

Arent Fox

BOARD OF ZONING
2010 MAY 25 PM 4:22

May 25, 2010

BY HAND

Meredith Moldenhauer, Chair
District of Columbia Board of Zoning Adjustment
441 Fourth Street N.W. Suite 210 South
Washington DC 20001

Kinley R. Bray

Attorney
202.715.8572 DIRECT
202.857.6395 FAX
bray.kinley@arentfox.com

Reference Number
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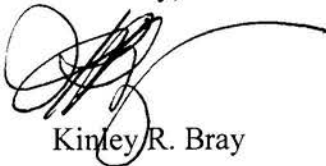
Re: Application of N Street Follies, Ltd.
BZA Case No. 17337-A
Party Opponent Tabard Inn's Proposed Findings of Fact and Conclusions of Law

Dear Chairperson Moldenhauer and Members of the Board:

Enclosed for filing please find the Party Opponent Tabard Inn's Proposed Findings of Fact and Conclusions of Law in the above-referenced case.

We urge the Board to deny the relief requested at its decision meeting on June 8, 2010.

Sincerely,



Kinley R. Bray

Enclosure

Cc: Jeremiah Cohen (w/enclosure, via electronic mail)
Emily Hotaling Eig (w/enclosure, via electronic mail)
Robert Schwartz (w/enclosure, via electronic mail)
David Nelson (w/enclosure, via electronic mail)
Ellen McCarthy (w/enclosure, via electronic mail)
Arlova Jackson, OP (w/enclosure, via U.S. Mail)
Joel Lawson, OP (w/enclosure, via U.S. Mail)
Jennifer Steingasser, OP (w/enclosure, via U.S. Mail)
George Keys, Jr. (w/enclosure, via U.S. Mail)
Advisory Neighborhood Commission 2B (w/enclosure, via U.S. Mail)

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17337
EXHIBIT NO. 127

GENBUS/742298.1

Arent Fox

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 2010, a copy of the foregoing was mailed, first class, postage pre-paid to the following persons:

George Keys, Jr.
Jordan & Keys, PLLC
1400 16th Street NW, Suite 710
Washington D.C. 20036-2217

Jennifer Steingasser, Joel Lawson & Arlova Jackson
Office of Planning
1100 4th Street S.W. Suite 650-E
Washington D.C. 20024


Kinley R. Bray

PARTY OPPONENT TABARD INN'S PROPOSED ORDER

Application No. 17337-A of N Street Follies, Ltd., pursuant to 11 DCMR §§ 3104.1 and 3103.2 for special exceptions to allow a hotel under section 512, for a partial waiver of the rear yard requirements under subsection 534.6, and to allow multiple roof structures and roof structures not meeting the normal setback requirements of subsection 530.4 under section 411, and for variances from the height requirements under section 530, the floor area requirements under section 531, and the court requirements under section 536, to allow the construction of an addition to an existing building to be used as a hotel in the DC/SP-1 Zone District.

Note: The Applicant amended the application during the course of the Board's consideration of this case on remand from the Court of Appeals and filed a revised self-certification form purporting to delete all need for variance relief. See Exhibit 83.

HEARING DATES: November 1, 2005; January 24, 2006; February 28, 2006; June 27, 2006; April 28, 2009; June 2, 2009; October 6, 2009; December 8, 2009; March 16, 2010; and March 23, 2010

DECISION DATE: June 8, 2010

ORDER ON REMAND

This application was originally submitted on March 31, 2005 by N Street Follies, Ltd. ("Applicant"), the owner of the property that is the subject of the application. The Applicant sought special exception and variance relief from the Board of Zoning Adjustment ("Board" or "BZA") to construct and establish a hotel at 1743-1755 N Street, N.W., Square 158, Lots 69, 835, and 836. On June 27, 2006, the Board of Zoning Adjustment ("Board" or "BZA") dismissed by a vote of 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II, and Carol Mitten to grant the motion to dismiss; Curtis L. Etherly, Jr., voting to deny the motion to dismiss). The Order dismissing the application, BZA Order No. 17337, was issued on April 2, 2007.

On May 8, 2007, the Applicant brought a Petition for Review to the Court of Appeals seeking reversal of the Board's decision to dismiss the application as moot. On June 30, 2008, the Court of Appeals reversed the decision of the Board and remanded the case "for further proceedings not inconsistent with this opinion." *N Street Follies v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584 (D.C. 2008).

The Board took up the application on remand at a hearing on April 28, 2009 and in subsequent hearings on June 2, 2009; October 6, 2009; December 8, 2009; March 16, 2010; and March 23, 2010. For the reasons discussed herein, the Board denies the relief requested.

PRELIMINARY MATTERS:

Applicant. The Applicant was initially represented by Norman Glasgow, Jr., Holland & Knight, LLP. (See Exhibit 8, Authorization pursuant to 11 DCMR § 3106.1). Holland & Knight withdrew as counsel, and Jordan & Keys, George Keys, Jr., Esq., noted its appearance on or about September 1, 2006 (See Exhibits 58 and 63).

Self-Certification. The zoning relief requested in this case was self-certified pursuant to 11 DCMR § 3113.2 (Exhibits 7 and 83).

Notice of Application Public Hearing: Pursuant to 11 DCMR 3113.3, the Office of Zoning ("OZ"), by memoranda dated February 12, 2009, notified Advisory Neighborhood Commission 2B (the "ANC") of the application (Exhibit 65). Notice of the hearing was published in the *D.C. Register* on _____, 2009.

