GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 17316 of Randle Highlands Manor Limited Partnership, pursuant to 11 DCMR § 3104.1, for a special exception under § 353 and § 410 (new residential development), and pursuant to 11 DCMR § 3103.2, for a variance from the side yard requirements of § 405, to allow the development of ten single-family dwellings on a single subdivided lot in the R-5-A District at premises 2700 R Street, S.E. (Square 5585, Lot 812).[1]

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17316
EXHIBIT NO. 37

HEARING DATE: May 10, 2005
DECISION DATE: June 7, 2005

DECISION AND ORDER

This application was filed with the Board on March 2, 2005 by Randle Highlands Manor, L.P., ("Applicant"), the owner of the property that is the subject of this application ("subject property"). The self-certified application requested a special exception and a variance to permit the Applicant to construct 10 single-family dwellings, including 2 lower-income units, on a single subdivided lot in an R-5-A zone district.

The Board held a hearing on the application on May 10, 2005, and at its June 7, 2005 decision meeting, voted 4-0-1 to grant the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated March 4, 2005, the Office of Zoning ("OZ") gave notice of the filing of the application to the Office of Planning ("OP"), the District Departments of Transportation ("DDOT") and Education, Advisory Neighborhood Commission ("ANC") 7B, the ANC within which the subject property is located, ANC Single Member District member 7B02, and the Council Member for Ward 7. Pursuant to 11 DCMR § 3113.13, OZ published notice of the public hearing in the *District of Columbia Register*, and on March 17, 2005, sent such notice to the Applicant, all property owners within 200 feet of the subject property, and ANC 7B.

[1]The caption has been changed from that advertised to reflect the Applicant's changed plans and changed request for relief.

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Requests for Party Status. ANC 7B was automatically a party to this application and appeared as a party opponent. There were no other requests for party status.

Applicant's Case. At the hearing, the Applicant's representative testified about the project and the community outreach performed by the Applicant. The Applicant's architect, in his testimony, discussed the design of the project and the need for the special exception and variance. A representative of the Anacostia Economic Development Corporation ("AEDC"), the nonprofit corporation with which the Applicant is associated, also testified concerning the requirement to provide lower-income housing imposed on the project.

Government Reports. The Office of Planning filed a report with the Board on May 3, 2005 recommending approval of the special exception and variance relief. OP supports row dwelling development for the subject property and opined that the Applicant's proposal would further a number of major themes of the Comprehensive Plan. In its report, OP analyzed the request for a special exception pursuant to § 353, and a side yard variance pursuant to § 405.2, but pointed out that a special exception as to lot width and lot area, pursuant to § 401.3, was unnecessary because in an R-5-A zone, § 401.3 stipulates that lot width and lot area are to be determined by the Board.

The Department of Housing and Community Development ("DHCD") submitted a memorandum dated May 3, 2005 to OP which OP attached to its report filed with the Board. In its memorandum, DHCD supports the application and notes positively, among other things, that, even the narrowest unit width of 16 feet, is "a standard width for townhouses."

DHCD also sent a letter dated June 2, 2005, to the Anacostia Economic Development Corporation, which the Applicant submitted to the Board. The letter explains that DHCD had loaned money to the AEDC to construct an assisted living facility on the subject property. However, in BZA Case 16896, the Board denied a special exception and variance application brought by AEDC and the Applicant to permit the construction of the assisted living facility. The letter states that DHCD will forgive the outstanding loan amount if at least two of the row dwellings to be constructed pursuant to this application are reserved for low to moderate income first-time home purchasers in the District of Columbia.

The District Department of Transportation submitted a report to the Board dated June 3, 2005 and expressed no objection to the final design of the Applicant's project.

ANC Report. On April 29, 2005, ANC 7B filed a preliminary report with the Board which did not take a position on the application. On June 1, 2005, however, the ANC filed its second report with the Board, which stated that at a properly noticed regular monthly meeting, with a quorum present, the ANC voted to recommend that the Board

reject the application. In an attachment, the ANC set forth its reasoning. The ANC questioned the validity of two of the Applicant's contentions: that 10 is the minimum number of homes that is economically feasible for this property and that the Applicant has covenanted to provide 2 homes for lower-income families (as opposed to 1).

FINDINGS OF FACT

Background

1. The subject property is located in an R-5-A zone district, at 2700 R Street, S.E. (Square 5585, Lot 812.)

2. The subject property is a rectangle encompassing approximately one-third of an acre, bordered to the west by R Street, S.E., and to the south by 27th Street, S.E. The property is vacant, but was previously developed with a 3-story apartment building, which was razed at some time in the past.

