of the Addition (BZA FF ¶ 60); (2) that the distribution of traffic would be favorable because the location is convenient to a subway stop (one block away), as well as a major city bus route, and staff would be centralized, thereby creating car-pooling opportunities (BZA FF ¶¶ 16, 61); (3) that after other medical facilities were consolidated in the Addition, rush-hour traffic would increase by only eighty- four vehicles, which would not change the operational levels of service on I Street, 22nd Street, and Pennsylvania Avenue (BZA FF ¶ 62); (4) that vehicles entering the Addition's parking garage on I Street would present no safety problems or significant traffic congestion (BZA FF ¶¶ 63, 64); [FN24] (5) that the Addition would not increase the number of university students (BZA FF ¶ 65); (6) that it would have "a negligible impact on the adjacent street system" (BZA FF ¶ 67); (7) that it would have adequate loading facilities (BZA FF ¶ 80); and (8) that it would not have an adverse impact on parking (BZA FF ¶¶ 54, 75). One of the Board's conclusions of law was that "the Addition will not have an adverse impact on the traffic, because the levels of service will not be adversely affected and will remain in the current favorable condition." BZA CL ¶ 8.

FN24. The BZA's findings reflect its thorough analysis of the traffic safety issue. It stated in FF ¶ 63:

No safety problems will be caused by vehicles entering the Addition's parking garage. Approximately 84 vehicles will enter the garage during the A.M. peak hour. The pedestrian traffic in the morning hours is projected at roughly 412 persons between 8:30 and 9:30 A.M. This pedestrian movement represents seven persons per minute. The estimated 84 vehicles generated in the A.M. peak hour by the garage represents 1.4 vehicles per minute. The interaction of these numbers of vehicles and pedestrians poses no safety problems. Even if 140 vehicles, the garage's capacity, entered during this period, the result would be 2.33 vehicles per minute, which the Board finds would not create a safety problem. At a typical downtown garage, 5 vehicles per minute enter the garage.

The BZA made these findings after considering written submissions and testimony by representatives of the Office of Planning and after hearing the testimony of John Callow, GWU's traffic consultant. Mr. Callow spoke at length, produced exhibits, and was subject to thorough cross-examination. The BZA's detailed findings, supported by ample evidence in the record, convince us that it faithfully followed our instructions in *Draude I*.

The BZA also addressed other issues that might

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perhaps indicate unreasonable expansion. For example, the Board made a factual finding that a trash compactor would be located adjacent to the loading dock (BZA FF ¶ 81). [FN25] The BZA also found that the Addition had been designed to minimize any noise impact on the Condominium, stating that "[t]he Addition is not a noise intensive use and does [not] create objectionable noise conditions" (BZA CL ¶ 10). Finally, it noted that landscaping would be coordinated with GWU's overall campus landscape plan and would not conflict with the District's requirements for types, sizes, and locations of plant material (BZA FF ¶ 41). Even the roof covering the ***960** garage ramp would be landscaped (BZA FF ¶ 52).

> FN25. The trash compactor, however, would replace one already on the site, and the design of the Addition called for the compactor to be shielded from the Condominium's view. Furthermore, it would not increase already existing noise levels.

2. *The Addition Will Not Have an Adverse Impact on the Use of Neighboring Property*

On the question of whether the Addition would "tend to affect adversely the use of neighboring property," 11 DCMR § 3108.1 (1987), one of the issues which prompted a remand in *Draude I*, petitioners contend that the Addition will deprive the Condominium of sufficient light and air. We shall address this issue hereafter in part D of this opinion, and hence we do not discuss it here.

[8] There are, however, two additional matters that fall under the heading of adverse impact: noise and resale value. The former, although discussed in the BZA's findings of fact, [FN26] does not appear to concern petitioners, but the resale value of the condominium units is very much at issue. Petitioners contend that "the Addition adversely affects the value of units on the west side of the Condominium because units looking at a blank wall with sunlight blocked are less attractive and bring lower prices." One of the owners testified that the Addition has already made units on the west side of the Condominium more difficult to rent.

> FN26. Concerning traffic noise, the BZA found that the roof over the garage ramp would minimize the noise from vehicles entering and leaving the parking garage, which is completely enclosed. "Overall," the BZA found, noise from the Addition would be "less than presently generated by the vehicles which use the surface parking lot." BZA FF ¶¶ 51, 53.

At the hearing on remand, GWU presented testimony on resale value from William S. Harps, an expert real estate appraiser. A representative of the unit owners, petitioner Draude, also testified. After weighing their testimony, the BZA found:

> The Addition will have no adverse effect on the fair market value of units in the President Condominium. Based upon the totality of the evidence about sales, including Mr. Draude's testimony in particular, the Board finds that the value of the units in the President which would hypothetically appear most likely to be affected by the Addition has not been adversely affected by the construction of the Addition....

BZA FF ¶ 83. Because this finding is based on extensive testimony, we have no reason to second-guess the BZA's decision on this point. Furthermore, although we strongly encourage the articulation of reasons, *see, e.g., Harris v. District of Columbia Human Rights Commission*, 562 A.2d 625, 631- 632 (D.C.1989), we have repeatedly held that an administrative agency "is not legally required to explain ... why it favored one witness or one statistic over another." *Citizens Ass'n of Georgetown, supra*, 402 A.2d at 47 (footnote omitted).

D. The Special Exception Allowing the Non-Conforming Roof Structures

[9] The structures on the roof of the Addition are non-conforming because they do not meet setback requirements, because not all the penthouses and mechanical equipment are placed in one enclosure, and because the walls are of unequal heights. Petitioners argue that the special exception allowing GWU to place non-conforming structures on top of the Addition should not have been granted because they have an adverse impact on the light and air of the Condominium. The importance of this issue was recognized in *Draude I*, where we said that "[o]n remand, the BZA should re-evaluate the significance it must accord the Addition's effect on light and air to the condominium." 527 A.2d at 1251-1252. Here again, the record of the remand proceedings demonstrates to our satisfaction that the BZA properly evaluated the effect of the Addition on the Condominium's light and air, and that its final

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decision on this point "rationally flow[s] from findings of fact supported by substantial evidence in the record as a whole." *Id.* at 1250 (citations omitted). For example, the BZA found that the condominium units facing the Addition "do not fail to benefit from a reasonable level of direct and reflected light" (BZA FF ¶ 45). In its conclusions of law, the BZA said:

> ***961** [T]he Board concludes that the roof structure will not adversely affect the light and air of adjacent property, will not materially impair the intent and purpose of the Regulations and it is not likely to become objectionable to the neighboring property.

BZA CL ¶ 13. The question before us is whether there was enough evidence on the record to enable the BZA to make this pronouncement.

Avery Faulkner, GWU's architect, testified at the remand hearing on matters pertinent to light and air. He explained that there is a significant difference between direct sunlight and reflected light, and that "direct light can penetrate the passageway between [the] buildings and reflected light exists between both buildings." He also illustrated and augmented his testimony with a number of exhibits. Mr. Faulkner noted, in addition, that the light-colored materials used in the construction of both the Addition and the Condominium are conducive to maximizing reflected light, and that GWU could build a matter-of- right building that would "block all light on the portions of the Condominium closest to I Street and [would] narrow the passageway between the buildings and reduce reflected light available to the habitable rooms of the Condominium." [FN27] Overall, Mr. Faulkner concluded that, because of the penetration of direct sunlight between the buildings and the color of the building materials, there would be no adverse impact on the reflected light available to the Condominium.

> FN27. This last observation was reflected in the BZA's findings. The BZA noted that if the Addition and the Condominium were parts of a single building, the **zoning** regulations would permit the courtyard between them to be less than 30 feet wide. "In fact, the width of the open space between the Addition and the habitable rooms of the Condominium is well in excess of the width of [the] court which would be required, *to wit,* 36 feet. The Addition, as designed, will exceed the standards in the [regulations] for the provision of light and air by open courts. The Board is mindful that the [regulations] set higher standards for buildings which are on separate lots, but it would be unreasonable to evaluate the Addition's impact without considering standards which the **Zoning** Commission has found to be reasonable in other circumstances which are significantly similar to those which are before the Board." BZA FF ¶ 48.

Our decision in *Draude I* also stated that when a public service organization applies for a **variance**, it must show (1) that the specific design of the building it proposes to build is an institutional necessity, not merely the most desirable of various options, and (2) precisely how the needed design features require the specific **variance** sought. 527 A.2d at 1256. These points were addressed by the BZA in its findings:

> The penthouse will house critical major mechanical equipment for the addition, as well as the emergency power and the central cooling tower and associated equipment for the complex. It has been designed so that the equipment is within the smallest envelope which the building codes allow. Some equipment which is normally placed in a penthouse was moved to mechanical rooms on each floor below the penthouse due to space restrictions. This resulted in a loss of clinical space. No further transfers could reasonably be made. Due to the required equipment and the elevation differential between the Burns Building and the Addition, two separate penthouses are required. Due to the required equipment, the walls of the Addition penthouse cannot match the lower height of the Burns Building penthouse. The same constraints require a special exception from the setback requirements for roof structures.

BZA FF ¶ 42. This finding of fact is supported by the evidence. For example, Mr. Faulkner testified:

> I can assure the Board that every engineering effort was made to compress this equipment into the smallest envelope which building codes allow.... Some of the equipment normally found in the penthouse in buildings of this type was moved to mechanical rooms on each floor below the penthouse. This move sacrificed valuable clinic space and no further equipment transfers could be made.

***962** Because the mechanical equipment contained in the penthouse structures is integral to the purpose of the Addition, and because this particular exception is required by the purpose of the building,

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this court will not overturn the BZA's finding. We hold that the decision to permit a non- conforming roof structure is supported by substantial evidence--namely, Mr. Faulkner's testimony--and must therefore be affirmed.

E. The **Variances** Allowing the Non-Conforming Open Court on the East Side of the Addition

1. *The Open Court Requirements*

[10] If strictly applied, 11 DCMR § 406.1 (1987) would require the open court between the Addition and the Condominium to be slightly more than twenty- nine feet wide. Because its actual width is only twenty-one feet, the eight- foot difference made it necessary for GWU to seek a **variance**. Just as with the **variance** from FAR requirements, GWU was required to show (1) that strict application of the **zoning** regulations would result in peculiar and exceptional practical difficulties for the owner, and (2) that the **variance** would not result in substantial detriment to the public good, nor would it impair the intent, purpose, and integrity of the established **zoning** plan. D.C.Code § 5-424(g)(3) (1988); 11 DCMR § 3107.2 (1987). In *Draude I* we concluded that when the BZA first granted a **variance** from open court width requirements, its order did not state "precise or detailed reasons for concluding that conditions exist justifying a **variance** for the non-conforming open court." 527 A.2d at 1254. The BZA's final order, however, cures these deficiencies and supports the granting of a **variance**.

First, we are satisfied that both the proximity to the Burns Building and the irregular dimensions of the site satisfy the "extraordinary or exceptional condition" requirement of D.C.Code § 5-424(g)(3). The width of the lot upon which the Addition is built, measured from west to east, ranges from 57 feet at the north end to 100 feet in the middle to 82 feet at the south end. *See Draude I, supra,* 527 A.2d at 1255. In order to build a useful structure, efficient use of space was an absolute necessity. The narrowness and the odd shape of the lot are exceptional conditions in that, as the BZA found, the function of the Addition would have been seriously impaired if a **variance** were not granted.

The evidence supports the BZA's finding that strict application of the regulations regarding open courts would result in peculiar and exceptional practical difficulties for GWU. In its order the BZA stated:

> The wall [of the Addition] was moved to the maximum extent possible without serious and significant loss of functional space required for the ambulatory care center. The further narrowing of the Addition would have resulted in a building not acceptable for ambulatory health care services. Further narrowing of the building would have resulted in the loss of a substantial number of exam and treatment rooms on each level of the Addition, which rooms could not have been relocated to the front portion of the building.

BZA FF ¶ 50. This finding is supported by the testimony of three of GWU's witnesses, Dr. Bowles, Mr. Knowles, and Mr. Faulkner. For example, Mr. Faulkner, a specialist in the design of health care facilities, stated:

> An ambulatory care building must have a width-to-length ratio which will provide an efficient core and a minimum corridor to serve the patients, physicians and the staff. It is our professional opinion that if the south end of this addition had been made any narrower it would not have been an acceptable building for university medical purposes.

The evidence presented on this issue is particularly important because of our statement in *Draude I* that "[i]f the Board accepts [such testimony] and finds that a conforming open court would *require* significant reductions of floor area, *then a variance may be justified."* 527 A.2d at 1256 (emphasis added). [FN28] The testimony on ***963** remand focused on this precise issue. As a result, we decline to disturb the BZA's conclusion that "the irregular shape of the lot, the narrowness of its southern portion, and the pre-existing Burns Building constitute an extraordinary or exceptional situation or condition of the subject site" (BZA CL ¶ 17).

> FN28. What prompted our remand with respect to this point was the fact that the BZA's first order gave "scant attention to this crucial question and [did] not expressly rely on the evidence of necessity in stating its conclusion that GWU [had] met the requirements for the open court **variance** ." 527 A.2d at 1256.

Finally, we agree that the **variance** is not detrimental to the public good, nor does it impair the intent of the **zoning** regulations. The width of the court affects only the Condominium. It is significant that the Addition is twenty- one feet from

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the lower floors of the condominium, and these lower floors do not have rooms generally considered to be "habitable." Upper floors that do have habitable rooms facing the Addition are stepped back fifteen feet from the Condominium's property line, so that the distance between the east wall of the Addition and the parts of the west wall of the Condominium that contain habitable rooms is thirty-six feet. Thus the distance between the walls of the two buildings exceeds--for the most part--the open court width requirements. Furthermore, as discussed in previous sections, the BZA found that the proximity of the Addition would not have an adverse impact on the Condominium. It concluded, rather, "that the granting of these **variances** will benefit the public interest and good and will not substantially impair the intent, purpose, and integrity of the zone plan as embodied in the **Zoning** Regulations and Map" (BZA CL ¶ 16). Petitioners have not persuaded us that this conclusion should be overturned.

2. *The Open Court As the Addition of a Non-Conformity to the Already Non- Conforming Burns Building*

[11] The pertinent regulation, 11 DCMR § 2001.3(c), prohibits an addition to a non-conforming structure that creates a new non-conformity, but the BZA is authorized to grant a **variance** if exceptional conditions result in practical difficulties or undue hardship. See note 15, *supra*. We are satisfied, as was the BZA, that these conditions have been met.

Mr. Faulkner testified that without the open court **variance**, the Addition "would not have been an acceptable building for university medical purposes." This testimony, supported as it was by specific detail, satisfies the "practical difficulties" prong of the test. Furthermore, the open court does not appear to create a substantial detriment to the public good, nor does it impair the intent of the zone plan. [FN29] The BZA's findings of fact with respect to the Addition's impact on the Condominium, and the testimony supporting these findings, which we have already discussed, speak directly to this issue. Given the record now before us, we find no basis for overturning the open court **variance**.

FN29. We reject petitioners' arguments to the contrary for essentially the reasons set forth in part B-3, *supra*.

F. Deference to the ANC

[12] Finally, petitioners claim that the BZA's decision-making process was flawed because insufficient deference was given to the concerns raised by the ANC. As we have often emphasized, the BZA must give "great weight" to those concerns and must specifically address them "in the written rationale for the governmental decision taken." D.C.Code § 1-261(d) (1971), quoted in *Levy v. District of Columbia Board of* ***Zoning*** *Adjustment*, 570 A.2d 739, 746 (D.C.1990). Here, however, the issues raised by the ANC are--with one exception--identical to those raised by petitioners. Those issues were the subject of written submissions and live testimony. The February 1988 hearing, in particular, demonstrates that the BZA did accord "great weight" to the ANC's positions. The BZA was not required to do more. *Upper Georgia Avenue Planning Committee, supra*, 500 A.2d at 993.

The one issue raised by the ANC and not by petitioners involves the entrance to the underground parking garage. The ANC ***964** maintained that the location of the entrance immediately adjacent to the west wall of the Condominium would generate an unacceptable level of noise and congestion. This point, however, was examined in detail by the BZA. Mr. Callow gave extensive testimony concerning the effect of the Addition on traffic patterns, opining that "[t]he vehicles entering the new Burns garage will not cause congestion on that street [I Street] and will not pose a safety problem for pedestrians." The BZA concluded "that the parking garage ramp cannot feasibly be located on 22nd Street, and that its location on I Street will not tend to affect adversely neighboring property due to traffic, noise, or fumes. There will be no pedestrian conflict with vehicles entering the garage, nor will left-turning vehicles create an objectionable condition due to congestion or conflict with westbound traffic. There will be no objectionable condition due to noise or fumes from the garage or ramp." BZA CL ¶ 9. It is evident to us that the BZA did indeed address the ANC's concerns with particularity, and that the decision to go against the ANC's recommendations was sufficiently supported by evidence in the record.

III

In *Draude I* this court held that the BZA (1) did not

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have sufficient evidence in the record to support its conclusions, (2) had failed to provide sufficiently detailed findings of fact and conclusions of law, and (3) had erroneously permitted GWU to aggregate FARs without a special exception. On remand the BZA cured these defects in its earlier performance. A review of the record shows that each decision is supported by sufficient evidence, and that the evidence adduced over the course of the various hearings rationally leads to conclusions of law consistent with governing statutes and regulations. The BZA's decision on remand is accordingly

Affirmed.

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ZONING VARIANCE

District of Columbia Court of Appeals.

William GILMARTIN, et al., Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.
David C. Barnes, Intervenor.

No. 87-1253.

Argued May 22, 1989.
Decided Aug. 29, 1990.

Adjoining landowners petition for review of order of board of **zoning** adjustment, granting landowner's application for area **variance** for proposed parking space and permitting parking in front of landowner's property. The Court of Appeals, Belson, J., held that: (1) property for which owners sought **variance** from minimum parking space size requirements satisfied uniqueness requirements; (2) board's authority to grant **variance** relief for exception or extraordinary conditions was not limited to conditions brought about after adoption of **zoning** regulations; but (3) board was required to determine whether locating parking space within structure of carriage house was feasible and whether such alternative was, under circumstances, itself a practical difficulty.

Remanded.

West Headnotes

[1] Zoning and Planning ⇐509
414k509

Property for which owner sought **variance** from minimum parking space size requirements satisfied uniqueness requirements; unique confluence of location of carriage house on property in relation to property boundaries on north and easements on south made it necessary for owners to seek **variance** . D.C.Code 1981, § 5-424(g)(3).

[2] Zoning and Planning ⇐496
414k496

Zoning statute does not preclude approval of **variance** where uniqueness arises from confluence of factors; extraordinary or exceptional condition must affect single property. D.C.Code 1981, § 5-424(g)(3).

[3] Zoning and Planning ⇐489
414k489

Board of **Zoning** Adjustment's authority to grant **variance** relief for exceptional or extraordinary conditions was not limited to conditions brought about after adoption of **zoning** regulations. D.C.Code 1981, § 5-424(g)(3).

[4] Zoning and Planning ⇐489
414k489

"Other extraordinary or exceptional situation or condition of specific piece of property," as required by statute to warrant **variance**, need not have preceded promulgation of **zoning** regulation. D.C.Code 1981, § 5-424(g)(3).

[5] Zoning and Planning ⇐509
414k509

In determining whether "practical difficulties" precluded grant of **zoning variance** permitting parking space that did not comply with minimum length requirement next to carriage house that owner wished to convert to single family residence, board of **zoning** adjustment was required to determine whether locating parking space within structure of carriage house was feasible and whether such alternative was, under circumstances, itself a practical difficulty. D.C.Code 1981, § 5-424(g)(3).

[6] Zoning and Planning ⇐540
414k540

Substantial evidence supported board of **zoning** adjustment's determination that there would be no harm to public good if owners of carriage house were allowed to have **variance** from minimum parking space requirements, despite claim that occupant of carriage house would not park in such space and exacerbate serious parking problem in the neighborhood by parking on the street.

***1165** Richard Halberstein, for petitioners.

Frederick D. Cooke, Jr., Corp. Counsel at the time the brief was filed, Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., and Martin B. White, Asst. Corp. Counsel, Chevy Chase, Md., were on the Memorandum in Lieu of Brief, for

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respondent.

Aurelius K. Wilson, with whom Leonard L. McCants, Silver Spring, Md. was on the brief, for intervenor.

Before ROGERS, Chief Judge, and BELSON, Associate Judge, and MACK, Senior Judge. [FN*]

FN* Judge MACK was an Associate Judge of the court at the time of argument. She became a Senior Judge December 1, 1989.

BELSON, Associate Judge:

***1166** Petitioners [FN1] challenge an order of the respondent District of Columbia Board of **Zoning** Adjustment ("BZA" or the "Board") granting an application for an area **variance** to David C. Barnes and Janet B. Barnes to permit a decrease in length by one foot in a proposed parking space and to permit parking in the front rather than in the rear of the Barnes' property. These **variances** would enable Mr. and Mrs. Barnes to convert their two-story brick carriage house into a single-family residence while complying with the requirement that a parking space accompany each single-family residence. [FN2] Although we are unpersuaded by petitioners' challenges to BZA's order on the issues of uniqueness and lack of harm to the public good, we conclude that BZA's findings are insufficient to support its conclusion that the applicants would suffer practical difficulties if made to comply with the **zoning** regulations pertaining to parking for single-family dwellings. We therefore remand this case to BZA for further proceedings.

FN1. Petitioners are William Gilmartin, Donald S. Good and John McCarthy. Petitioners own property fronting on 12th Street, S.E. in the 300 block.

FN2. 11 DCMR § 2101.1 (1987) requires the provision of a parking space with each dwelling unit for one-family dwellings.