Parties in Opposition. The Tabard Corporation, which operates the Tabard Inn ("Tabard"), located at 1739 N Street, N.W. was granted party status in opposition to the application. William A. Green, Director of Operations for Science Service, Inc., located at 1719 N Street, N.W., was also granted party status to represent his company and other companies in the area, including Johns Hopkins University, Pen Arts Ladies, United Auto Workers, and Middle East Institute. Neither Mr. Green nor any of the other organizations participated as parties in opposition to the application on remand.

Government Reports:

Office of Planning Reports. The District of Columbia Office of Planning ("OP"), in a report dated October 18, 2005, recommended denial of the initial application (Exhibit 35). OP filed subsequent reports on the application, as amended, on January 13, 2006 and on September 28, 2009, recommending approval of the application (Exhibits 35 and 84). OP found that the height and scale of the existing building would not be inconsistent with existing buildings on the block because the proposed additions would not be visible from N Street and the overall height and bulk standards of the SP-1 Zone District are met. OP determined that the presence of hotel uses is anticipated in the SP-1 Zone because hotels are identified as a permitted use via special exception, and that the requested special exception is in harmony with the purposes and intent of the Zoning Regulations. Finally, the Office of Planning determined that requested special exception would not have an adverse affect on neighboring property. (Exhibit 84).

Department of Transportation Reports. The District of Columbia Department of Transportation ("DDOT"), in a memorandum dated February 28, 2006, recommended that the application be approved with 31 parking spaces for a 98-room hotel, rather than the 98 parking spaces requested by the Applicant (Exhibit 54). In a subsequent report dated September 29, 2009, DDOT recommended denial of the application as proposed, finding that the volume of vehicles entering and existing the alley on 17th Street, N.W. would cause unsafe conditions for pedestrians, cyclists, and vehicle operators, and recommending that the Applicant significantly reduce the number of parking spaces proposed. (Exhibit 86).

DC Fire & Emergency Medical Services Report. The District of Columbia Department of Fire & Emergency Medical Services ("DC FEMS"), in a report dated November 14, 2009 (Exhibit 104), expressed concern regarding the single point of access to the rear of the proposed structure through the narrow public alley in Square 158.

Ward 2 Councilmember Jack Evans. On May 19, 2010, Ward 2 Councilmember Jack Evans filed a letter in opposition to the application. (Exhibit 125).

ANC Report. The subject site is located within the area served by ANC 2B, which is automatically a party to this application. In a letter dated October 11, 2005, ANC 2B indicated that at its regular meeting on September 14, 2005, the ANC considered the application and, with nine of nine Commissioners in attendance, the Commission voted 9-0 to oppose the application. The ANC based this recommendation on, among other things, concerns about the bulk, height, and density of the proposal. (Exhibit 30).

In a subsequent letter dated September 15, 2009, the ANC indicated that, at a regularly scheduled meeting on September 9, 2009, with a quorum present, it voted 9-0 to object to the application and request that the BZA require the applicant to revise its design, as provided in Section 512.4 of the Zoning Regulations, to ensure that the height, bulk, and design of the proposed hotel is in harmony with existing uses and structures on neighboring property, giving "great weight" to the provisions of Chapter 1501.4(e) of the Zoning Regulations. The ANC designated Commissioner Victor Wexler to represent the ANC at the hearing. (Exhibit 90).

Michael Silverstein, Chair of ANC 2B, testified on the record during the proceedings and also submitted his testimony in writing.

Other Persons/Entities in Support/Opposition. The Board received numerous submissions in opposition, including several letters from area residents; United Auto Workers (1757 N Street, N.W.)(Exhibit 38); Middle East Institute (1761 N Street, N.W.)(Exhibits 42 and 75); the Residential Action Coalition (Exhibit 53); the Palladium Condominium Association (1325 18th Street, N.W.)(Exhibit 88); and Janis, Schuelke & Wechlser (1728 Massachusetts Ave., N.W.)(Exhibit 105). Katherine A. Eckles testified on behalf of the Residential Action Coalition in opposition to the application at the hearing on October 6, 2009. Jim McGrath testified in opposition to the application on behalf of the D.C. Tenants Action Coalition (TENAC) at the October 6, 2009 hearing. Robert Sutton testified in opposition to the application on behalf of Janis, Schuelke & Wechsler, owners of 1728 Massachusetts Avenue, N.W. at the March 16, 2010 public hearing. Anne Sellin also testified in opposition to the application at the March 16, 2010 hearing on behalf of the League of American Pen Women, owners of 1300 17th Street, N.W.

Rick Busch testified on behalf of the Dupont Circle Conservancy in support of the application at the October 6, 2009 hearing. There were no other persons or organization in support of the proposed application.

The Applicant's Case. The Applicant filed numerous submissions, including the initial application with plans, a pre-hearing statement, a revised pre-hearing statement and supplement, and a traffic impact analysis.

Morton Bender, managing partner of N Street Follies, Ltd., testified for the Applicant, as well as several expert witnesses: Stan Andrulis, Project Architect; Anton Janezich, Project Architect; and Osborne George, Transportation Engineer.

The Opposition's Case. Party Opponent Tabard Inn filed numerous submissions, including Pre-Hearing Statements and supplements, reports prepared by a traffic consultant, photographs, and a computerized three-dimensional model of the proposed development demonstrating impacts on the surrounding neighborhood. The Party Opponent Tabard Inn also presented testimony from several expert witnesses: Robert Schwartz, AIA, expert in architecture; Emily Hotaling Eig, Architectural Historian, expert in Historic Preservation; David Nelson, P.E., expert in Transportation Engineering; and Ellen McCarthy, expert in Planning and Zoning.