3. Just to the east of the property is a public alley and immediately to the north of the property is a large open parking area serving an apartment house located further to the north.

4. Between 1992 and 1998, four or five nonprofit organizations considered purchasing and residentially developing the subject property, but each one determined that the property was not economically viable to develop because the cost of construction, and therefore the cost of each unit, could not be afforded by people willing to live at this location.

5. In or around September, 1998, the AEDC purchased the subject property from the DHCD's Homestead Program for $6,750.00.

6. AEDC, a non-profit corporation, partnered with the Applicant to develop the subject property.

7. One of the conditions of sale was that the Applicant had to sell "each unit to a first time homebuyer who will live in it for at least five years." Exhibit No. 23, Attachment B.

8. In 2003, in BZA Case No. 16896, this Board denied the Applicant's earlier application for a special exception and variance that would have enabled it to construct a multi-story assisted living facility on the subject property.

9. During the proceedings in Case No. 16896, members of the community expressed concern that the proposed multi-story facility was too dense a use for the subject property and that it would result in a negative impact on traffic.

10. After being denied the relief requested in Case No. 16896, the Applicant changed its proposal for the subject property to the current project of construction of single-family row dwellings.

11. In light of the changed nature of the proposal, the Applicant and the District of Columbia Housing Finance Agency ("DCHFA"), which provided the loan for the purchase of the subject property, entered into a Declaration of Covenants on September 3, 2004, whereby the Applicant agreed to set aside one residential unit for a family of very low income for a period of 10 years. *See,* Exhibit No. 32, Third Attachment.

12. DHCD has represented that, if permitted by law, it will forgive the loan for the property upon the recordation of a covenant running with the land by the Anacostia Economic Development Corporation reserving two or more of the ten town homes for low to moderate income first- time buyers. *See,* Exhibit No. 34.

13. Applicant represented to the Board that it intended to enter into this covenant and based its economic analysis on providing two or more of the ten town homes for low to moderate income first-time buyers. *See,* Exhibit No. 34.

The Proposed Project

14. The Applicant proposes to construct 10 residential units on the subject property, 8 of which will be attached in a row along 27th Street, S.E. The other 2 units will front on R Street, S.E., and will be attached to each other, but not to the row of 8 units.

15. Six of the units are matter of right row dwellings because they provide no side yards. 11 DCMR § 199.1, definition of "Dwelling, Row".

16. Four of the units have party walls on one side and side yards on the other. As such the units meet the definition of a one-family semi-detached dwelling. 11 DCMR § 199.1, definition of "Dwelling, One-Family, Semi-Detached".

17. One-Family Semi-Detached Dwellings in an R-5-A district are subject to the 8 foot side yard requirements for R-2 zones. 11 DCMR § 405.2 & 405.9.

18. The four units each have 0.2 foot side yards.

19. The subject property has a 15% grade change, with the land sloping up toward the east and southeast, with a rapidly increasing gradient, perhaps up to 45%, closest to the alley bordering the property to the east.

20. The sloping nature of the property increases site development costs, which must be distributed among the units. It also precludes rear vehicular access from the alley to the 8 units situated along 27th Street, necessitating that the Applicant provide access via a drive aisle from R Street.

21. The grade change will also necessitate the construction of a retaining wall between the rear of units 1 through 8 (along 27th Street) and the side of unit 9 (units 9 and 10 face R Street). The retaining wall will start at R Street and bisect the property, reaching a maximum height of approximately 10 feet at its northern end.

22. Each of the residential units will be approximately 20 feet in height, lower than the permitted 40-foot height, helping to ensure sufficient light, air and privacy to adjacent lots. *See,* 11 DCMR § 400.1.

23. Each unit will be between 33 and 35 feet long and 16 or 17 feet in width, except unit 1, the northernmost unit facing 27th Street, which will be just over 18 feet in width.[2]

24. The lot areas and lot widths chosen by the Applicant are in keeping with the character of the neighborhood, which includes lot areas and lot widths both larger and smaller than those created by the Applicant.

25. Each unit will have the required rear yard with a rear parking space. The parking spaces for the 8 units facing 27th Street will be accessible from the 20-foot-wide rear drive aisle which will have an access easement imposed on it. The drive aisle runs between the rear yards of units 1 through 8 and the side of unit 9 and its rear yard. Access to the rear parking spaces of units 9 and 10 will be provided from the public alley immediately to the east of the subject property.