Intervenor, David C. Barnes ("Barnes" or "intervenor"), with his wife Janet B. Barnes, owns the subject property located just to the rear of 303 12th St., S.E., lot 814 within square 991 located within an R-4 district. [FN3] The subject lot is bounded on the east by petitioners Gilmartin and McCarthy's property and on the west by a public alley. It is improved with a two-story brick carriage house currently used for storage. Square 991 is bounded to the north by South Carolina Avenue to the south by D Street, to the east by 12th Street and to the west by 11th Street. The only direct means of access to the lot is via the public alleys, as there is no frontage on any public street. Both Gilmartin's and McCarthy's lots are beneficiaries of easements across the subject lot to the south (or rear) of the carriage house so as to provide access to the alley.

FN3. An R-4 district consists of "those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families." 11 DCMR § 330.1 (1987).

Barnes is seeking **variances** from the **zoning** ordinances in order to convert the carriage house into a single-family residence. In his initial application to BZA, Barnes sought a **variance** from the prohibitions against converting an existing garage into a residence when located on an alley less than thirty feet wide. Barnes' initial application provided for two parking spaces on the lot, one to the north of the carriage house and one to the south, so as not to exacerbate local parking congestion. While the proposed parking space on the south of the carriage house was regulation-size, the proposed north parking space was smaller, measuring nine feet by eighteen feet. A regulation-size parking space is nine feet by nineteen feet. 11 DCMR § 2115.1 (1987). The Board approved Barnes' initial application despite petitioners' contentions that the south parking space would interfere with their easements. In order to avoid impeding the use of easements on the south side of the carriage house, Barnes sought to delete the south parking space from his application for a **variance**. BZA ruled, however, that a new application was required. This second application, the subject of this appeal, sought two specific **variances**: (1) from ordinance § 2115.1 requiring parking spaces to be a minimum of nine feet wide and nineteen feet long; and (2) from ordinance § 2116.2 providing that parking spaces may only be located in "rear" or "side" yards of residential lots (the **Zoning** Administrator ruled that the area to the north of the carriage house is the front).

After a hearing at which petitioners and other

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neighbors opposed the requested **variance**. BZA granted Barnes' **variance** application ***1167** on October 7, 1987. [FN4] Petitioners then sought review of BZA's order in this court.

FN4. BZA concluded in part as follows:
Sub-section 2115.1 of the **Zoning** Regulations requires that a parking space be a minimum of nine feet in width and 19 feet in length. The parking space proposed will be measured only 9 by 18 feet. Sub-section 2116.2 provides that parking may not be located in front yards of residential lots. The proposed parking will be located in the space determined by the **Zoning** Administrator to be the front yard of the lot.
The Board concludes that the applicant has met the burden of proof. The site is affected by an extraordinary condition in that development and use of the site is restricted by an easement. If the easement did not exist, the subject **variance** would not have been requested. The required parking space cannot be located in the rear yard as originally proposed because of the location of the easement in that area.

This court's standard for reviewing orders of BZA is well-settled: "we must determine: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Levy v. District of Columbia Bd. of **Zoning** Adjustment*, 570 A.2d 739, 746 (D.C.1990) (citing cases). *See also* D.C.Code § 1-1509(e) (1987 Repl.). "Generalized, conclusory or incomplete findings are insufficient; subsidiary findings of basic fact on all material issues must support the end result in a discernible manner." *Levy, supra*, 570 A.2d at 746. "If the agency makes no finding of fact on a material contested issue, this court on review may not 'fill in the gap by making its own determinations from the record,' but must remand the case." *Id.* (citations omitted). This court will defer to the Board's interpretation of its own regulations so long as its interpretation is consistent with the regulations and not "plainly erroneous." *Id.* We apply these standards of review to the issues before the court in this case.

Intervenor sought **variances** pursuant to D.C.Code § 5-424(g)(3) (1988 Repl.). [FN5] This court has enunciated the following three-part test, each part of which the applicant for the **variance** has the burden of satisfying before BZA may grant a **variance**:

FN5. D.C.Code § 5-424(g)(3) provides:
Where, 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 §§ 5-413 to 5-432 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a **variance** from such strict application so as to relieve such difficulties or hardship, provided such 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....
See also 11 DCMR § 3107.2 (1987).

An applicant must show, first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the **zoning** regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the **variance** will do no harm to the public good or to the zone plan.

*Capitol Hill Restoration Society v. District of Columbia Bd. of **Zoning** Adjustment*, 534 A.2d 939, 941 (D.C.1987) (*Capitol Hill II*).

Petitioners contend that Barnes has failed to satisfy any of these three criteria and that BZA erred in concluding that he had met them. We will address, in turn, each of the three prongs of the test set forth in *Capitol Hill II, supra*, as they were applied by BZA.

[1] Petitioners contend that private encumbrances such as an easement or covenant, especially those in existence before adoption of the zone plan, may not satisfy the uniqueness test because such encumbrances are "commonly found to exist with regard to all types of properties, and in all different **zoning** districts." Petitioners misapprehend the uniqueness criteria. As explained in *Capitol Hill II, supra*, the ***1168** rationale behind the uniqueness test is that difficulties that are common to or affect an

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entire neighborhood, or a substantial portion thereof, are properly addressed by seeking amendment of the regulations themselves from the **Zoning** Commission. *Id.* at 942 (citing *Taylor v. District of Columbia Bd. of* **Zoning** *Adjustment,* 308 A.2d 230, 234 (D.C.1973)); *Myrick v. District of Columbia Bd. of* **Zoning** *Adjustment,* 577 A.2d 757, 760 (D.C.1990). If such problems were addressed through individual **variances,** the effect would be a *de facto* amendment of the **zoning** regulations by BZA because requests by other owners similarly situated would have to be granted as a matter of equal protection under the due process clause. *Capitol Hill II, supra,* 534 A.2d at 942. It is the **Zoning** Commission, however, not BZA that is empowered to make such amendments to the overall zone plan.

[2] The test follows from its rationale. 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 the general conditions in the neighborhood." *Palmer v. Bd. of* **Zoning** *Adjustment,* 287 A.2d 535, 539 (D.C.1972), *quoted in Myrick, supra,* 577 A.2d at 760. There is no requirement that the uniqueness "inheres in the land at issue...." *Capitol Hill II, supra,* 534 A.2d at 942. *See also Monaco v. District of Columbia Bd. of* **Zoning** *Adjustment,* 407 A.2d 1091 (D.C.1979); *Clerics of St. Viator, Inc. v. District of Columbia Bd. of* **Zoning** *Adjustment,* 320 A.2d 291 (D.C.1974). The statute does not preclude the approval of a **variance** where the uniqueness arises from a confluence of factors. The critical point is that the extraordinary or exceptional condition must affect a single property. *Capitol Hill II, supra,* 534 A.2d at 942. In this case the petitioners maintain that the exceptional condition is the general existence of easements. It is not, however, simply the existence of some unspecified easement that makes this property unique. What makes this property different from others is the fact that two specific easements cross the subject property in a particular fashion in relation to the improvement on the property so as to preclude the use of that portion of the property for a parking space. Thus, it is the unique confluence of the particular location of the carriage house in relation to the property boundaries on the north and the easements on the south that makes it necessary for the intervenors to seek the **variances,** as BZA found. This, in effect, makes the topography of the property unique. *Cf. Peterson v. Washington Court Athletic Club,* 28 Ohio App.3d 90, 92, 502 N.E.2d 252, 254 (Ohio Ct.App.1986) (unique topography of the land prevented construction of the pool in any place other than the side yard). While encumbrances by easement are likely to be common on a large number of properties in the neighborhood as well as in other neighborhoods, it seems unlikely that many properties would be affected in this particular way, so that these particular types of **variances** would be required for a large number of properties and, if granted, constitute a *de facto* amendment of the zone plan.

This court has decided a closely-related issue in a manner adverse to petitioners' position in *Monaco v. District of Columbia Board of* **Zoning** *Adjustment, supra,* 407 A.2d 1091. There we held that private restrictive covenants "may be considered in their own right as an extraordinary condition of a particular piece of property...." *Id.* at 1099 (citing *Capitol Hill Restoration Society v.* **Zoning** *Commission,* 380 A.2d 174, 184-185 (D.C.1977) (*Capitol Hill I*)). We see no reason to distinguish between the covenants at issue in *Monaco* and the easements at issue in the case at bar. Consequently, we conclude that the Board's finding of uniqueness based on the existence of the easements across Barnes' "rear" yard is supported by substantial evidence in the record and is neither arbitrary nor capricious.

[3] Petitioners also contend that BZA's authority to grant **variance** relief for exceptional or extraordinary conditions is limited to conditions brought about after adoption of the **zoning** regulations on March 12, 1958. The lot and carriage house were created prior to 1900 whereas the easements ***1169** providing adjacent property owners "free and uninterrupted use, liberty and privilege of and passage in, over and along" the rear of the property were in place before 1920. Petitioners cite *De Azcarate v. District of Columbia Board of* **Zoning** *Adjustment,* 388 A.2d 1233, 1236 (D.C.1978), in support of their position. *De Azcarate,* however, does not purport to limit BZA's authority to grant **variances** to situations in which the exceptional conditions resulted from actions taken after adoption of the **zoning** regulations. Rather, the particular conditions in that case occurred after adoption of the **zoning** regulations. Our language in *De Azcarate, supra,* 388 A.2d at 1236, reveals that the court was simply addressing itself to the facts posed in the case before it. The

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court did not affirmatively hold that conditions existing before adoption of the regulations would not suffice as the basis for a **variance**.

In addition, the express wording of the statute does not limit the circumstances or conditions that can provide a basis for a **variance** to those that came about subsequent to adoption of the **zoning** regulations. The statute merely refers to "other extraordinary or exceptional situation [sic] or condition of a specific piece of property...." D.C.Code § 5-424(g)(3) (1988 Repl.). This is especially significant in view of the statute's specificity as to physical aspects of the property requiring that they exist "at the time of the original adoption of the regulations...." *Id.* Moreover, this court has held that prior knowledge or constructive knowledge or that the difficulty or hardship is self-imposed is not a bar to an area **variance**, the type of **variance** with which we are concerned in the instant case. *See A.L.W. v. District of Columbia Board of Zoning Adjustment*, 338 A.2d 428, 431 (D.C.1975). In *Taylor v. District of Columbia Board of* **Zoning** *Adjustment*, 308 A.2d 230 (D.C.1973), it was held that such knowledge or self-imposition of the hardship would ordinarily bar a use **variance**. *Taylor*, however, has been limited to requests for use **variances**, and has not been applied to applications for area **variances**. *See A.L.W.*, *supra*, 338 A.2d at 431.

To the contrary, consideration of *Capitol Hill II*, *supra*, in conjunction with *Clerics of St. Viator, Inc. v. District of Columbia Board of* **Zoning** *Adjustment*, *supra*, *Taylor*, *supra*, and *De Azcarate*, *supra*, indicates that circumstances occurring before adoption of the **zoning** regulations may satisfy the statute. In *Capitol Hill II* we stated, "the extraordinary or exceptional conditions which justify a finding of uniqueness can be caused by subsequent events...." *Capitol Hill II*, *supra*, 534 A.2d at 942, citing *De Azcarate*, *supra*, 388 A.2d at 1237. The use of the word "can" implies that we viewed *De Azcarate* as extending the circumstances in which BZA could grant a **variance** from only those conditions that predated the promulgation of the 1958 **zoning** regulations to conditions that came into being after their promulgation. Indeed, this is the most reasonable reading of the statute.

[4] Today we make explicit what was implicit in our previous opinions that certain "other extraordinary or exceptional situation [sic] or condition of a specific piece of property" as stated in § 5-424(g)(3) need not have preceded the promulgation of the **zoning** regulation. This is the interpretation adopted by BZA, it seems explicit in the statute, and we can discern no reason to reject this interpretation in the instant case. Consequently, BZA's decision to consider these easements merits our approval.

[5] Turning to "practical difficulties," petitioners argue that the only such difficulties suffered by intervenor in complying with the applicable **zoning** regulations for parking for single-family residences would be the economic cost of having to park within the interior of the residence rather than in a non-conforming space outside in the yard. Upon review of the record we conclude that the findings of BZA are insufficient to support the conclusion that intervenor would suffer "practical difficulties" in complying with the requisite **zoning** regulations pertaining to parking, and that BZA failed to make findings on all material contested issues of fact.

***1170** The seminal case in this jurisdiction on this issue is *Palmer v. Board of* **Zoning** *Adjustment*, *supra*. In *Palmer* this court held that because of the nature of the respective types of **variances** and their effects on the zone plan, the higher "undue hardship" standard applies to requests for use **variances** while the lower "practical difficulty" standard applies to area **variances**. *Id.* at 540-41. *Palmer* did not establish a precise definition of what constitutes "practical difficulties." *Id.* at 542. The court merely set forth a general standard that the applicant must show that strict compliance would be "unnecessarily burdensome," leaving specific questions regarding the nature and extent of burden to a case-by-case analysis. *Id.* The court did state, however, that "it is certain that a **variance** cannot be granted where property conforming to the regulations will produce a reasonable income but, if not put to another use, will yield a greater return." *Id.* (footnote omitted). Although this statement was within the section of the opinion discussing area **variances**, it appears that it refers to the particular use of a property and thus the economic discussion is more appropriately confined to use **variances**. The *Palmer* test for determining "practical difficulties" for area **variances** has been further refined by our subsequent case law. In order to prove that an applicant suffers from "practical difficulties" two elements must be proven:

The applicant must demonstrate that (1)

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"compliance with the area restriction would be unnecessarily burdensome ...", *A.L.W. Inc. v. District of Columbia Board of* **Zoning** *Adjustment*, D.C.App., 338 A.2d 428, 431 (1975); and (2) the practical difficulties are unique to the particular property. *Barbour v. District of Columbia Bd. of* **Zoning** *Adjustment*, 358 A.2d 326, 327 (D.C.1976).

Association for Preservation of 1700 Block of N Street, N.W., and Vicinity v. District of Columbia Bd. of **Zoning** *Adjustment*, 384 A.2d 674, 678 (D.C.1978) (*"1700 Block"*).

Economic use of property has been considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in **variance** cases that have used the *Palmer* analysis. In *Barbour v. District of Columbia Board of* **Zoning** *Adjustment, supra*, the court affirmed BZA's denial of an area **variance** application from certain side yard requirements in order to expand the size of the applicant's kitchen. The fact that alternative methods of expansion without necessitating the **variance** would cost fifty to ninety percent more, or that the other methods would reduce the interior living space or backyard space, was held insufficient to meet the burden imposed by the *Palmer* standard. *Id.* at 327. In *1700 Block, supra*, however, this court upheld BZA's grant of an area **variance** from off- street parking requirements to the YMCA. The difficulties in compliance were that recreational facilities would have to be reduced, including cutting the size of the swimming pool in half. Even if that were done, the cost of the parking spaces would still have been prohibitive. If the normal number of parking spaces were included, the YMCA would not have been able to provide all of its programs. In both *Barbour* and *1700 Block* the practical difficulties were ones of increased costs and reduced enjoyment of the property. Yet it was clear that in the latter the costs were far larger and the restrictions upon use were far greater. In *1700 Block*, moreover, there was no feasible alternative that would have complied with the regulations whereas in *Barbour*, there were different designs that would have been in compliance with the regulations, albeit with a consequent loss in back yard size or interior space in the rest of the house. *1700 Block, supra*, 384 A.2d at 678 n. 13.

Thus, *Barbour* suggests that a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property was not a practical difficulty that merited an area **variance**. *See also Myrick, supra*, 577 A.2d at 761-62 (cost of renovation of interior space insufficient to justify area **variance** where expansion of living space could be achieved in accordance with regulations). On the other hand, *1700 Block* indicates ***1171** that at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure. It is for BZA, in the first instance, to weigh carefully the claims of potential difficulty advanced here in light of *Barbour*, *1700 Block*, and other applicable precedents.

We repeat the observation we made in *Palmer, supra*, 287 A.2d at 542, that the "nature and extent of the burden which will warrant an area **variance** is best left to the facts and circumstances of each particular case." *See Wolf v. District of Columbia Bd. of* **Zoning** *Adjustment*, 397 A.2d 936, 942 (D.C.1979) (this court defers to BZA's determination of the practical difficulties so long as the requisite findings of fact are made).

BZA considers many factors in reaching a decision to grant or deny a **variance**. In *A.L.W., Inc. v. District of Columbia Board of* **Zoning** *Adjustment, supra*, the court considered the issue of whether an owner who knew or should have known of area restrictions should be granted an area **variance**. The court essentially held that prior knowledge or self-imposition of the difficulty did not bar granting an area **variance**. Rather, that fact was but one of many factors that BZA might consider in reaching its decision. *Id.* at 431-32 (citing *Ozolins v. Horn*, 26 A.D.2d 555, 270 N.Y.S.2d 1001, 1002- 03 (1966)). As in *A.L.W.*, BZA may also consider a wide range of factors in determining whether there is an "unnecessary burden" or "practical difficulty." *See Monaco, supra*, 407 A.2d at 1097; *Clerics of St. Viator, supra*, 320 A.2d at 294. Increased expense and inconvenience to applicants for a **variance** are among the proper factors for BZA's consideration. *Barbour, supra*, 358 A.2d at 327.

It is possible that a factor underlying BZA's decision in the instant case was that the requested **variances** were *de minimis* in nature. [FN6] The one foot difference in the size of the parking space is almost negligible, especially where, as here, the Board determined that the grant of the **variance** would not harm the public. The prohibition on

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parking in "front yards" seems more likely to have been aimed at lots such as petitioners' that front directly onto public streets than at lots along an alley, like intervenor's. In this case, because the lot is completely enclosed within other lots and a public area, the distinction between the "front" and "rear" yards appears at least negligible, if not irrelevant.

FN6. This court may not substitute its reasoning for BZA's when that reasoning appears to be lacking in its order. *See, e.g., Levy v. District of Columbia Bd. of* ***Zoning*** *Adjustment, supra,* 570 A.2d at 753 ("A court may not supply a rationale for the agency decision by conjecture from what it did."). "[O]ur function is to 'assure that the agency has given full and reasoned consideration to all material facts and issues. The court can only perform that function when the agency discloses the basis of its order by an articulation with reasonable clarity of its reasons for the decision.' " *Id.* (quoting *Dietrich v. District of Columbia Bd. of* ***Zoning*** *Adjustment,* 293 A.2d 470, 473 (D.C.1972), *aff'd on remand,* 320 A.2d 282 (D.C.1974)). On remand BZA may consider whether the **variance** sought is *de minimis* in nature and whether for that reason a correspondingly lesser burden of proof rests on the intervenor. *See* 3 R.M. Anderson, American Law of **Zoning**, § 2051 at 534 (1986 ed.); *Stewart v.* ***Zoning*** *Hearing Bd. of Radnor Township,* 110 Pa.Cmwlth. 111, 531 A.2d 1180, 1182 (1987) ("infinitesimal deviation [lot a few feet short of one acre] from complete compliance is clearly within the de minimis exception for granting dimensional **variances**.").

In order for BZA to deal with circumstances such as those presented in the application for **variances** in this case, BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the **variance**(s) requested; and 3) the effect the proposed **variance**(s) would have on the overall zone plan. Although BZA's consideration of such factors seems to flow implicitly from its conclusion that a failure to grant the **variances** would result in "practical difficulties" for the intervenor, and it is likely that BZA considered it significant that the specific **variances** requested were slight and would not harm the overall zone plan, we must require more specific findings as to what practical difficulties BZA identified.

The Board also failed to make the requisite findings concerning each contested issue ***1172** of material fact. *See Draude v. District of Columbia Bd. of* ***Zoning*** *Adjustment,* 527 A.2d 1242, 1251 (D.C.1987). BZA failed to address the feasibility of locating the parking space (or part of it) within the structure of the carriage house in order to comply with **zoning** regulations, or whether such an alternative was in the circumstances of the instant case itself a practical difficulty. [FN7] Accordingly, we remand this case to BZA for more thorough findings on "practical difficulties" consistent with the views expressed in this opinion.

FN7. Barnes made only broad conclusory statements to the Board during the hearing to the effect that "the whole reason that I don't want to park inside" is because the property is more valuable to him with outside parking. Barnes provided no documentation to BZA as to what the economic or other loss to him would be if he parked inside rather than out. This court cannot consider for the first time on appeal figures listed in intervenor's brief at 15 n. 4 as to the extent of possible losses due to interior parking in the carriage house. In remanding this case to BZA for further proceedings, BZA may seek additional evidence on this issue to support any findings on practical difficulty.

[6] Turning to the matter of the public good, we note that the basic harm asserted by petitioners is that conversion of the carriage house to a residence with two bedrooms and two full baths is likely to result in the addition of more than one car to the neighborhood. Petitioners contend that this will exacerbate an already serious parking problem in the neighborhood. Petitioners argue that if the only space is on the north side of the carriage house, the difficulty of getting into that space will cause the resident to park on the street or, if not, to congest the alley area unduly and impede the provision of municipal services such as trash collection. Intervenor, on the other hand, contends that it is unlikely that someone with a space right next to the house would park out on the congested street where parking is scarce, especially at night when walking through the alley might be dangerous.

This issue presents a particularly fact-based question more appropriately resolved by BZA. The Board explicitly found that an "occupant of the carriage house is most likely to park in the front yard of the site." There is evidence in the record on both sides of the issue, and the evidence in Barnes' favor is more than just his testimony.

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Petitioners themselves provided substantial evidence in Barnes' favor during cross-examination. Given the deference that we owe BZA, particularly on factual issues, we are satisfied that substantial evidence supports BZA's conclusion that there is no harm to the public good or the zone plan. The Board's conclusion is amply supported by the record. It flows rationally from its findings of fact. Consequently, we conclude that BZA's order finding that no public harm would result from granting the **variances** is supported by substantial evidence in the record and is neither arbitrary nor capricious. [FN8]

FN8. As to petitioners' contention that BZA's ruling in this case conflicts with their prior ruling in Barnes' initial application, case 14491, that the easements are not relevant, the record in that prior case is not before the court and thus we do not consider it here.

In view of the foregoing, this case will be remanded to BZA for further consideration, and the entry of appropriate findings on the issue of practical difficulties.

It is so ordered.

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