The Proceedings. The Board held public hearings on ten days over the course of five years, including:

November 1, 2005: The Board established the parties to the proceeding and continued the hearing, at the request of the Applicant, to January 24, 2006. The Applicant stated that it wanted more time to meet with the staff of the Historic Preservation Review Board ("HPRB") to resolve concerns over the extent of demolition proposed, as the Applicant was seeking the approval of both the HPRB and the BZA for its proposed project at the same time. Board Members and the Office of Planning expressed considerable concern on the record at the hearing that the application as presented did not adequately reflect what would ultimately be approved by the HPRB, and that substantial changes were needed to garner the support of HPRB (required for a building permit) and the community at large. Commissioner Mitten suggested that the Applicant withdraw the application, without prejudice, and come back to the BZA when the Applicant was ready to proceed. The Applicant argued that withdrawal would require forfeiting the application fee of nearly \$14,000, and that the concerns of HPO Staff could be resolved in advance of the next hearing. The Board granted the Applicant's request for postponement over the objection of the Office of Planning and the Party Opponent Tabard Inn.

January 24, 2006: The Applicant completed its case presentation. A report was given by Travis Parker on behalf of the Office of Planning. The Party Opponents and the ANC were allowed to cross-examine the witnesses. Due to the lateness of the hour, the case was continued to February 28, 2006 before either the Party Opponents or the ANC could present their cases in opposition to the application.

February 28, 2006: The Board again continued the hearing until June 27, 2006, at the request of the Applicant. The Applicant's Request for Postponement was based on the denial of the Applicant's Concept Plan before the HPRB earlier in February, 2006. The Applicant indicated that due to HPRB's action, it would need time to revise its plans to conform to the requirements of the Historic Preservation Law.

June 27, 2006: The Applicant did not submit revised plans prior to the June 27, 2006 hearing date. Prior to resuming the hearing, Party Opponent Tabard Inn made an oral motion to dismiss the application, arguing that it was futile for the Board to consider a zoning request based upon plans that the HPRB considered unacceptable because, *inter alia*, the property is located in a historic district, and no building permit may be issued unless the HPRB recommends approval or the Mayor finds, after a hearing, that the issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner. D.C. Official Code §§ 6-1104 and 6-1105. The Board agreed, and dismissed the application.

April 28, 2009: Despite having filed a motion for continuance on February 12, 2009, the Applicant filed a Pre-Hearing Statement with new materials with OZ on April 14, 2009, purporting to amend the application (Exhibit 70). On April 24, 2009, Party Opponent Tabard Inn filed a Motion to Strike the Applicant's April 14, 2009 Supplemental Materials, arguing that the record in the case had been closed at the conclusion of the case in June, 2006 (Exhibit 74). The Board granted the Applicant's Request for Postponement, set a decision date of June 2, 2009 on Tabard's Motion to Strike, and scheduled a hearing on the merits of the case for October 13, 2009. On May 8, 2009, the Applicant filed a written response to the Tabard's Motion to Strike (Exhibit 77).

June 2, 2009: At its decision meeting on the Motion to Strike (Exhibit 74), the Board resolved to treat the Applicant's Supplemental Materials (Exhibit 70) as a Motion for Leave to File Amended Plans and the Tabard's Motion to Strike (Exhibit 74) as an Opposition to the Motion for Leave to File Amended Plans. The Board granted the Applicant's Motion for Leave to File Amended Plans and set in a date of July 31, 2009 by which the final amended plans were to be submitted to OZ and served on all Parties to the case. The Board then gave the ANC and Party Opponent Tabard Inn until September 28, 2009 to file any written opposition to the amended plans, in the form of a pre-hearing statement. The hearing on the matter was postponed until October 6, 2009.

October 6, 2009: On July 31, 2009, the Applicant filed a pre-hearing statement and supporting documentation amending its plans to remove the request for variance relief and seek only a special exception pursuant to 11 DCMR § 3104.1 and 512 (Exhibit 83). The Board allowed the Applicant to make an entirely new presentation of its case in chief on the amended application, including further amendments reducing the total number of parking spaces from 98 to 58 (Exhibit 97). The Applicant presented testimony from its expert witness in the field of architecture, Stan Andrulis, and its expert in traffic engineering, Osborne George. Party Opponent Tabard Inn cross-examined the Applicant's witnesses. Due to the late hour, the Board took testimony from several individuals and representatives of organizations in the audience who had waited for an opportunity to testify on the record. The case was continued to December 8, 2009.

December 8, 2009: Early on the morning of December 8, 2009, counsel for the Applicant, George Keys, Jr., notified the staff of the Office of Zoning, the ANC, and Party

Opponent Tabard Inn of a family medical emergency and requested postponement of the hearing. There was no objection. The hearing was postponed until March 16, 2010.

March 16, 2010: As a preliminary matter at the March 16, 2010 hearing, the Board considered a request from the Applicant to postpone the proceedings in the case (Exhibit 107). The request was opposed by the Party Opponent Tabard Inn (Exhibit 108). The Applicant's request was based on testimony presented at the December 19, 2009 meeting of the HPRB at which representatives of Party Opponent Tabard Inn asserted that there were discrepancies in the Applicant's plans. The Board denied the Applicant's request to continue the case and proceeded to the Party Opponent's case in opposition. Jeremiah Cohen, General Manager of the Tabard Inn testified in opposition to the application. In addition, Tabard presented expert testimony from Robert Schwartz, an expert in architecture; Emily Hotaling Eig, an expert in historic preservation; David Nelson, P.E., an expert in traffic engineering and transportation planning; and Ellen McCarthy, an expert in planning and zoning. Tabard submitted numerous exhibits into the record in support of its case, including written testimony of Ms. McCarthy and Ms. Eig, and exhibits depicting the massing and scale of the proposed addition. On cross-examination of Mr. Nelson, counsel for the Applicant introduced historic plats depicting the layout of Square 158 (Exhibit 111).