26. Providing parking in the rear in lieu of street-facing garages permits the Applicant to make only one curb cut – for the drive aisle – instead of 8 separate curb cuts for eight individual driveways.

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[2]Because the subject property is in an R-5-A zone district, the minimum lot area and minimum lot width for each unit is "as prescribed by the Board pursuant to § 3104." 11 DCMR § 401.3.

27. All of the units will be the same, with identical amenities, and will therefore cost the same amount to construct, but one unit will be sold to households earning approximately 50% of the average median income, and one will be sold for to households earning approximately 80% of the average median income. One additional unit may also be sold for a discounted price. (Transcript at 158)

28. With the 2 lower-priced units, and 8 units at "market price," gross sales receipts will be $2,537,000, with costs to build of $2,521,340, leaving a reserve of $15,660. (*See* Exhibit 31)

29. If the required side yards were included in the project, a minimum of 2 units would be lost, rendering the project economically infeasible because the estimated gross sales receipts would be $2,019,000, with cost to build of $2,355,000, resulting in a loss of $336,000. (*See* Exhibit 31)

30. The subject property cannot accommodate the required side yards and still provide sufficient room for 10 units, the minimum number of units necessary to make this project economically viable.

31. Two policies of the District of Columbia, which are also specific Ward 7 objectives of the Comprehensive Plan, are to provide affordable housing, particularly for low and moderate income households, and to encourage home ownership.

CONCLUSIONS OF LAW

The Special Exception

The Board is authorized to grant a special exception where, in its judgment, the special exception 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." 11 DCMR § 3104.1. Certain special exceptions must also meet the conditions enumerated in the particular section(s) pertaining to them. In this case, the Applicant had to meet the requirements of §§ 3104, 353, and 410.12 of the Zoning Regulations.

Section 353 of the Zoning Regulations states that, in R-5-A zone districts, all new residential developments, except those comprising all one-family detached and semi-detached dwellings, shall be reviewed by the Board as a special exception in accordance with § 3104 and § 410. Because the Applicant's development includes row dwellings, it falls within the parameters of § 353. Section 353, however, only requires the Board to refer the application to other appropriate agencies, and states what types of plans the

Applicant must submit to the Board. The substantive requirements of the special exception are set forth in § 410, and specifically 410.1 through 410.11. The *raison d'etre* of § 410 is to permit more than one principal residential building on a single record lot,[3] as is the desire of the Applicant in this case.

The Applicant, however, cannot meet the requirement of § 410.8 that no more than four single-family dwellings shall face any street that abuts the lot. The Applicant, therefore, requests relief pursuant to § 410.12, which permits the special exception to be granted to an applicant which cannot meet all the requirements set forth in §§ 410.1 through 410.11, but can meet the three specific conditions enumerated in § 410.12.

The three conditions enumerated in § 410.12 are compliance with both § 410.4 and 410.5, and no adverse effect on the present character or future development of the neighborhood. Section 410.4 prohibits a rear or service entrance from abutting the front of any dwelling, and § 410.5 prohibits exterior stairways above the level of the main floor. The Applicant's development complies with both of these provisions. Lastly, section 410.12 requires that the group of buildings "shall not adversely affect the present character or future development of the neighborhood." This language is similar to that of the general special exception section, § 3104, which states that the special exception shall not tend to affect adversely the use of neighboring property, and must be in harmony with the general purpose and intent of the Zoning Regulations and Maps. The Board will, therefore, analyze these two sections together.

The Applicant has designed its development to be in harmony with the neighborhood. Each dwelling will be only 2 stories, and approximately 20 feet high. The width of each unit is comparable to row dwellings in the area, and has not been made artificially narrow in order to squeeze in more units. There is significant open space around each of the units so light, air, and privacy are not compromised All the units have street frontage with small open areas for planting in front of each dwelling and open areas in the rear of each dwelling, accommodating parking. The two units facing R Street are approximately 40 feet from the rear of the row of 8 units facing 27th Street and are bordered on the other side by an alley, providing more open space. The fronts of the dwellings along 27th Street have been staggered to provide a more interesting streetscape.