The Board also heard testimony from several persons in opposition, and the report of the Office of Planning. Due to the late hour, the Office of Planning was not cross-examined by either party. The hearing was continued to March 23, 2010. The Applicant identified one witness, Stan Andrulis, would be called on rebuttal.

March 23, 2010: The Applicant and the Tabard Inn cross-examined the Office of Planning. The Applicant then presented three (3) rebuttal witnesses: Stan Andrulis, Anton Janezich, and Osborne George. These witnesses were cross examined by the Party Opponent Tabard Inn. The Applicant was given an opportunity for closing remarks. At the conclusion of the hearing, the Board closed the record, except for certain limited post-hearing submissions, including proposed findings of fact and conclusions of law. The Board set the case in for decision at its regular public meeting on June 8, 2010.

Post-Hearing Submissions. The Applicant failed to provide the traffic counts relied upon by Mr. George in his rebuttal testimony as requested on March 23, 2010 in a post-hearing filing. The Applicant did file detailed information on how the rear elevation responds to the existing "alleyscape" requested by Board Member Sorg (Exhibit 120); a hard copy of the Applicant's electronic presentation during rebuttal (Exhibit 120); and revised plans including dimensioned drawings, a survey, and a breakdown of residential and non-residential floor area ratio in the proposed development (Exhibit 123). As requested by the Board, Tabard filed responses to the Applicant's post-hearing submissions (Exhibits 122 and 124). Both parties filed proposed findings of fact and conclusions of law (Exhibits 126 and 127).

FINDINGS OF FACT

1. The subject property is located at 1743-1755 N Street, N.W. The property is zoned DC/SP-1 and is located within the Dupont Circle Historic District. (Exhibit 2).
2. The property consists of 20,583 square feet in land area and is improved with six existing structures, all of which are contributing buildings in the Dupont Circle Historic District. The existing buildings are all three to five stories or less in height.
3. The existing buildings have been vacant for many years, but were predominantly residential in use prior to their vacancy. At least three of the buildings enjoy a permanent residential tax classification. (Exhibit 108).
3. The Special Purpose (SP) Zone is designed to stabilize areas adjacent to C-3-C and C-4 Zoning, to provide a buffer between adjoining commercial and residential uses, and to ensure that new development is compatible in use, scale, and design with the transitional function of the SP Zone District. 11 DCMR §§ 500.1 and 500.2. The SP zone is divided into SP-1 (medium density) and SP-2 (medium-high density) Districts. 11 DCMR § 500.4. Hotels are permitted in the SP Zone District only by special exception. 11 DCMR § 512.
4. The site is also governed by the Dupont Circle Overlay District (DC). The Overlay was created in 1991 to protect and further enhance the unique neighborhood of Dupont Circle, characterized by historic buildings, a diverse and lively mixture of uses and subareas, and its location on the edge of the Central Employment Area. Zoning Commission Order No. 705. The purposes of the Dupont Circle Overlay are to:
 - (a) Require a scale of development consistent with the nature and character of the Dupont Circle area in height and bulk; and to ensure a general compatibility in the scale of new buildings with older, low scale buildings by restricting the maximum permitted height and floor area ratio of new buildings to that of the underlying zone;
 - (b) Protect the integrity of "contributing buildings", as that term is defined by the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144, as amended; D.C. Official Code §§ 6-1101 to 6-1115 (2001)(formerly codified at D.C. Code §§ 5-1001 to 5-1015 (1994 and 1999 Supp.))), in the various historic districts within the overlay district; to require compatibility of development with the purposes of D.C. Law 2-144; and to preclude demolitions or partial demolitions that would lead to an increase in height and floor area ratio inappropriate to the area;
 - (c) Enhance the residential character of the area by maintaining existing residential uses and controlling the scale, location, and density of commercial and residential development;

- (d) Ensure compatibility of development with the Comprehensive Plan;
- (e) Preserve areas planned as open gardens and backyards and protect the light, air, and privacy that they provide;
- (f) Enhance the streetscape by maintaining the public space in front of buildings as landscaped green spaces and limited curb cuts on Connecticut Avenue; and
- (g) Encourage greater use of public transportation and the free circulation of vehicles through public streets and alleys.

11 DCMR § 1501.4.

5. The site is located on the north side of N Street, N.W., in Square 158, which is bounded by N Street on the south, 17th Street on the east, Massachusetts Avenue on the north, and 18th Street on the west. The entire square is zoned DC/SP-1. (Exhibit 84).

6. The site is within the Central Employment Area and within 1,300 feet of the Dupont Circle Metrorail Station. (Exhibit 84).

7. The subject property is immediately adjacent to two contributing buildings in the Dupont Circle Historic District. On the west is the United Auto Workers building at 1757 N Street, N.W., and on the east is the Tabard Inn at 1739 N Street, N.W. (Exhibit 84).

8. Pedestrian access to the site is provided directly off of N Street N.W. The site also abuts a public alley in the center of Square 158, which ranges in width from 9 feet, 9.5 inches at its entrance (where the alley intersects 17th Street, N.W.) to 43 feet in width in the center of Square 158. The alley has only one access point, on the west end of Square 158 at 17th Street N.W. (Exhibit 83).

The Neighborhood

9. The neighborhood surrounding the property consists of predominantly low-scale, residential buildings that are contributing buildings within the Dupont Circle Historic District. The National Register of Historic Places Nomination for the Dupont Circle Historic District notes that N Street is one of the most architecturally significant streets in Dupont Circle, historically home to many socially- and culturally-prominent Washington residents, including Presidents Theodore and Franklin Roosevelt, and Robert Todd Lincoln, son of President Lincoln. According to the National Register Documentation of the Dupont Circle Historic District, "The 1700 Block of N Street reflects the breadth of architectural talent working in the area. Among the approximately forty residential structures on the block are houses by [T.F.] Schneider, [Frederick Bennett] Pyle, Frank Harding, Samuel Edmonston, and Waddy B. Wood. With the exception of an apartment in the middle of the north side of the street, the block remains

essentially as it did at the turn of the century. Dominated by Queen Anne and Richardsonian Romanesque Revival style houses, many of which were designed to relate to the National Presbyterian Church which once stood on the corner of 18th and N Streets, N.W., this block reflects the character of the historic district as a whole.” (Exhibit 113)

10. The historic pattern of development for residential streets that give the Dupont Circle Historic District its significance is characterized by attached and detached houses that are oriented to the streets, and which feature open rear yards. The common pattern for the houses along the 1700 block of N Street N.W. is characterized by houses that fill the horizontal width of their lot, leaving rear yards as open space, or a main block with a rear ell, where the main block fills the width of the lot and the ell, narrower in width, extends to the rear. (Exhibit 113).

11. N Street is a one-way street allowing eastbound-only traffic between Connecticut Avenue/18th Street and 17th Street, N.W. 17th Street is one-way, southbound-only during the morning rush hour. (Exhibit 83).

12. The entrance area to the public alley is ten feet or less in width for at least 75 feet, measured from the intersection of the alley with 17th Street westward into the interior of Square 158. The alley is used for parking of vehicles by many of the property owners in Square 158. (Exhibit 110).

13. Many, if not all, of the residential buildings on N Street N.W. have been converted to office and non-profit uses. (Exhibit 112). A few large-scale office buildings exist near the intersection with 18th Street and Connecticut Avenue, including the American Society for Microbiology at 1752 N Street, the National Association of Broadcasters at 1771 N Street, and the World Bank at 1225 Connecticut Avenue, N.W., which includes a child development center use in the building.

14. There are three existing hotels within a one-block radius of the site: (1) the Tabard Inn, immediately adjacent to the subject property; (2) the Topaz Hotel at 1733 N Street, N.W., and (3) the Beacon Hotel, just across 17th Street at 1615 Rhode Island Avenue, N.W. (Exhibit 112)

The Tabard Inn

15. The Tabard Inn is a contributing building in the Dupont Circle Historic District and has existed as an Inn and restaurant since 1917. It is the oldest continuously-operating hotel in the District of Columbia.

16. The Tabard Inn consists of three individual town houses located at 1737-1741 N Street, N.W. that were constructed between 1887 and 1900. The townhouses form a U-shaped footprint, with a substantial interior courtyard garden and patio between the ells in the rear of 1741 and 1739 N Street, N.W. This garden and outdoor patio is surrounded by a wall along the rear property line and is used for weddings, outdoor dining, and is the Tabard Inn’s signature space. A parachute is strung above the garden wall to diffuse light on the garden patio. (Exhibit 114).

17. The Tabard Inn has 40 guest rooms, most all of which are lit with a combination of natural and low-moderate artificial light. (Exhibit 114).

18. The Tabard's dining room and bar feature a series of west-facing windows which provide diffused natural light into the space. (Exhibit 114). The restaurant features outdoor brunch, lunch, and dinner service. The bar is open throughout the day and well into the evening, and patrons may consume their beverages at the bar, in the lounge areas of the hotel, or on the outdoor patio in the garden.

19. Jeremiah Cohen, General Manager of the Tabard Inn, testified on the record at the public hearings on October 6, 2009 and March 16, 2010 that the Tabard is committed to operating in an efficient and environmentally manner. To that end, it has installed a series of green roofs on its property to improve the energy efficiency of its building. Tabard has also contracted (but has not yet installed, pending the outcome of this case) to add solar water heating equipment to its roof. Mr. Cohen and the Tabard's expert in architecture testified that the existing green roofs and proposed solar water heating equipment require direct and diffused natural sunlight in order to operate.

The Proposed Project

20. The Applicant proposes to convert the five existing buildings on the subject site to a single hotel building with a large, five story addition in the rear, separated from the original historic structures by an interior, closed court, a portion of which would be under roof. Following construction of the addition, the percentage of lot occupancy would be 100%. (Exhibit 123). The interior closed court would not be visible from N Street or the public alley abutting the property.

21. The proposed hotel would consist of 98 guest rooms; 3,181 square feet of meeting and exhibit space; approximately 2,500 square feet of restaurant space; and a spa consisting of approximately 2,300 square feet of gross floor area. (Exhibit 123).

22. The proposed overall gross floor area is 79,896 square feet, or 3.89 FAR, of which .42 FAR would be devoted to non-residential uses. The total percentage of function/exhibit space proposed is 4%. (Exhibit 123).

23. The applicant initially proposed a total of 98 parking spaces accessed via a mechanized parking system. (Exhibit 83). The applicant subsequently revised its plans to propose a total of 58 parking spaces on two levels which would be accessed via vehicle elevator at the rear of the building, but not completely mechanized (Exhibit 97). The applicant further revised its plans in a post-hearing submission to propose a total of 35 parking spaces in two below-grade levels, accessed via a vehicle elevator at the rear of the building. (Exhibit 123).

24. The proposed parking spaces would be accessed via the public alley in the center of Square 158. (Exhibit 83). Parking operations would be valet-only, with patrons picking up and dropping off their cars in front of the building on N Street, N.W. (Exhibit 83). The valet will

need to pick up a patron's car in the front of the building on N Street, N.W. and, during the morning peak hour of traffic, when 17th Street is one-way southbound, the valet will need to make a right turn on 17th Street, a right turn on Rhode Island Avenue, a right turn onto Connecticut Avenue and then 18th Street, a right turn onto Massachusetts Avenue, a right turn onto 17th Street, and finally a right turn into the alley in Square 158 to access the parking garage in the building. Outside of the morning peak hour, when 17th Street allows two-way traffic, the valet will need to pick up the patron's car in front of the building, make a left turn across southbound traffic into the northbound lanes of 17th Street, N.W., then make another left turn across the same southbound traffic on 17th Street into the alley to access the parking. (Exhibit 110).

25. The applicant proposes to construct a 30 foot deep loading berth and adjacent loading platform on the first floor of the building, in the rear, adjacent to the public alley (Exhibit 123).

26. The applicant's architect and traffic expert testified that guest check-in would begin at 3:00 p.m. and extend into the late afternoon and evening, and that check-out would end mid-day, approximately 11:00 to 1:00 p.m. The Board credits the testimony of Jeremiah Cohen of the Tabard Inn that most hotel guests begin checking out in the 8:00 a.m. to 9:00 a.m. hour.

The Impact of the Proposed Development

27. The Board finds that the proposed development would create a substantial adverse impact on adjacent and surrounding property in Square 158 due to the height, bulk, and design of the building and objectionable traffic conditions.

Transportation-related Impacts

28. The Board finds that the alley in Square 158 is less than ten (10) feet in width at its entrance. (Exhibit 83, Exhibit 110, Exhibit 111).

29. The Board credits the testimony of David Nelson, the Tabard's traffic expert, that the alley, which is less than ten feet at its entrance, does not meet the requirements of 11 DCMR § 2117.4 or Chapter 31 of the D.C. Department of Transportation Design Manual.

30. The Board credits the testimony and evidence presented by Party Opponent Tabard Inn's traffic expert and DDOT that the alley in Square 158 is extremely narrow. The alley and 17th Street are both heavily used by pedestrians, trucks, and passenger vehicles. Due to the extreme narrowness of the entrance of the public alley, the alley can only accommodate one lane of traffic. If a vehicle wishes to enter the alley system while another vehicle is attempting to exit, the vehicle wishing to enter the alley must back up into oncoming traffic on 17th Street N.W., creating a dangerous traffic condition. (See Exhibit 110). The Board also credits the testimony of David Nelson, the Tabard's traffic expert, DDOT, Anne Sellin, Jeremiah Cohen, and Robert Sutton, that the buildings on either side of the alley entrance have been damaged by trucks entering and exiting the alley. (See Exhibit 110).

31. The Board finds that the vehicle trips generated by the proposed use will range from 42 morning and 44 evening peak hour trips to 84 morning and 88 evening peak hour trips, depending on the number of vehicles which park on site, utilizing the valet service.

32. The Board finds that the operation of the alley is highly directional; that is, almost all of the traffic that travels the alley in the morning peak hour is inbound, and almost all of the traffic that travels in the alley in the afternoon/evening is outbound. The Board further finds that the proposed check-in and check-out times would create the need for hotel vehicles to travel, via the valet, into the alley in the opposite direction of the predominant traffic flow, creating objectionable and potentially dangerous traffic impacts in the area surrounding the subject property.

33. Based on the self-certified application submitted by the Applicant, the number of parking spaces required for the proposed development is 19. The Board agrees with the report of DDOT and the testimony of Party Opponent Tabard Inn's traffic expert and finds that the number of parking spaces provided in the proposed development, 35, is excessive given the site's proximity to mass transit and its location within the Central Employment Area. The number of parking spaces proposed is likely to create objectionable traffic-related impacts in the surrounding neighborhood.

Height-, Bulk-, and Design-related Impacts

34. The proposed development includes substantial demolition of historic fabric, including approximately one-third of the footprint of the building existing at 1743 N Street, N.W. (Exhibit 113).

35. The height, bulk, and design of the proposed project includes a rear addition that is higher and bulkier than the historic buildings to which it is attached, with a design that is inconsistent with the historic patterns of development. (Exhibit 113).

36. The proposed addition includes a five-story wall immediately adjacent to the Tabard Inn's garden and patio, part of which will be constructed on top of an existing party wall. (Exhibit 123). The proposed addition includes east-facing windows overlooking the existing garden and patio, some of which will be placed just 18 inches from west facing windows on the Tabard's property. The proposed development includes windows punched through the existing party wall. (Exhibits 123, 114).

37. The Board credits the testimony of Party Opponent Tabard Inn's expert in architecture, Robert Schwartz, who testified that the massing of the proposed addition is oriented toward the east, which will have a disproportionate impact on the Tabard Inn. The Board further credits the testimony given and the electronic model presented by Mr. Schwartz at the public hearing (part of Exhibit 114 in the record) that depicted the shadows and visual impact created by the proposed development. The Board concludes that the proposed development will reduce the duration of sunlight, both direct and diffused by the Tabard's own east-facing wall above the courtyard, by approximately 40% on the sunniest day of the year. The Board further concludes

that such deprivation of sunlight constitutes a substantial and direct adverse impact on neighboring property.

38. The Board credits the testimony of Party Opponent Tabard Inn's expert in historic preservation, Emily Eig, that the height, bulk, scale, and massing of the proposed addition is not in character with the contributing buildings in the Dupont Circle Historic District. The Board further credits the testimony of Ms. Eig that the rear ell wing of 1743 N Street is most likely original to the building, and that removal of the ell wing constitutes substantial demolition.

39. The Board credits the testimony of Party Opponent's expert in planning and zoning that the proposed project virtually doubles the density of the existing buildings, from existing 2.2 FAR to approximately 3.9 FAR, and that the effective bulk of the building is 5.0 FAR, due to the enclosed central courtyard included in the proposed design. The Board further credits the testimony of Ms. McCarthy that of the 40 addresses in the 1700 Block of N Street, 36 can be defined as low-density and small-scale. The small number of high-density buildings proximate to the site were constructed before the Dupont Circle Overlay was enacted and can be characterized as nonconforming structures. The Board finds that the application would adversely affect the low-scale, residential character of the neighborhood and would adversely impact the light and air available to the adjacent Tabard Inn.

40. The Board further credits the testimony of Ms. McCarthy that four hotels within the span of two-blocks represents a concentration of hotel uses. The Board finds that the vast majority of SP-1 zoned properties in the vicinity of the subject site are commercial in nature.

CONCLUSIONS OF LAW

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code § 6-641.07(g)(2) (2001), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 512 to allow the construction of a hotel in the DC/SP-1 Zone District at 1743-1755 N Street N.W.

The Applicant Does Not Meet the Applicable Special Exception Standards

The Board can grant a special exception where, in its judgment, two general tests are met, and the special conditions for the particular exception sought are met. First, the requested exception must "be in harmony with the general purposes and intent of the Zoning Regulations and Zoning Maps." 11 DCMR § 3104.1. Second, the use must "not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Map." 11 DCMR § 3104.1.

The Board concludes that the proposed special exception for hotel use would adversely affect the use of neighboring property in the area for several reasons: the height, bulk, design, and massing of the proposed addition to the existing buildings would deprive neighboring property owners of light and air, and would not be compatible with the pattern of development in

the DC/SP-1 Zone or the Dupont Circle Historic District; and the proposed hotel is likely to create dangerous and objectionable traffic and transportation-related impacts in the surrounding area. The height, bulk, and design of the proposed addition to the existing buildings on the subject property would not be consistent with the purposes of the Dupont Circle Overlay.

Because this application fails under the general test for a special exception, it is not necessary to evaluate each of the special exception criteria; however, as will be set forth below, the applicant has not met the criteria in subsection 512 of the Zoning Regulations for the same reasons that it does not meet the test for a special exception. Subsection 512 requires that the height, bulk, and design of the proposed hotel be in harmony with existing uses and structures on neighboring property; that the approval of the proposed hotel must result in a balance of residential, office, and hotel or inn uses in the SP District in the vicinity of the hotel or use; and the location and design of driveways, access roads, and other circulation elements of the hotel or inn must not create dangerous or other objectionable traffic conditions.

Moreover, because the application does not meet other requirements of the Zoning Regulations, namely, the requirements of Chapter 21 relating to the access, operation, and maintenance of required off-street parking, the relief requested may not be granted absent a variance pursuant to 11 DCMR § 3103.2. Pursuant to 11 DCMR § 2117.4 of the Zoning Regulations, all required parking space must be accessible at all times directly from improved alleys with a *minimum width of ten feet* (10 ft.) or improved public streets. The Applicant's own expert traffic engineer conceded on the record and in his written findings that the public alley through which the required parking is accessed is less than 10 feet wide. The Board finds that a variance from 11 DCMR § 2117.4 is required. The application is self-certified and does not request any variance relief, nor has the Applicant demonstrated that the application meets the test for any variance relief required under the Zoning Regulations.

The burden of proof to show that a proposed development complies with the special exception regulations rests with the Applicant. *Dorchester Associates LLC v. District of Columbia Bd. of Zoning Adjustment*, 976 A.2d 200, 213 (D.C. 2009)(citing *Neighbors Against Foxhall Gridlock v. District of Columbia Bd. of Zoning Adjustment*, 792 A.2d 246, 252 (D.C. 2002)). The Applicant has not met its burden of proof under the applicable Zoning Regulations, and thus the Board is not persuaded that the proposed project meets the general or specific requirements for the requested special exception under 11 DCMR §§ 3104.1 and 512.

The Proposed Development is Not in Harmony with the Purpose and Intent of the Zoning Regulations and Zone Maps

The proposed use of the Subject Property is not in harmony with the purpose and intent of the Zoning Regulations and Zone Maps. The purpose and intent of the Zoning Regulations and the Zone Maps is enumerated on the face of the Regulations themselves, in 11 DCMR § 500.1 and § 1501; and by reviewing the legislative history behind the regulations which are applicable to the subject property and proposed use.

The Subject Property is classified within the SP-1 Zone District and located within the Dupont Circle Overlay District. The SP-1 Zone District is designed to act as a buffer between commercial and residential areas, and to “ensure that new development is compatible in use, scale, and design with the transitional function of this zone district.” 11 DCMR § 500.1. Moreover, the SP Zone is designed to “preserve and protect areas...that contain a mix of row houses, apartments, offices, and institutions...including buildings of historic and architectural merit.” 11 DCMR § 500.3.

The Dupont Circle Overlay states that the “area is a unique resource to the District of Columbia that must be preserved and enhanced. Strong protections are needed to retain its low-scale, predominantly residential character, independent small retail businesses, human scale streetscapes, and historic character, given the high-density development pressures caused by the proximity of the Central Employment Area and the Dupont Circle Metrorail Station.” 11 DCMR § 1501.1 The explicit purposes of the Dupont Circle Overlay, as noted in 11 DCMR § 1504.1(b) through (e), are to: protect the integrity of contributing buildings in the Dupont Circle Historic District, including by prohibiting demolitions or partial demolitions which would lead to an increase in height and floor area ratio inappropriate to the area; to “enhance the residential character of the area by maintaining existing residential uses and controlling the scale, location, and density of commercial and residential development;” “to ensure compatibility of development with the Comprehensive Plan; and, perhaps most relevant to the instant case, to “preserve areas planned as open gardens and backyards, and to protect light, air, and the privacy they provide.” 11 DCMR § 1504.1(b) through (e).