The development is not overly-dense for the zone or the neighborhood and is less dense than other matter-of-right uses, such as a multiple dwelling. *See,* 11 DCMR § 350.4(c). Further, the development will have little or no negative impact on traffic or parking. Therefore, the Board concludes that the Applicant has met its burden of proof that the development will not adversely affect the use of neighboring property, or the present character or future development of the neighborhood.

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[3]Although the tax lot number of the subject property is given as 812, there is no indication in the record of the case of the record lot number.

The Variance

The Board is authorized to grant a variance from the strict application of the Zoning Regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the 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...." D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. Relief can be granted only "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." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the greater showing of "undue hardship," which applies in use variance cases. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D0.C. 1972). The Applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicant, and that the granting of the variance would not impair the public good or the intent and integrity of the zone plan and regulations.

In determining uniqueness, the Board is directed to look at the property, including the physical land and the structures thereon, but it can also consider "events extraneous to the land." *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978); *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987). The District of Columbia Court of Appeals has opined that the Board must be able to consider such events in order "to weigh more fully the equities in an individual case." *National Black Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687, 690 (D.C. 1984). *See also, Downtown Cluster of Congregations v. Board of Zoning Adjustment,* 675 A.2d 484 (D.C. 1996) (market conditions); *French v. Board of Zoning Adjustment,* 658 A.2d 1023 (D.C. 1995) (previous chancery use); *Tyler v. Board of Zoning Adjustment,* 606 A.2d 1362 (D.C. 1992) (economic factors); *Gilmartin v. Board of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990) (easement); *United Unions v. Board of Zoning Adjustment,* 554 A.2d 313, 317-318 (D.C. 1989) (historic preservation requirements); *National Black Child Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687 (D.C. 1984) (changes in zoning regulations); *Capitol Hill Restoration Society v. Zoning Commission,* 380 A.2d 174 (D.C. 1977) (private restrictive covenant); *Clerics of St. Viator v. Board of Zoning Adjustment,* 320 A.2d 291 (D.C. 1974) (societal changes).

The category of "events extraneous to the land" has been broadly interpreted by the Court of Appeals. Under this category fall events which have no immediate relationship to the property, such as the "extraordinary drop in enrollment of seminarians" found to be the uniqueness leading to undue hardship in *Clerics of St. Viator, supra.* Also under the

category of "events extraneous to the land" fall events which have a more direct connection to the property in question, such as an agreement or covenant placing restrictions on the use of the land, for example, the easement in *Gilmartin, supra.*

The Court of Appeals first recognized restrictive covenants as potentially important considerations in zoning decisions in *Capitol Hill Restoration Society v. Zoning Commission*, 380 A.2d 174 (D.C. 1977), where it stated that "[t]he existence of lawful private restrictions on land use is an actuality properly to be considered in zoning decisions."[4] *Id.,* at 185. Two years later, the Court of Appeals decided *Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091 (D.C. 1979). The BZA order appealed to the Court in *Monaco* found, as one of the factors making the property "unique" under the first prong of the variance test, an agreement between the House Office Building Commission and Capitol Hill Associates, Inc., which restricted the building height and required the Architect of the Capitol to approve the exterior building design. The Board stated, as a conclusion of law, that such an agreement "uniquely affected" the property in question. The Court agreed with the Board's finding and conclusion, citing *Capitol Hill Restoration Society v. Zoning Commission* and its holding that private restrictive covenants may properly be considered in zoning decisions. But the Court in *Monaco* further stated:

> *[t]he restrictions contained there [i.e., in the restrictive covenant] also may be considered in their own right as an extraordinary condition of a particular piece of property, since they effectively restrict design, height, and use* to that which the BZA considered compatible with surrounding residential and governmental properties. (Emphasis added.)

Id., at 1099. *Monaco* therefore stands for the proposition that private restrictive covenants may be considered "in their own right" in variance cases, and specifically, that such covenants may be considered as evidence of an extraordinary or exceptional situation or condition under the first prong of the variance test.

In 1990, the Court decided *Gilmartin v. Board of Zoning Adjustment,* 579 A.2d 1164 (D.C. 1990), and restated its position that a private restrictive covenant may be considered as an extraordinary condition of a particular piece of property. In *Gilmartin,* the private agreement was an easement which affected the use of the property. The Court specifically stated that there was no reason to distinguish between the covenants in *Monaco* and the easement in *Gilmartin.* They are both private agreements restricting the design or use of the land to which they apply. The Court also pointed out in *Gilmartin* that the fact that encumbrances by easement may be common on other properties in the

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[4]Part of the holding in *Capitol Hill Restoration Society v. Zoning Commission,* pertaining to an interpretation of the application of the Comprehensive Plan and the role of the National Capital Planning Commission, was later overruled in *Citizen's Ass'n. of Georgetown v. Zoning Commission,* 392 A.2d 1029 (D.C. 1978). The holding that private agreements should be considered in zoning decisions was, however, not even questioned in the later case.

neighborhood and, for that matter, in other neighborhoods, does not negate their consideration as a uniqueness factor for any particular property. The effect of the easement on the property at issue and whether it leads to a practical difficulty under the variance test are what count in determining whether any particular easement or other private agreement constitutes a factor in uniqueness. In *Gilmartin* the Court found that the particular location of a carriage house in relation to the property boundaries and the easements created a unique confluence of factors that made it necessary for the intervenors to seek the variances in order to convert their two-story carriage house into a single-family residence.

As in *Gilmartin*, there is in this case a confluence of factors between the topography of the land and restrictive agreements. In this case the size and contour of land in combination with restrictions placed upon its development by the Anacostia Economic Development Corporation's purchase agreement under the District of Columbia Homestead Housing Preservation Program, and the subsequent covenants with the Department of Housing and Community Development (DHCD) create a unique situation not shared by others in the neighborhood or by others who may also have a covenant with DHCD. That unique situation gives rise to Applicant's practical difficulty of being unable to develop the property in accordance with its obligations under the program restrictions placed upon it in conjunction with the purchase of the property and the subsequent covenants, without the requested variances.

The District of Columbia sold the property to the Anacostia Economic Development Corporation under the District of Columbia Homestead Housing Preservation Program subject to the condition that all units be sold to first time buyers who will live in them for five years. While the term "affordable housing" may be subject to various definitions and levels of affordability, it is clear in this case that this property is being developed by a non-profit organization not for profit, but to provide housing to first time buyers at various affordable levels. However, the Applicant cannot provide the affordable housing at any cost –i.e. without covering construction costs. The Board credits the Applicant's claim that it must construct a minimum of 10 units in order to make the project viable. The subject property has a slope which adds to overall site preparation and construction costs and causes the need for a retaining wall. These added costs complicate the economics of the project. In addition, while the topography of the property would allow 8 units without zoning relief, i.e. with the required side yards, the 8 units marketed in accordance with the restrictions and obligations of the program and the covenants on the land would not net a return to cover the costs. In order to fit 10 units on the lot in a viable manner, consistent with all zoning requirements other than that for a side yard, with street frontage, sufficient open space, and parking, the Applicant needs zoning relief from the side yard requirements.

The practical difficulty arising out of the confluence of the topography of the site and Applicant's agreement to provide affordable housing is in part an economic one. But that

is not a reason for the Board to ignore it. In fact, in the past, the Board has been faulted by the Court of Appeals for refusing to consider an economic justification for area variances. In *Tyler v. Board of Zoning Adjustment,* 606 A.2d 1362 (D.C. 1992), the Board heard an application for area variances in which the applicant claimed that the uniqueness of having to "restore, preserve, and design around historic structures" led to an economic practical difficulty. The applicant in *Tyler* stated that the floor area ratio and height variances requested were necessary, in essence, to make the project economically feasible. The Board refused to base its decision on economic factors, but granted the variances on other grounds. The Court remanded, looking for a further exposition of these grounds or a consideration of the evidence of economic feasibility and explicit findings relevant to it.

Significantly, the Court in *Tyler* went out of its way to correct what it called the Board's "misunderstanding of [its] precedents" concerning the consideration of economic evidence of hardship or practical difficulty. *Id.,* at 1366. The Court categorically stated that it "had never held that proof of economic burden is irrelevant to the decision whether to grant an area variance," only that financial considerations alone are insufficient. The economic burden must be related to a unique condition of the property. *See, Gilmartin, supra* and *Monaco, supra.*