With respect to hotels, the Zoning Commission, in Order No. 314, stated explicitly that the purpose of the requirement for a special exception for hotel uses in the SP-1 District was to ensure that any new or expanded hotels are compatible with their surroundings and to help foster a mix of uses in the SP District. *Zoning Commission Order No. 314*, p. 13.

The proposed development would convert existing formerly-residential buildings to a hotel and would virtually double the density of existing development on the site. The overwhelming evidence in the record of this case demonstrates that the proposed height, bulk, design, scale, and massing of the additions contemplated by the applicant would be out of character with the contributing buildings in the Dupont Circle Historic District, and especially with the existing Tabard Inn, which is itself a contributing building in the historic district. A significant amount of demolition is proposed in a direct effort to maximize the density of the proposed addition. Finally, the rear yard of the subject property would be completely filled in, eliminating what has historically been open gardens, backyards, and open space enjoyed by all of the users of Square 158; eliminating the light and air available to the adjacent Tabard Inn, and significantly diminishing the privacy of the Tabard Inn’s guests and patrons.

The addition of a fourth hotel within two blocks would result in an upset of the balance of uses in the surrounding area, and there is no evidence on the record to determine that the proposed use would be compatible with surrounding uses or would not create the adverse impacts claimed by opponents to the application. The Applicant’s case was devoid of any specific reference to how the hotel would operate. Despite the claim of the Applicant’s architect

that he met with “hotel experts” in revising the plans submitted following remand of this case to the Board for further proceedings, no hotel experts—in fact, no one with any experience in constructing or operating a hotel—testified on behalf of the Applicant in this case.

The Proposed Development Will Adversely Impact Neighboring Property

The totality of evidence presented during the five-year history of this case before the Board of Zoning Adjustment strongly suggests that the proposed development will cause real and substantial harm to the Tabard Inn and to users of the public alley in Square 158—uses which are currently in accordance with the Zoning Regulations and Zone Maps. The Tabard Inn’s existing use is grandfathered, having been established in 1917 and operated continuously since that time. The use of the public alley in Square 158 for parking and loading of existing uses is consistent with Chapter 21 of the Zoning Regulations. The proposed development would create shadows and deprive the Tabard Inn of light, air, and privacy; the use of the public alley, which is already heavily-traveled and arguably dangerous, would be increased substantially due to the location of a significant number of parking spaces in the rear of the subject property. The proposed use will adversely impact the use of neighboring property and the surrounding area in accordance with the requirements of the Zoning Regulations and Zone Maps.

The Proposed Development Does Not Meet the Specific Criteria for Special Exceptions for Hotel Use in the DC/SP-1 Zone

For the same reasons enumerated above, the application does not meet the specific criteria required for special exceptions allowing hotel uses in the SP-1 Zone District under 11 DCMR § 512. The height, bulk, and design of the proposed development is not in harmony with existing uses (namely, the Tabard Inn) and structures on neighboring property as required by 11 DCMR § 512.3. The approval of the hotel or inn will not result in a balance of residential office, and hotel or inn uses in the SP District in the vicinity of the hotel or inn as required by 11 DCMR § 512.5, because, if approved, the proposed hotel would be the fourth such use in two blocks. Finally, the evidence of record demonstrates that the location, design, access, and other circulation elements proposed in the application would cause dangerous or other objectionable traffic conditions, in violation of 11 DCMR § 512.10.

ANC Issues and Concerns

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; now codified at D.C. Official Code § 1-309.10(d)(3)(A)), to give “great weight” to the issues and concerns raised in the affected ANC’s written recommendations. To give great weight, the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC’s issues and concerns.

The ANC's primary concerns, as expressed in their written resolutions¹, were that the proposed development was not in harmony with existing uses and structures on neighboring property or the purpose and intent of the Zoning Regulations and Zone Maps. As set forth above, the Board found these ANC concerns persuasive.

OP Report and Recommendation

The Board is required under D.C. Code § 5-412.4 (1994) to give OP recommendations "great weight." The Board carefully considered OP's report, but for the reasons stated in this decision, does not agree that the application meets the criteria in 11 DCMR § 3104.1 and § 512 for a special exception for hotel use in the DC/SP-1 Zone.

Accordingly, the Board concludes that the proposed project would not be in harmony with the purposes and intent of the Zoning Regulations and Zone Maps, and that the proposed special exception would have an adverse impact upon the use of neighboring property. Finally, because the Board concludes that the proposed use would have an adverse impact upon the use of neighboring property, would result in an over-concentration of hotel uses in the vicinity of the subject property, and would result in dangerous and objectionable traffic conditions, the Board concludes that the specific special exception criteria in 11 DCMR § 512 have not been met.

It is therefore **ORDERED** that the application for the special exception relief is **DENIED**.

VOTE:

Vote taken on June 8, 2010

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____

JAMISON L. WEINBAUM
Director, Office of Zoning

¹ The Board notes that Commissioner Mike Silverstein also testified on behalf of the ANC at the public hearings on this matter. The Board is required to treat oral testimony by an ANC "as if provided in advance in writing...when accompanied within 7 days by written documentation approved by the respective [ANC] which supports the testimony." D.C. Official Code § 1-309.10(d)(4) (2001). The testimony of Commissioner Silverstein given on the record at the hearing on October 6, 2009, to the extent that it indicated the ANC supported the approval of the proposed special exception, was not accompanied by any written documentation approved by the ANC, and thus was not entitled to be given "great weight" by the Board, pursuant to D.C. Official Code § 1-309.10(d)(1)(2001). See *Neighbors United for a Safer Community v. District of Columbia Board of Zoning Adjustment*, 647 A.2d 793, 798 (D.C. 1994); *Friendship Neighborhood Coalition v. District of Columbia Board of Zoning Adjustment*, 403 A.2d 291, 295 (D.C. 1979).

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT IS FINAL.