It could be argued that the Applicant has imposed a difficulty on itself by voluntarily entering into agreements with DHCD and DCHFA to provide the affordable housing units and that it should not now be heard to complain about the effect of those agreements on the project. While the Court of Appeals has in some instances held that a variance cannot be granted where the affirmative action of the Applicant makes the property non-conforming, in those instances the Applicants were solely responsible for changing their property and the changes resulted in substantial detriment to the public and impairment of the intent and integrity of the zone plan. *See, e.g. Carliner v. Board of Zoning Adjustment*, 412 A.2d 52 (D.C. 1980) (Court would not disturb Board's determination that petitioner's subdivision of property into three lots, leaving one useless without variance relief, was of the petitioner's making and justified denial of the variance.) and *Taylor v. Board of Zoning Adjustment,* 308 A.2d 230 (D.C. 1973) (Applicant subdivided lot in manner that could not be improved in conformance with regulations and variance would have had the effect of rezoning the property.) The Court of Appeals has even questioned the validity of the application of the self-created hardship doctrine to an area variance in general and has therefore applied it narrowly. *See, De Azcarate v. Board of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978) ("the doctrine of self-created hardship, ***whatever its validity in this jurisdiction"*** held not applicable where intervenor's subdivision of the property resulted in a lot that could not be improved without variance relief due in part to actions of zoning officials.) and *Russell v Board of Zoning Adjustment,* 402 A.2d at 1236, n.7 (DC 1979); "This court has held that the self-created hardship doctrine does not apply to an application for an area variance", *citing, inter alia A.L.W., Inc. v Board of Zoning Adjustment,* 338 A.2d 428, 431-32 (D.C. 1975.) In

Russell, the Court noted that the general rule in this jurisdiction is that self-imposed difficulty or hardship "is not a bar to an area variance." *Gilmartin, supra,* at 1169, and cases cited therein. Rather, the self-imposed nature of a difficulty is but one factor to be considered by the Board. *Tyler, supra* at 1368, n.9; *Block v Board of Zoning Adjustment,* 384 A2d at 678 (DC 1978), and 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." *Palmer v. D.C. Board of Zoning Adjustment,* 287 A.2d 535, 542 (D.C. 1972).

In this case, the practical difficulty is caused by a confluence of the topographical features of the property and the agreements with the District of Columbia government, not solely by the actions of the Applicant. Further, the area variances are not sought to ensure any profit, but rather to enable the development of affordable housing at a site designated by the District of Columbia government for that purpose.

The last prong of the variance test requires that granting the application would not be detrimental to the public good and would not impair the intent, purpose and integrity of the Zoning Regulations and Map. As alluded to above in the discussion of special exception relief, the Board concludes that the Applicant's project will not be detrimental to the public good and will not impair the Zoning Regulations and Map. The dwellings will not be too high, or too narrow, and therefore, the density of the project is appropriate for the neighborhood. The low height and the open space provided around the units allow for the flow of light and air and for the protection of privacy. The provision of the required parking, and specifically, the provision of parking in the rear, helps the development fit into the neighborhood with only a minimal, if any, impact on traffic and parking.

Finally, granting the variance will not only have no adverse impact, but it will also further the public good. It will provide affordable housing in furtherance of specific policies of the District of Columbia set forth in the Comprehensive Plan, and specifically the Ward 7 objectives stated therein – to provide affordable housing, particularly for low to moderate income households, and to encourage home ownership. "[I]mportant public interest concerns as well as potential hardship to the public are properly considered as factors in BZA determinations of variance relief." *Williams v Board of Zoning Adjustment, 535 A.2*d *910, 911* fn. *2 (D.C. 1988)*, citing *National Black Child Development Institute, Inc v. Board of Zoning Adjustment*, 483 A2d. 687, 690 (D.C. 1984), and *Monaco, supra* at 1098.

Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues

and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

The Office of Planning recommended granting the special exception and variance relief requested, and the Board agrees with this recommendation. ANC 7B, however, recommended against granting the application. The ANC explained that it was not persuaded by the Applicant's contention that it was economically infeasible to construct fewer than 10 units, but the ANC based its explanation on the earlier covenant requiring one lower-income unit. The ANC apparently did not credit the Applicant's statement at the hearing that it had to provide 2 such units. However, this fact was substantiated to the Board's satisfaction by the letter from DHCD filed in the record by the Applicant after the hearing. *See,* Exhibit No. 34. Accordingly, the Board does not find the ANC recommendation persuasive, particularly because it was based on inaccurate or dated information.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for a special exception pursuant to §353 and § 410 (new residential developments) and for a variance from the side yard requirements of § 405. It is therefore **ORDERED** that the application is hereby **GRANTED.**

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller and John A. Mann, II, to grant; Kevin Hildebrand, sitting Zoning Commission member, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this order granting this application.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 1 2 2005

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

LM

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPLICATION NO. 17316

As Director of the Office of Zoning, I hereby certify and attest that on DEC 1 2 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR