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July 5, 2005

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VIA HAND DELIVERY

D.C. Board of Zoning Adjustment
Suite 210S
441 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Case No. 17352
Pre-Hearing Submission

Dear Members of the Board:

On behalf of the applicant, 1464 Harvard, LLC, I enclose an original and twenty (20) copies of the pre-hearing submission for the above-referenced matter.

Please do not hesitate to contact me should you have any questions or comments.

Very truly yours,

HOLLAND & KNIGHT LLP

Edward Donohue/JGC

Edward Donohue

Enclosures

cc: Travis Parker, Office of Planning
Dee Hunter, Chairman, Advisory Neighborhood Commission 1B
Lori Parker, Advisory Neighborhood Commission 1B-07

BZA
Case No. 17352
Exhibit No. 24

Board of Zoning Adjustment
District of Columbia
CASE NO. 17352
EXHIBIT NO. 24

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF:	)	
	)	
1464 HARVARD, LLC	)	**BZA CASE NO. 17352**
	)	
AREA VARIANCE FROM THE LOT OCCUPANCY REQUIREMENT IN THE R-5-B DISTRICT SQUARE 2668, LOT 69	)	**HEARING DATE: JULY 19, 2005**

STATEMENT OF THE APPLICANT

I.
NATURE OF RELIEF SOUGHT

This statement is submitted on behalf of 1464 Harvard, LLC (the "Applicant") in support of its application to the Board of Zoning Adjustment ("Board" or "BZA") for: variance relief from Section 403 to permit a lot occupancy of approximately 73 percent instead of 60 percent. The Applicant is seeking variance relief in order to complete construction of a fourteen (14) unit condominium building at Lot 69 in Square 2668, premises address 1464 Harvard Street, NW, Washington, D.C. (the "Subject Property").

II.
JURISDICTION OF THE BOARD

The Board has jurisdiction to grant the requested variance relief pursuant to D.C. Code § 6-641.07 (2001 ed.) and section 3103.2 of the Zoning Regulations.

III.

BACKGROUND

A. Site and Vicinity Characteristics

1. The Property

Square 2668 is bounded on the north by Harvard Street, on the east by 14th Street, on the south by Girard Street, and on the west by 15th Street. The Subject Property is located on the south side of Harvard Street, approximately mid-block and is bordered on the south by a public alley. The Subject Property consists of approximately 6,767 square feet of land area and is included in a R-5-B zone district. The Subject Property is depicted on Exhibit A and the applicable zoning is as shown on a portion of the Zoning Map attached as Exhibit B.

What is not apparent from either exhibit is the topography of the lot and the existing building line. As will be explained in detail at the hearing, the grade of the lot rises abruptly from the sidewalk to the front of the building—a grade change of approximately seven (7) feet. The distance from the sidewalk to the façade of the pre-existing building (which was preserved) is approximately 16 feet to the bay window, and 19 feet to the entrance.

2. Vicinity

To the east and south of the Subject Property along Harvard Street are row dwellings. However, adjacent to the Subject Property to the west is a low-rise apartment building, separated from the Subject property by its side yard. Mixed residential buildings are located to the north of the Subject Property across Harvard Street. The surrounding area is characterized by residential uses.

B. Description

The Applicant is currently developing the Subject Property with a three-story plus mezzanine residential building with cellar (the "Building") that will include fourteen dwelling units. The Building is near completion based upon the issuance of a building permit by the City. A copy of that permit is attached as Exhibit C. The lot occupancy was initially calculated to be *sixty percent* (60%) and the Building was determined to fully comply with the Zoning Regulations. Upon additional review, after construction was substantially underway and the terraces were constructed, the Zoning Administrator concluded that the terraces located below the level of the main floor should be included in the lot occupancy calculation, increasing the lot occupancy above the maximum permitted. While this application responds to that determination, it continues to be the Applicant's belief that as the terraces in question are located below the level of the main floor and maintain the light and ventilation required by code, the building in its current configuration meets the lot occupancy requirements. However, the Applicant hereby seeks approval by the Board of Zoning Adjustment (hereinafter "Board") of variance relief from the lot occupancy requirements applicable in residential zone districts (§403.2).

In order to preserve its rights, the Applicant has filed an appeal of this determination of the Zoning Administrator. That appeal is set to be heard in the Fall. If the Board grants the variance requested, that appeal will be withdrawn.

At the completion of the permit drawings and at the time of application for raze permit for the project (originally anticipating the demolition of the existing building) and prior to construction, the Applicant and Applicant's architect met with Councilmember Jim Graham and spoke with staff from the Office of Historic Preservation. At the urging of the Councilmember and staff, the façade of the Building was preserved in its entirety. The new construction was re-

designed to respond to the context and features of the existing building. These concessions created significant burdens and associated costs to the development. The Property is not in an historic district and the Building is not a landmark. However, the spirit of historic preservation was addressed and incorporated into the building design at considerable time and expense to the Applicant.

Following issuance of the permit, the Applicant proceeded to construct and nearly complete the project. The below-grade area and entrance to the garage were covered with a concrete deck, which is intended and designed as a garden patio for residents as well as cover for the garage below. Strict application of the lot occupancy requirement would necessitate removal of this slab, loss of the garden patio, exposure of the garage to the elements and adjacent properties, and severely compromise the building's design. The Applicant requests a deviation from the lot occupancy provisions of section 403 to allow an increase from 60 percent to 73 percent.

IV.

THE APPLICATION MEETS THE REQUIREMENTS FOR VARIANCE RELIEF FROM THE ZONING REGULATIONS

A. Standard of Review

Under D.C. Code § 6-64107(g)(3) (2001 ed.) and 11 DCMR 3103.2, the Board is authorized to grant an area variance where it finds that three conditions exist:

> (1) the property is unique because, *inter alia*, of its size, shape or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; (3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.

French v. District of Columbia Board of Zoning Adjustment, 658 A.2d 1023, 1035 (D.C. 1995), *quoting Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). *See, also, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment,* 534 A.2d 939 (D.C. 1987). As set forth below, the Applicant satisfies this three-pronged test for a variance from the area requirements for lot occupancy.

A. <u>The Property is Affected by an Exceptional or Extraordinary Situation or Condition.</u>

During design review and discussions with staff, it was determined that the façade of the existing building was worth preserving. Designing around this feature placed significant constraints on any new construction. The D.C. Court of Appeals has held that existing structures are as important as topography in creating "other extraordinary or exceptional situation or condition of a specific piece of property." *See Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974); *see also Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (D.C. 1979) (extraordinary conditions are not limited to physical aspects of the land).

Following design review and approvals, the Applicant proceeded to near completion of the Building before being told by the Zoning Administrator that the lot occupancy determination was being reversed, and that the Building as designed and approved was in fact over the limit. This determination was made when the base Building was approximately 75% percent complete, after the terraces had been installed and the concrete slab had been poured covering this below-grade area.

The D.C. Court of Appeals and this Board have previously determined that such past interpretations by the Zoning Administrator create unique and exceptional circumstances inherent in the property to meet the first prong of the area variance test. In *De Azcarate v.*

District of Columbia Board of Zoning Adjustment, 388 A.2d 1233 (D.C. 1978), attached as Exhibit D, the Office of the Surveyor and the Zoning Regulation Division approved the subdivision of a lot as compliant with the minimum lot dimensions for a single family dwelling. The applicant in that case had subdivided a large parcel into three lots and proceeded to build houses on two of the lots. He then sought approval for a house on the third lot. However, "after [a] *reinterpretation* and application of the definition of width for lot 17, by the Zoning Regulations Division, the applicant was told the lot no longer complied with such definition and that all previous approvals had been in error." *Id.* at 1235 (citing Board's finding of fact; emphasis in original). As a result, the property owner sought, and the Board approved, a variance from the minimum lot dimensions. On appeal, the D.C. Court of Appeals upheld the Board's decision to grant the variance. The Court found that several factors created extraordinary conditions, including that the dispute was due to the actions of the zoning officials, which were later found to be in error, and that the applicant had proceeded in good faith in the subdivision of the original parcel. *Id.* at 1237-38.

Like *De Azcarate*, the extraordinary condition here is due to the *reinterpretation* of the Zoning Review Branch of minimum area calculations, in this instance for maximum lot occupancy. Just as the applicant in *De Azcarate* proceeded in good faith on the subdivision approved by the city, the Applicant in this case proceeded in good faith on the initial interpretation of the Zoning Administrator and has made substantial, expensive improvements to his property in reliance thereon. This factor alone is sufficient to meet the first prong of the variance test. *See also Monaco v. District of Columbia Board of Zoning Adjustment*, 470 A.2d 1091, 1097 (D.C. 1979) (past history of zoning approvals give rise to uniqueness).

The confluence of these extraordinary and exceptional conditions create practical difficulties for the Applicant, as described below. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1979) (uniqueness may stem from a confluence of factors).

B. The Strict Application of the Zoning Regulations Would Result in a Practical Difficulty.

1. Lot Occupancy

The practical difficulties associated with reconfiguring the Building to comply with the maximum permitted lot occupancy provisions are severe. The building footprint has already been established on the Property and construction has advanced significantly.

The terrace slab also acts as a cover over the garage ramp and parking, so demolition would expose the residents of the new building and the existing adjacent building to a view of the garage instead of an attractively landscaped "green roof." Removing the terrace would also increase the glare of reflected light off of the concrete for tenants of both buildings which would then have a view of the below grade garage and garage ramp. Furthermore, the terrace acts as a sound barrier between the garage and new and existing construction by blocking noise at the top and side.

The architect has determined that removal of the concrete slab which covers the below-grade space and garage entrance is possible, although in practice very difficult to accomplish. Adhering to the Zoning Administrator's conclusion of lot occupancy in this case would therefore create an inequitable burden on the Applicant at this point of construction.

C. Variance Relief Can Be Granted Without Substantial Detriment to the Public Good and Without Impairing the Intent, Purpose and Integrity of the Zone Plan.

Granting the proposed variance relief will pose no detriment to the public good and will not substantially impair the intent or purpose of the zoning laws. With respect to the public good, the residential building will serve to enhance the community while providing additional dwelling units in the Columbia Heights area. There will be no adverse impact on adjoining properties since the building to the west is set back approximately ten feet from its east lot line and the residential units in the subject building will have all required light and ventilation. The building was designed to maximize light available to itself and to the neighboring building. The terrace does not block more light than a seven foot high solid masonry wall would, which is permitted by zoning.

The zone plan will not be compromised, as the development adheres to all other components of the Zoning Regulations including those that will foster compatibility with surrounding development.

If the Applicant were forced to comply with the lot occupancy requirement after agreeing to preservation of the façade, and after good faith reliance on the determination by the Zoning Administrator that the project was in compliance with all requirements, would serve no useful purpose. Removal of the slab and loss of the patio improvements would be detrimental to the future occupants of the Building, without otherwise affecting the public good.

For all the above reasons, the requested variance relief can be granted without detriment to the public good or without substantial impairment to the Zone Plan.

VI.

THE COMMUNITY

The Applicant has met with the Advisory Neighborhood Commission (ANC), single member district representative at the site, and initiated a dialogue. The Applicant is scheduled to meet with the full ANC on July 7th, to present the application and to answer questions.

VII.

WITNESSES

A. David Gelles, representative of 1464 Harvard LLC, Applicant

B. William Bonstra, AIA, representative of Bonstra Haresign Architects LLP

C. Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP

VIII.

EXHIBITS IN SUPPORT OF THE APPLICATION

The following exhibits are attached to this statement in further support of the application:

Exhibit A: A portion of the Sanborn Atlas showing the Property highlighted in yellow.

Exhibit B: A portion of the Zoning Map showing the Property highlighted in yellow, with zoning designation of R-5-B.

Exhibit C: Copy of Building Permit issued by DCRA.

Exhibit D: *De Azcarate v. District of Columbia Board of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978).

Exhibit E: Outline of Witness testimony

- David Gelles, 1464 Harvard LLC, Applicant
- William Bonstra, AIA, Bonstra Haresign Architects LLP
- Steven E. Sher, Director of Land Use Services, Holland & Knight LLP

Exhibit F: Revised and updated architectural plans.

IX.

CONCLUSION

For the reasons stated above, the requested relief meets the applicable standards of the Zoning Regulations and can be granted without substantially impairing the intent, purpose and integrity of the Zoning Regulations. The Applicant therefore requests that the Board grant the application.

Respectfully submitted,

HOLLAND & KNIGHT LLP

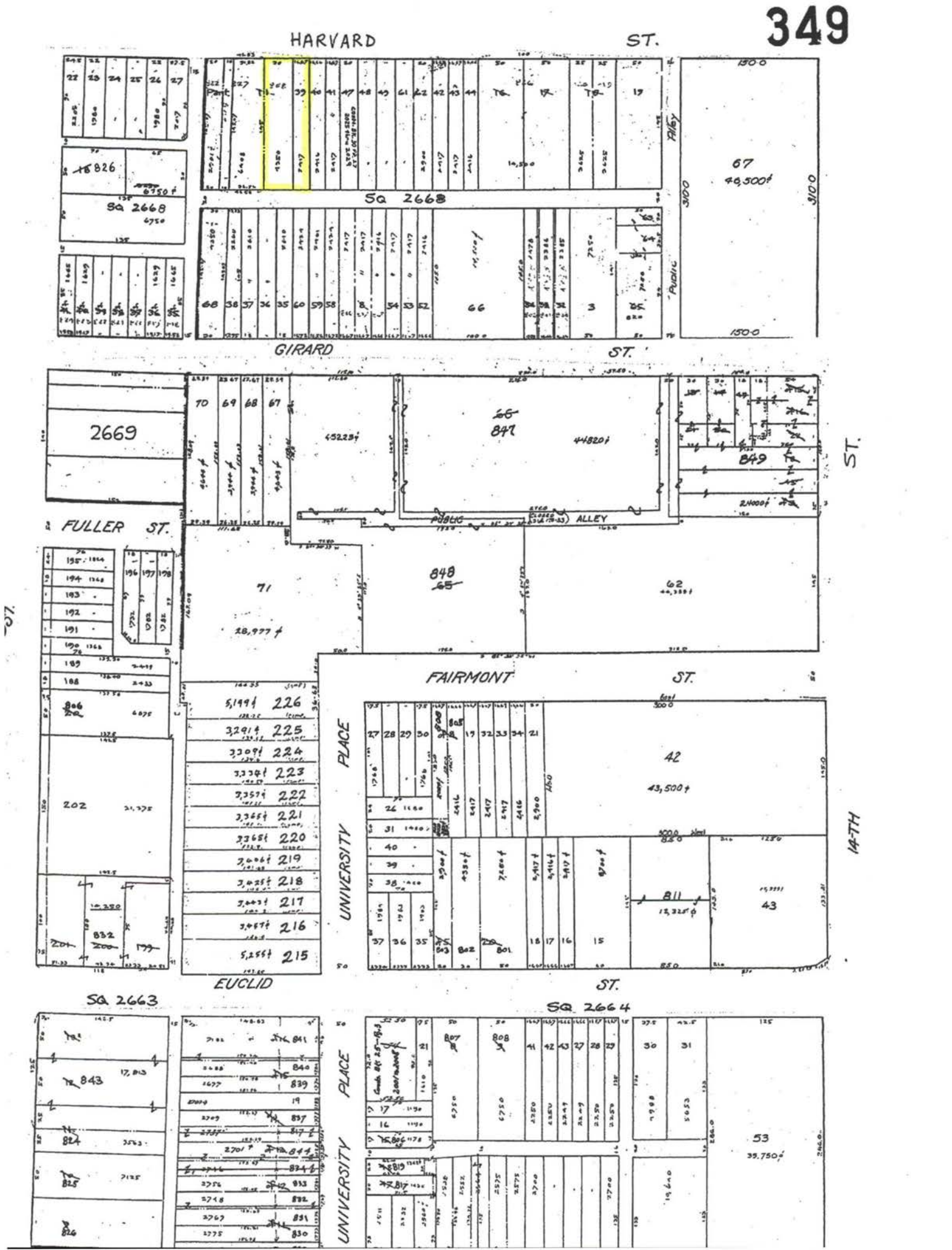
By _____
Norman M. Glasgow, Jr.
Edward L. Donohue

2099 Pennsylvania Avenue, NW
Suite 100
Washington, D.C. 20006
(202) 955-3000

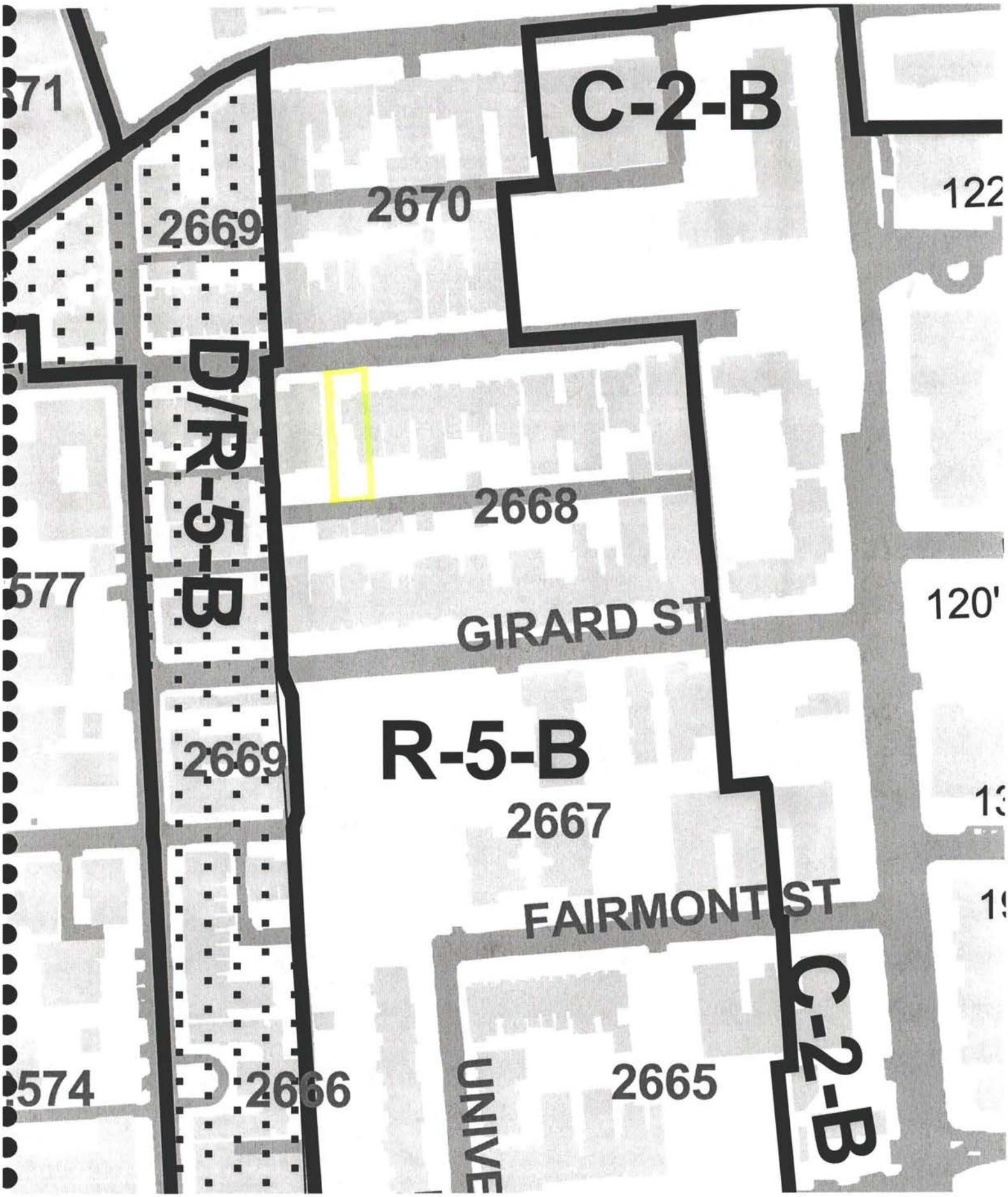
July 5, 2005

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Sq 2668
GIRARD ST.
FULLER ST.
FAIRMONT ST.
EUCLID ST.
UNIVERSITY PLACE
ALLEY
PUBLIC
Sq 2663
Sq 2664
14-TH ST.
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Jul. 1. 2005- 1:23PM -BOGDAN BUILDERS, INC No. 5423 P. 2

202-955-5569

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT PERMIT NO.

PERMIT

Date 11/2/04 (Type) MISC./NEW CONST.

Address of work 1464 HARVARD ST NW

Lot 0808 Square 2668

Permission is hereby granted to
BOGDAN BLDRS, INC. (Owner)
who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

NO.

TOTAL PERMIT FEE $

FILING FEE $

DATE

FEE PAYABLE $ 2,847.80

Authorized work and conditions of performance thereof:

FOR INSPECTIONS CALL [redacted] 442-4641

BUILD NEW 3 STORY W/BASEMENT APT BLDG W/STAIRS THAT PROJECT INTO PUBLIC SPACE & AREAWAY & PLANTERS PROJECTING INTO PUBLIC SPACE.
SEPARATE ELECTRICAL, PLUMBING AND MECHANICAL INSTALLATION PERMITS ARE REQUIRED.

Builder—

Value $ No. of Bldgs.

Width of Bldgs. Length Height No. of Stories 3 + MEZZ. + CELLAR

Zone R5B To be occupied as APT-14 UNITS

Height of terrace above grade Projections 2 PLANTERS & 2 STEPS & 1 AREAWAY

Address of owner 5272 RIVER RD BETHESDA, MD

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

By _____
Permit Clerk

D CLARK 32301
DIRECTOR

D

LEXSEE 388 a2d 1233

LUIS DE AZCARATE, ET AL., PETITIONERS, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT; MARVIN PITKIN and WALTER J. SCHAFER, INTERVENORS

No. 12650

District of Columbia Court of Appeals

388 A.2d 1233; 1978 D.C. App. LEXIS 391

May 11, 1978, Argued

July 14, 1978, Decided

PRIOR HISTORY:
[1]**

Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

DISPOSITION:
Affirmed.

COUNSEL:
James L. Montgomery for petitioners. Nelson Deckelbaum was on the brief for petitioners.

Leo N. Gorman, Assistant Corporation Counsel, for respondent. Richard W. Barton, Deputy Corporation Counsel, also entered an appearance for respondent. Respondent adopted the brief of the intervenors.

Whayne S. Quin, with whom Norman M. Glasgow and Iverson O. Mitchell III, were on the brief, for intervenors.

JUDGES:
Kelly, Kern and Yeagley, Associate Judges.

OPINIONBY:
KERN

OPINION:

[*1235] Petitioners seek review of a final order of the District of Columbia Board of Zoning Adjustment (Board) which granted intervenors a variance from the R-1-A district's minimum lot-width requirement of 75 feet, thereby permitting them to construct a single-family residence on the lot in question.

The history of the present dispute can be briefly summarized. Lot 17, for which the Board granted the area variance was originally part of a considerably larger lot designated Lot 13. Lot 13 was a triangular-shaped parcel of approximately 26,000 square feet, located in the R-1-A zone. n1 During July 1975, **[**2]** Lot 13 was subdivided into three lots and this subdivision was duly recorded at the Office of the Surveyor of the District of Columbia. Subsequently, Lot 17 was enlarged slightly to include an additional strip of land and this subdivision was also recorded. Following the approval of the second subdivision, intervenor-Pitkin applied for and *received* a building permit for the construction of a single-family dwelling on Lot 17. n2

n1 The minimum lot-area requirement for this particular type of zone is 7,500 square feet. D.C. Zoning Regs. § 3301.1. No one disputes that intervenors meet this requirement.

n2 Prior to recording a proposed subdivision, the Office of the Zoning Regulations Division reviews the subdivision to determine whether or not it is in accordance with the applicable zoning regulations. Also, D.C. Zoning Reg. 8103.1 provides: "... a building permit shall *not* be issued ... *unless* such structure complies with the provisions of these regulations." (Emphasis added.) Presumably, such reviews occurred on three occasions: first, when Lot 17 was recorded; second, when the addition to Lot 17 was added

and recorded; and third, when the first building permit was issued.

[**3]

As approved, Lot 17 was an irregular configuration. The main body of the property was connected to the street by a strip of land 30 feet wide and 70 feet long. A single-family home was to be constructed on the main portion of the lot, which contained approximately 8,500 square feet. Intervenor-Pitkin did not proceed with construction of the dwelling and, during December 1976, he sold Lot 17 to intervenor-Schafer on condition that the property was suitable for the erection of a single-family residence. During this same time-frame, single-family homes were constructed upon each of the other two lots carved from the original Lot 13. n3

n3 Petitioners do not allege that the other two lots upon which the houses were built are substandard in any respect.

When intervenor-Schafer applied for another building permit in February 1977, his application was rejected on the ground that Lot 17 failed to conform with the width requirements of the R-1-A zone; specifically, the Zoning Regulations Division concluded that Lot [**4] 17 was substandard since its width measured approximately 62 feet although the R-1-A zone requires a 75-foot width. n4

n4 The record does not clearly indicate the basis for the zoning authorities inconsistent decisions -- *viz.*, the grant of a building permit followed by the rejection of an application concerning the very same lot. One of the Board's findings of fact indicates that ".... after [a] *reinterpretation* and application of the definition of width of lot for lot 17, by the Zoning Regulations Division, the applicant was told the lot no longer complied with such definition and that all previous approvals had been in error." (Emphasis added.) Counsel for intervenors, during the hearing before the Board, described the different techniques of computation which purportedly produced the inconsistent results. Regardless of the methodology employed, the record indicates that on April 13, 1976, the Zoning Regulations Division concluded that the average width of Lot 17 was 76 feet. A later computation made when intervenor-Pitkin's application for a building permit was submitted, produced an average lot width figure of 50 feet. This figure was later withdrawn when the Zoning Regulations Division concluded that Lot 17 had an average width of 62 feet. Intervenors raise no specific challenge to the propriety of any alleged changes by the Zoning Regulations Division in their interpretation of the term "lot width."

[**5]

[*1236] Following the denial of his application for a building permit, intervenor-Schafer sought to obtain a variance from the 75-foot width requirements of the R-1-A zone. n5 After a public hearing, the Board, by unanimous vote, granted the area variance on the ground intervenors had established a practical difficulty in utilizing the lot. The Board concluded "... that [without a variance] the unusual shape of the lot renders it unusable for any purpose." The Board further concluded that relief, by way of a variance, could be granted without "... substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan."

n5 A variance of approximately 16% was needed to permit utilization of Lot 17. Intervenors contend, without contradiction, that the property satisfied every other requirement of the R-1-A zone. The record indicates that the complaints of the petitioners to the proposed construction of a single-family home were entirely esthetic.

[**6]

D.C. Code 1973, § 5-420(3) provides in pertinent part:

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 [zoning] regulation ... would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, [a variance may be granted]. [Emphasis added.]

Petitioners' first contention is the Board lacked the statutory authority to grant a variance on the ground of any alleged difficulty in the application of the lot-width zoning regulation to Lot 17 since:

"exceptional situation or condition of a specific piece of the property" refers to a situation or condition connected to the property. It does not include the circumstances here where invalid subdivisions and an invalid permit were issued because those circumstances are not conditions of a specific piece of property. [Petitioner's brief at 5.]

Intervenors respond, **[**7]** *inter alia*, that the grant of authority contained in the statutory phrase "or other extraordinary or exceptional situation or condition of a specific property" permits the Board to grant a variance in this case. We agree with the intervenors that this statutory language serves as a grant of authority to the Board empowering it to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations. n6

> n6 Consideration of all of petitioners' contentions is unnecessary in light of our resolution of this case. The thrust of petitioners' argument is that the Board lacked authority to grant a variance. Assuming the Board possessed statutory authority to act, petitioners cannot contend persuasively that its factual findings are not supported by and in accordance with reliable, probative and substantial evidence in the whole administrative record or that the Board's conclusions do not flow rationally from these findings. *Ass'n for Preservation of 1700 Block of N Street, N.W. and Vicinity v. BZA, D.C.App., 384 A.2d 674, 677 (1978).*

[8]**

This court has recognized the purposes served by a procedure through which a variance can be obtained:

> It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack ... and prevent usable land from remaining idle. [*Palmer v. Board of Zoning Adjustment, D.C.App., 287 A.2d 535, 541 (1972). See Daniel v. Board of Zoning Adjustment, D.C.App., 329 A.2d 773, 775 (1974); Salsbery v. Board of Zoning Adjustment, D.C.App., 318 A.2d 894, 896 (1974).]*

Palmer v. Board of Zoning Adjustment, supra at 539, did observe that "few cases ... [have construed] the term 'extraordinary or exceptional situation ... of a specific piece of property'." Moreover, the legislative history of § 5-420 **[*1237]** offers no explanation of the standard. *Id.* In that case, this court did not attempt to define comprehensively the content of the term "extraordinary or exceptional situation or condition"; instead, decisions from other jurisdictions are cited which defined the term to include economic, geographic or topographic conditions or *a condition created by the zoning authority's zoning of a lot* "partly **[**9]** for residence and partly for business." *Id.* n7

> n7 During oral argument, counsel for petitioners contended that a broad interpretation of the phrase "extraordinary or exceptional situation or condition of a specific piece of property" would vest the Board with unbridled authority. We disagree. D.C. Code 1973, § 5-420(3) itself imposes restraints upon the Board's discretion. Once an extraordinary and exceptional situation or condition has arisen, the owner of the property must show "peculiar and exceptional practical difficulties" or "exceptional and undue hardship." Furthermore, the Board may grant variance relief pursuant to the statute only where there is no "substantial detriment to the public good" and no "[impairment of] the intent, purpose, and integrity of the zone plan."

A second decision of this court suggests that petitioner's claim is not well taken; *viz.*, that a variance can be granted only where the extraordinary or exceptional situation or condition inheres in the land itself at the **[**10]** time of the passage of the statute. In *Clerics of St. Viator, Inc. v. Board of Zoning Adjustment, D.C.App., 320 A.2d 291, 293-94 (1974),* this court rejected the contention that "only a hardship which is inherent in the 'land' can be the basis of a variance." In that case, a *use* variance was sought in order to permit the conversion of an existing religious seminary into a nursing home. n8 *Id. at 292.* After concluding that an exceptional situation had been shown by the applicant, *viz.*, a serious and continuing decline in the seminary's enrollment, the court stated:

> We think that the statute is clear. It provides that "other extraordinary or exceptional situation or condition of a specific piece of property" may be grounds upon which a variance may be granted. The Board 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 effect, the extraordinary or exceptional condition which is the basis for a use variance need not be inherent in the land, but can be caused by subsequent events extraneous to the land itself, such as the failure of the

seminary **[**11]** to remain a viable institution in *Clerics of St. Viator, Inc., supra.* n9

n8 That an application for a use variance requires a greater burden of proof than for an area variance is well-established in this jurisdiction. *Ass'n for Preservation of 1700 Block of N St., N.W. and Vicinity v. BZA, supra at 677; Palmer v. BZA, supra* at 541.

n9 This is not to say that *any* subsequent event will invariably result in unusual conditions supporting the grant of a variance, particularly if an affirmative act of the applicant is the direct and sole cause of the hardship complained of.

We also need not in this case precisely define the contours of the term "extraordinary or exceptional situation or condition." In our view, that term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases, subject to the limitations found in Section 5-420. It is sufficient for the present to conclude that the facts of this **[**12]** case fall within the ambit of that term. *See Palmer v. Board of Zoning Adjustment, supra at 542* (the nature and extent of the burden justifying an area variance is best left to the facts and circumstances of each case).

Consequently, we hold that the Board was authorized to grant an area variance in the instant case due to the extraordinary situation concerning Lot 17 which created "peculiar and exceptional practical difficulties" for the intervenors. However, because it is not necessary to define comprehensively the statutory term at issue here, we will recite those factors which we found significant to the outcome in the instant case. First, the record suggests and it was asserted during oral argument by intervenors, without contravention by petitioners, **[*1238]** that the original Lot 13, although of irregular shape, was susceptible to subdivision into three conforming parcels. Second, zoning office personnel, on three occasions, implicitly found that Lot 17 conformed to the lot width requirements of the R-1-A zone. Third, intervenors proceeded in good faith, following the subdivision of the original parcel and, eventually, two homes were constructed on two of the three **[**13]** newly-created lots. Finally, during oral argument before this court, counsel for the Board conceded that the present dispute was due to the actions of the zoning officials which were later found to be in error.

Petitioner's second contention is that the "self-created hardship rule" bars variance relief where the affirmative act of the applicant, or his predecessor in title, is the sole cause of the hardship complained of. n10 At the outset, petitioner is confronted by *A.L.W., Inc. v. Board of Zoning Adjustment, D.C.App., 338 A.2d 428, 431-32 (1975),* where it is said:

In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases, *i.e.*, the fact that the condition complained of was self created is not dispositive of the matter but only one factor to be considered by the zoning board in determining whether to exercise its discretion and grant an area variance." [*Id. at 431-32.]*

Petitioner seeks to avoid the import of this decision by arguing:

The type of affirmative action creating the [zoning] difficulty as here has to be distinguished from the type of self-created difficulty which **[**14]** arises when the applicant has purchased the lot subject to the zoning ordinance. The latter, the purchase type of self-created difficulty, does not bar relief for an area variance. ... The distinction from the facts before the court in this petition was recognized in *A.L.W., Inc. [v. Board of Zoning Adjustment, supra], at 432* when the court said:

Unless the applicant himself -- as a result perhaps of some prior conveyance -- is responsible for the irregular shape of the property, he cannot as a practical matter improve the lot in any way that would enable him to realize income or sell it to a purchaser for value. ...

The act of the applicant or a former owner in the chain of title creating the condition does bar relief. [Petitioner's brief at 11.]

n10 Petitioner cites 2 A. RATHKOPT, LAW OF ZONING § 48-1 (3rd ed. 1972), for the proposition that:

if the peculiar circumstances ... have been themselves caused or created by the property owner or his predecessor in title, the essential basis of a variance, *i.e.*, that the hardship be caused *solely* through the manner of operation of the ordinance upon the particular property is lacking. In such a case, a variance will not be granted. [Emphasis in original.]

[15]**

However, a recent decision of this court, *Association for Preservation of 1700 Block of N Street, N.W. and*

Vicinity v. Board of Zoning Adjustment, D.C.App., 384 A.2d 674, 678 (1978), undermines petitioners' argument. In that case, the Board granted a parking variance. n11 After concluding that the Board properly treated the application as an area variance rather than as a use variance, the court rejected the petitioners' contention that the rule of self-created hardship applied. n12

[*1239] Petitioners state that whatever hardship faced the YMCA "was self-created to the extent of Metro YMCA having *full knowledge* of all problems with the alleged shape of the land, the type of zoning, and costs of putting in the parking *prior* to the purchase of the property in March 1974." The YMCA's self-created hardship is not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance. [*Id. at 678. See Salsbery v. Board of Zoning Adjustment, D.C.App., 357 A.2d 402, 404 (1976); A.L.W., Inc. v. Board of Zoning Adjustment, supra at 431* (emphasis in original).] n13

n11 The opinion notes that

> Provision of the required off-street parking with the proposed building on the subject property is impossible due to its irregular shape; furthermore, even if the lot were rectangular in shape, only thirty parking spaces -- rather than the required forty -- could be provided with the building. There would be further hardship to the YMCA if the required parking were to be placed below the proposed swimming pool. Each such parking space would cost over $20,000 to provide, whereas the normal cost of each off-street parking space located within the garage structure is between $6,000 and $8,000. [*Id.* at 676.]

[16]**

n12 The problem faced by the applicant (YMCA) in that case was "self created" in the narrow sense that the configuration of the lot, the design of the building, and the zoning regulations in force combined to create the hardship. Although it is clear that given these variables the YMCA could not readily comply with the zoning code on the lot in question, it is equally clear that the YMCA's difficulties stemmed directly from its decision to erect the facility on a small, irregularly shaped parcel of land.

n13 In *Salsbery v. BZA, supra* at 404, and *A.L.W., Inc. v. BZA, supra*, it appears that the self-created hardship rule was found inapplicable to variances where the purchaser-applicant bought the property with knowledge of its nonconformity with the zoning regulations. In *A.L.W., supra at 431-42,* it is stated:

> the fact that the owner knew or should have known of the area restrictions *before he purchased the property* does not alter the lesser standard [used in area variances as opposed to use variances]. In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases." [Emphasis added.]

In *Salsbery, supra at 403-04,* the applicant for a use variance purchased the commercial property without conditioning the contract upon the grant of a variance for a different non-conforming use. In that case, the economic hardship stemmed from the fact that the applicant made no efforts to protect his rights. In that context, the court's statement is entirely appropriate:

> If there is hardship present, it stems from the fact that petitioner contracted to purchase the existing property ... without conditioning the contract upon the securing of a use variance. A self-inflicted hardship, such as this, will not support the grant of a use variance. [*Id. at 404.]*

[17]**

Regardless of the impact of *A.L.W., Inc. supra,* and *Association for Preservation of 1700 Block of N Street, N.W., supra,* on the applicability of the self-created hardship rule in area variance cases, we think petitioners' argument founders for yet another reason; *viz.*, the particular facts of this case. The self-created hardship rule is, in fact, a manifestation of the equitable principle of estoppel; that is, where an applicant for an area variance, or his predecessor in title, has committed an *affirmative act* which directly results in the hardship complained of, variance relief will be withheld. 2 A. RATHKOPT, LAW OF ZONING, § 48-6 (3rd ed. 1972). However, the hardship at issue here -- the failure of the configuration of Lot 17 to meet the lot-width requirement -- cannot be accurately described as the direct consequence of the intervenors' sole and affirmative acts; here, the zoning department employees played a significant part by approving three separate applications during the original subdivision of Lot 13. Having concluded that Section 5-420(3) authorized the Board to grant an area variance in this case and that the doctrine of self-created hardship, whatever **[**18]** its validity in this jurisdiction to area variances, is

inapplicable on the facts of the present dispute, we are unwilling to disturb the decision of the Board.

Affirmed.

E

OUTLINE OF TESTIMONY
DAVID GELLES, VICE PRESIDENT OF CONSTRUCTION
1464 HARVARD LLC, APPLICANT

I. INTRODUCTION

II. PRIOR USE OF SITE

III. CONSTRUCTION STATUS

IV. EXISTING CONDITIONS AND LIMITATIONS

V. REQUIREMENTS FOR GRANTING THE VARIANCE RELIEF HAVE BEEN MET

VI. CONCLUSION

OUTLINE OF TESTIMONY
WILLIAM BONSTRA
BONSTRA HARESIGN ARCHITECTS, ARCHITECT

I. INTRODUCTION AND PROFESSIONAL QUALIFICATIONS

II. SITE AND LOCATION DESCRIPTION

A. OVERVIEW OF SITE, VICINITY AND LAND USE/ZONING

B. SITE PLANNING – SIZE, LOT CONFIGURATION

III. PROJECT AND BUILDING DESIGN CONSIDERATIONS

IV. ZONING RELIEF IS NEEDED AND THE APPLICANT MEETS ITS BURDEN OF PROOF

V. CONCLUSION

3034702_v1

Holland Knight

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Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

Outline of Testimony
before the Board of Zoning Adjustment

BZA Application No. 17352
1464 Harvard Street, N.W.

Steven E. Sher
Director of Zoning and Land Use Services
Holland & Knight LLP

July 19, 2005

I. Site location and description

A. Subject property, 1464 Harvard Street, N.W., is comprised of Lot 69 in Square 2668

B. Square 2668 is bounded on the north by Harvard Street, on the east by 14th Street, on the south by Girard Street, and on the west by 15th Street

C. Subject property is located mid-block on the south side of Harvard Street and is bordered by a public alley to its south

D. Frontage of approximately 46.7 feet along both Harvard Street and the public alley

E. Land area of approximately 6,767 square feet

II. Description of surrounding area

A. To the north:

1. Harvard Street, N.W.

2. Row dwellings, flats and multi-family dwellings

B. To the east:

1. Row dwellings, flats and multi-family dwellings

C. To the south:

1. 20' wide public alley

2. Row dwellings, flats and multi-family dwellings

D. To the west:

1. Low rise apartment building

2. Row Dwellings, flats and multi-family dwellings

III. Existing zoning – R-5-B District

A. Multiple dwellings permitted as a matter of right

B. Height - maximum of 50 feet, no story limitation (§400.1)

C. Floor area ratio – maximum of 1.8 (§402.4)

D. Maximum percentage of lot occupancy – 60 percent (§403.2)

E. Rear Yard – 4 inches per foot of vertical distance, but not less than 15 feet (§404.1)

F. Side Yard – None required (§405.9)

G. Parking –one for each two dwelling units (§2101.1)

IV. Proposed development:

A. Multi-family residential building with cellar

B. 14 residential units

C. 7 parking spaces located below grade

D. Total gross floor area of approximately 12,132 square feet

E. Height of 50 feet

V. Relief required - lot occupancy variance (§403.2)

A. Maximum permitted: 60 percent

B. Lot occupancy proposed: 73 percent

C. Variance required: 13 percent

VI. Standards for variance relief (§3103.2)

A. 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,

B. the strict application of any regulation adopted under D.C. Code §§5-413 to 4-432 (1981) would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, to authorize, upon an appeal relating to the property, a variance from the strict application so as to relieve the difficulties or hardship;

C. Provided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

VII. Compliance with the variance standards

A. Exceptional or extraordinary situation or condition

1. Grade change of approximately seven feet from sidewalk to front of building

2. Preservation of façade of existing building

3. Applicant proceeded with development based on City-issued building permit before Zoning Administrator reversed lot occupancy determination

B. Practical difficulty

1. Building footprint has already been established and majority of base building is complete

2. The terrace slab acts as a cover over the garage ramp and parking and removal would expose these areas to view by residents

3. Removing terrace slab would also increase glare of reflected light off of concrete and noise from garage

C. Application can be granted without substantial detriment to public good or the zone plan

1. Development will enhance the community while providing additional residential units in the Columbia Heights area

2. Building to the west is set back approximately ten feet from its eastern property line

3. All residential units will have all required light and ventilation

4. Development adheres to all other components of the Zoning Regulations

VIII. Conclusions

A. Site is affected by exceptional condition with regard to construction status and topography

B. Practical difficulty results from existing construction that was based on a City-issued building permit

C. Variance relief will present no substantial detriment to the public good or the Zone Plan

D. Variance relief criteria have been met

E. The application should be granted

F

1464 HARVARD STREET, NW
WASHINGTON, DC

BUILDING CODE AND PROJECT DATA

1. SITE DATA:

LOT	SQUARE	AREA
69	2668	6.767 S.F.

2. ZONING DISTRICT:
   R-5-B

3. CONSTRUCTION TYPE:
   WOOD CONSTRUCTION – TYPE 3B
   WOOD AND STEEL STUD LOAD BEARING WALLS

4. USE GROUP:
   R2 – MULTI-FAMILY RESIDENTIAL

5. FIRE SUPPRESSION SYSTEM:
   THE BUILDING WILL BE FULLY SPRINKLERED.

6. NUMBER OF STORIES ABOVE GRADE: 3

7. BUILDING HEIGHT: 50'-0" – MEASURED AT TOP OF CURB @ ℄ OF HARVARD STREET ELEVATION)

8. FLOOR AREAS:

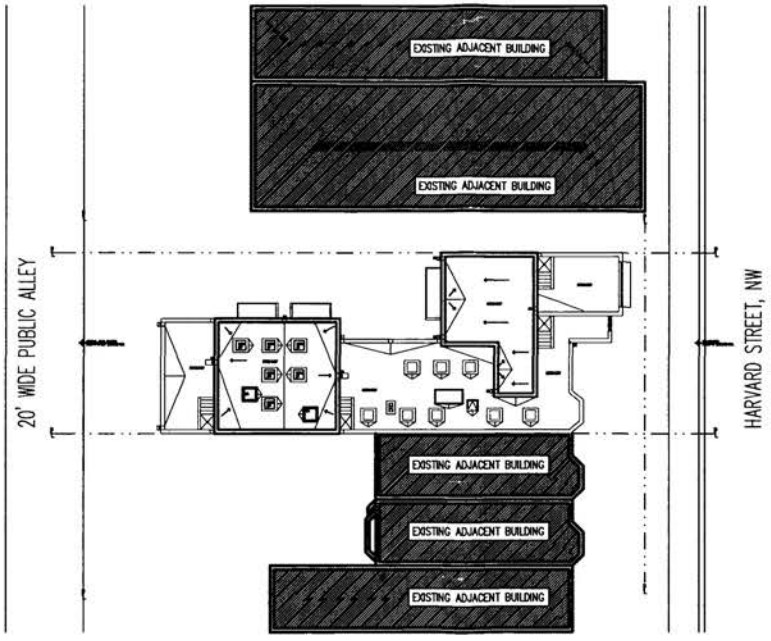
FOURTH	524 GSF
THIRD	3,817 GSF
SECOND	3,780 GSF
FIRST	3,848 GSF
CELLAR	162 GSF
TOTAL	12,132 GSF (ALLOWABLE: 12,180 GSF)

9. PARKING SPACES: REQUIRED – 7, PROVIDED – 7

10. BUILDING CODE:
    BOCA NATIONAL BUILDING CODE– 1996 EDITION, DC SUPPLEMENT DCMR 12/1999
    ZONING: DCMR 11, DC ZONING CODE
    SPRINKLER : NFPA #13 1996
    MECHANICAL: INTERNATIONAL MECHANICAL CODE/1996
    PLUMBING: INTERNATIONAL PLUMBING CODE/1995
    ELECTRICAL: NFPA NATIONAL ELECTRICAL CODE/1996
    FAIR HOUSING ACT

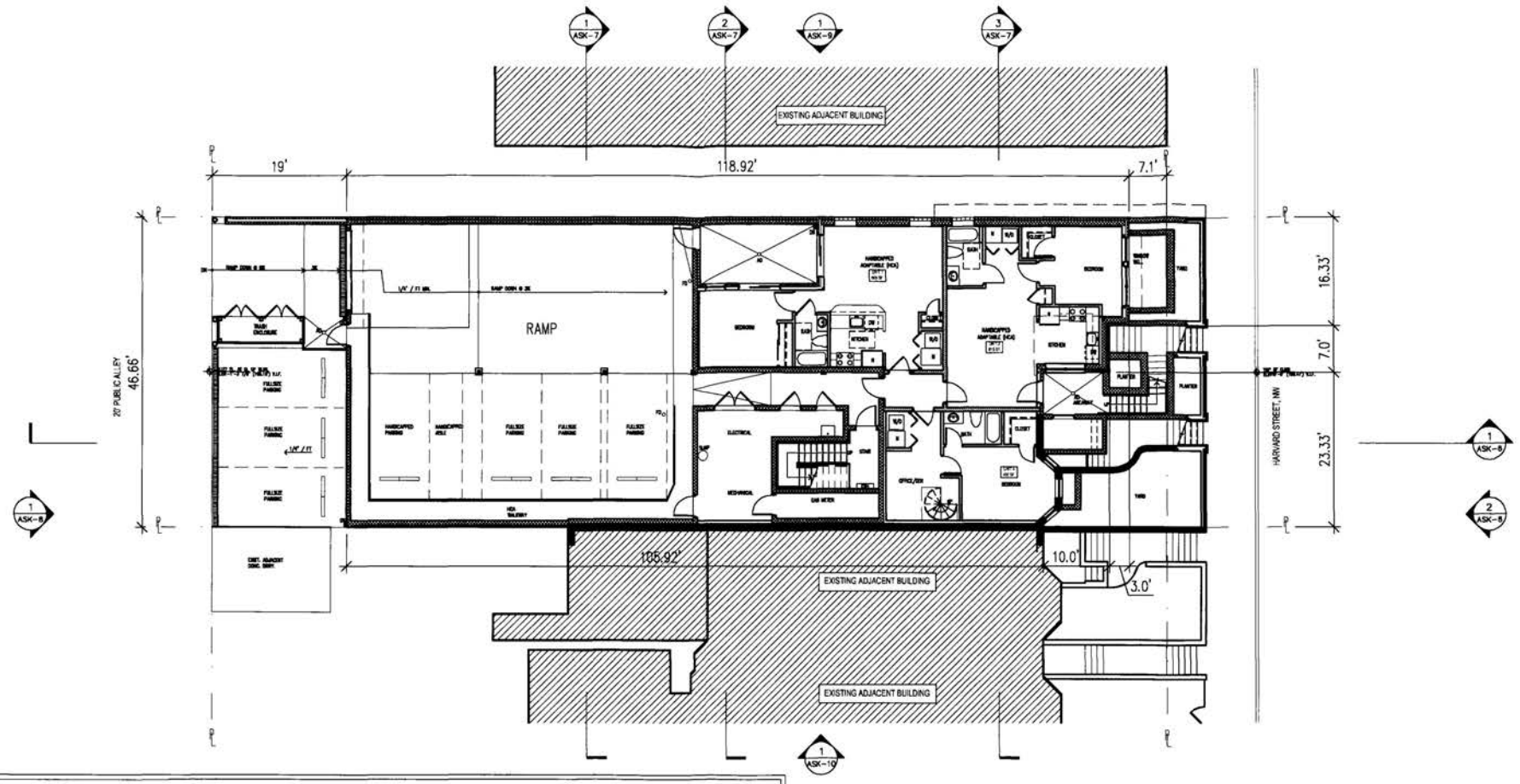
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ASK-2	FIRST FLOOR PLAN
ASK-3	SECOND FLOOR PLAN
ASK-4	THIRD FLOOR PLAN
ASK-5	FOURTH FLOOR PLAN
ASK-6	BUILDING SECTION
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ASK-8	BUILDING ELEVATIONS
ASK-9	BUILDING ELEVATION
ASK-10	BUILDING ELEVATION
ASK-11	LOT COVERAGE DIAGRAMS



1 / T-1.1 SITE PLAN
1/32" = 1'-0"

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CELLAR
TOTAL AREA: 5,247 SF
WALL CHECK - 15.33' WHERE UNDERSIDE OF CEILING IS > 4'-0" TO GRADE
334' LF, SO 4.59% OF CELLAR AREA COUNTS TOWARD FAR.
GROSS AREA - MECH WHERE CEILING IS < 6'-6" - GARAGE RAMP = 3,617 X .0459 = **163 SF (GFA)**

1 ASK-1 CELLAR LEVEL
1/16" = 1'-0"

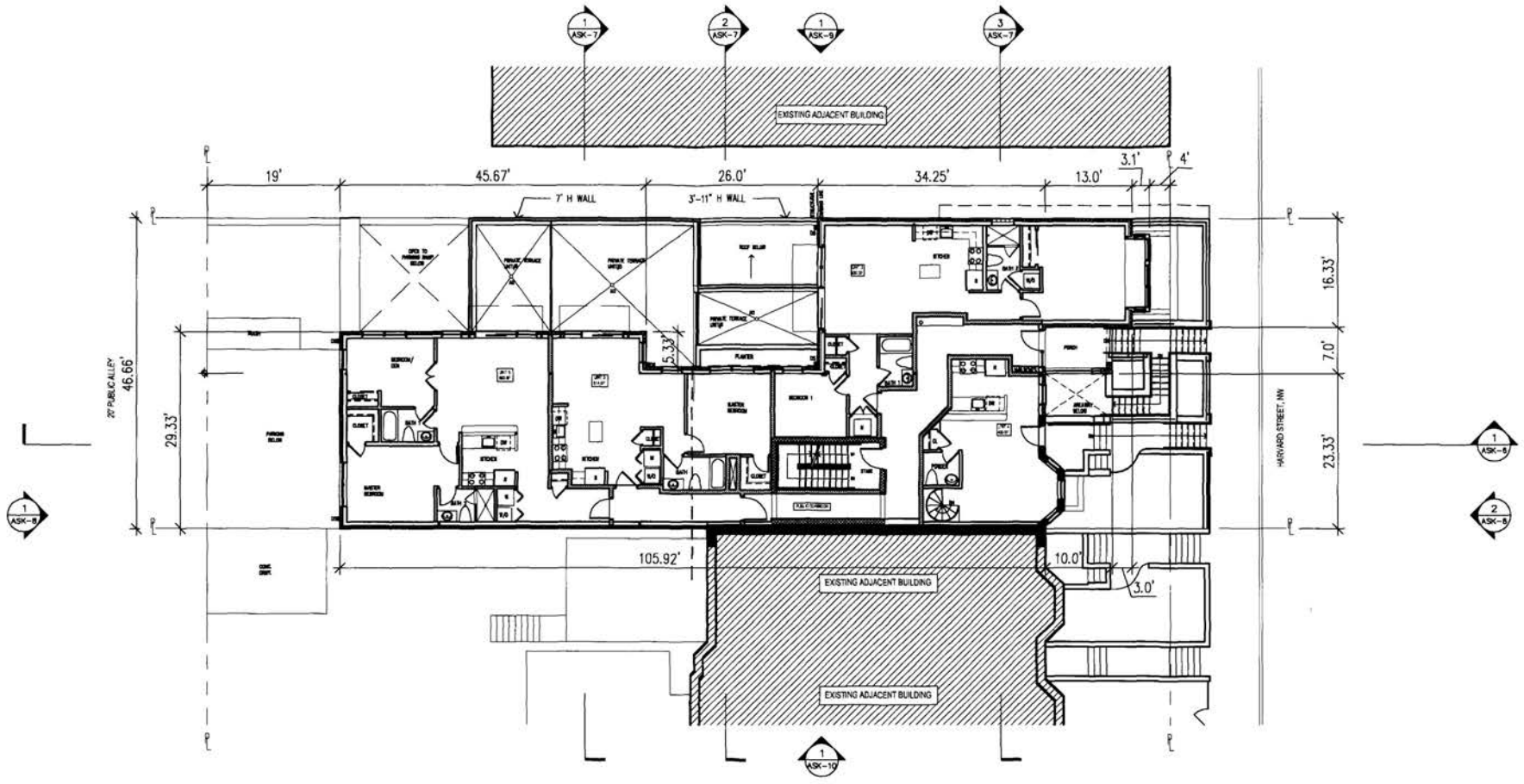
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ASK-1

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FIRST FLOOR
TOTAL FLOOR AREA: 3,906 SF
FAR: **3,848 SF (GFA)**

1 ASK-2 FIRST FLOOR

1/16" = 1'-0"

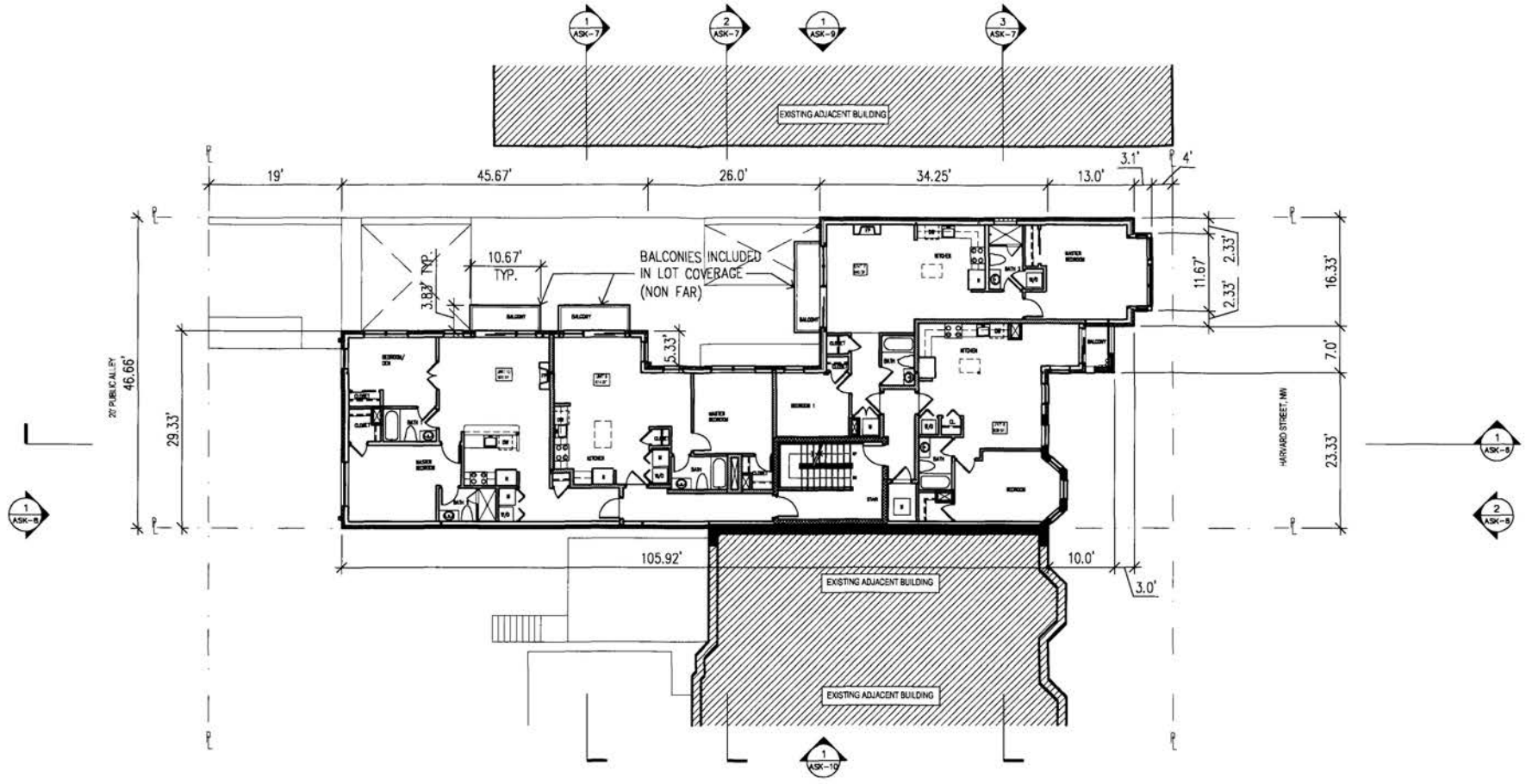
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ASK-2

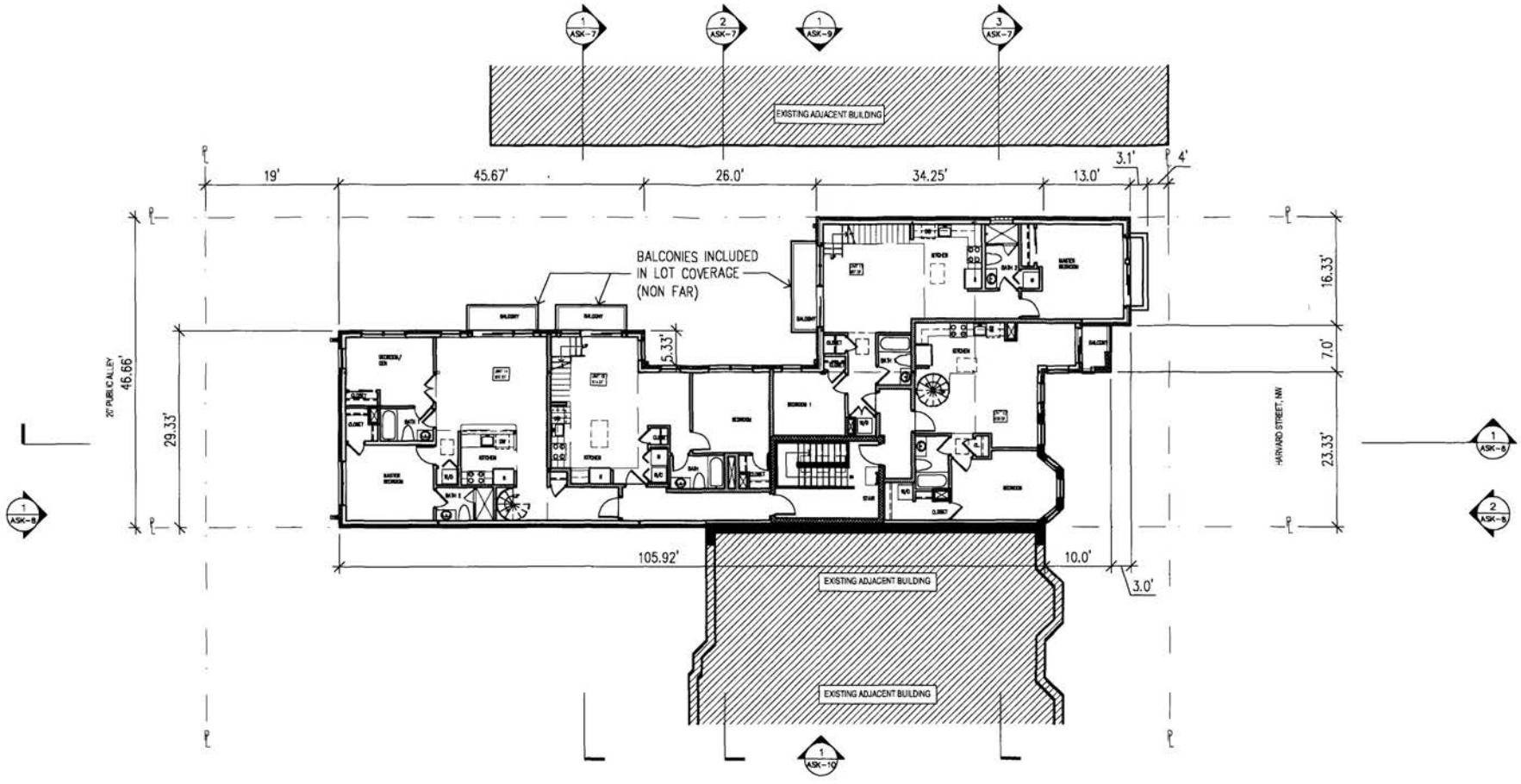
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SECOND FLOOR
TOTAL FLOOR AREA: 3,906 SF
FAR: **3,780 SF (GFA)**

1 ASK-3 SECOND FLOOR
1/16" = 1'-0"

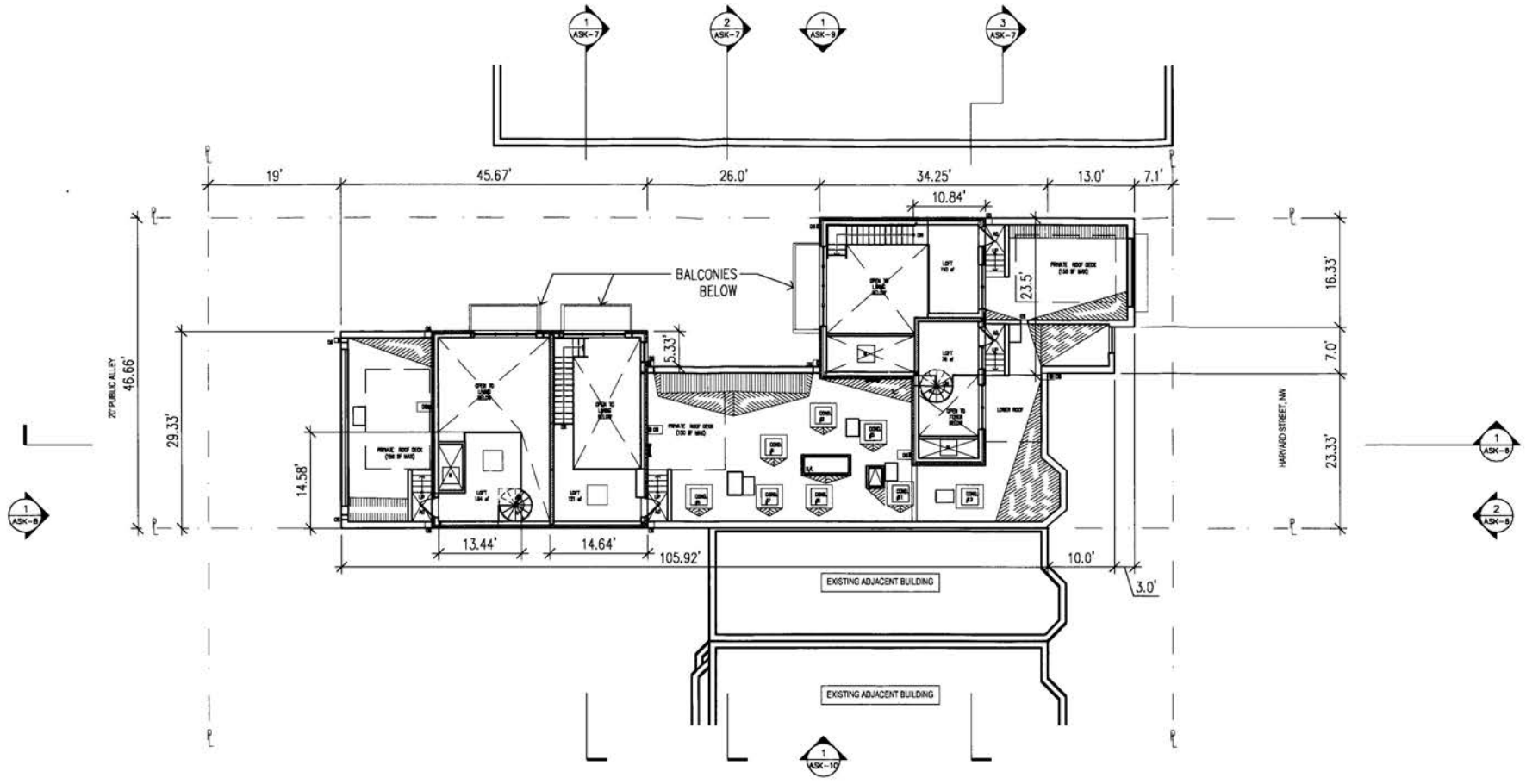
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THIRD FLOOR
TOTAL FLOOR AREA: 3,875 SF
FAR: **3,817 SF (GFA)**

1 ASK-4 THIRD FLOOR
1/16" = 1'-0"

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FOURTH FLOOR
FAR: 136 SF + 155 SF + 233 SF =
524 SF (GFA)

1 ASK-5 FOURTH FLOOR
1/16" = 1'-0"

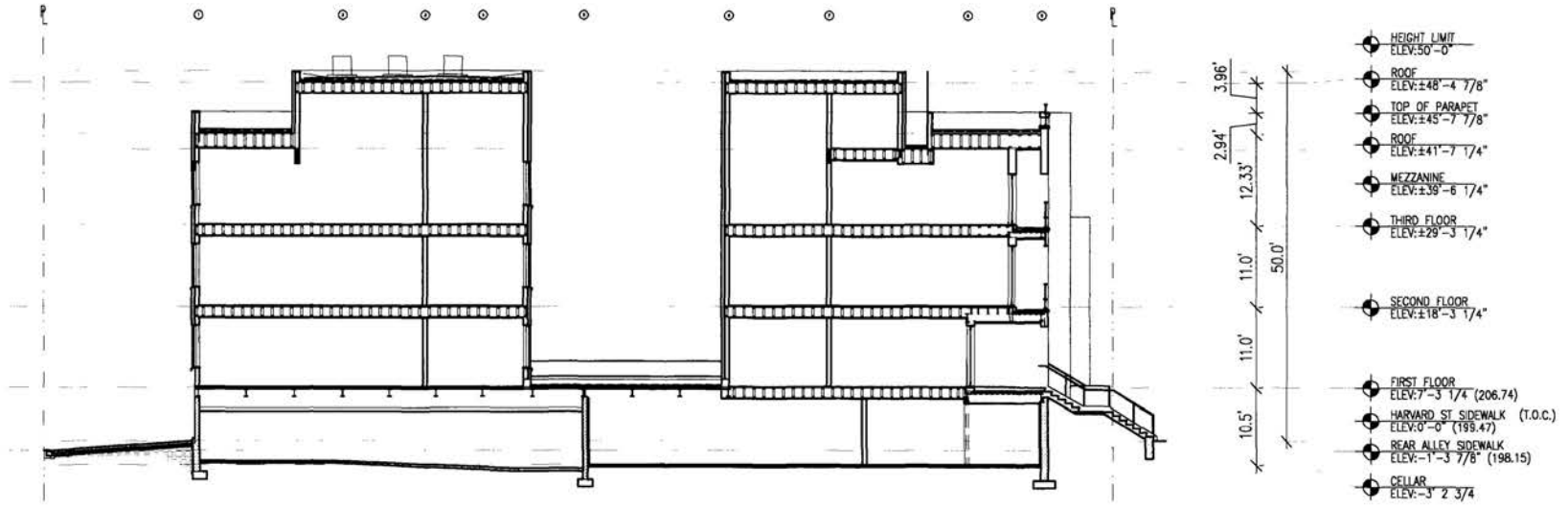
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ASK-5

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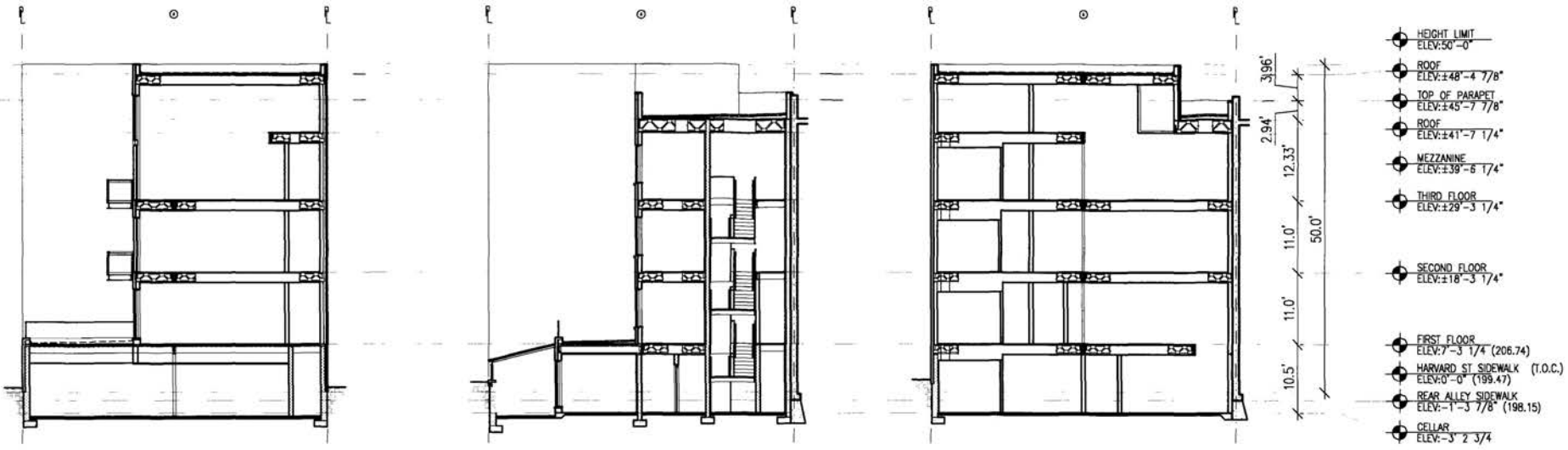


1
ASK-6

BUILDING SECTION

1/16" = 1'-0"

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1 ASK-7 BUILDING SECTION

1/16" = 1'-0"

2 ASK-7 BUILDING SECTION

1/16" = 1'-0"

3 ASK-7 BUILDING SECTION

1/16" = 1'-0"

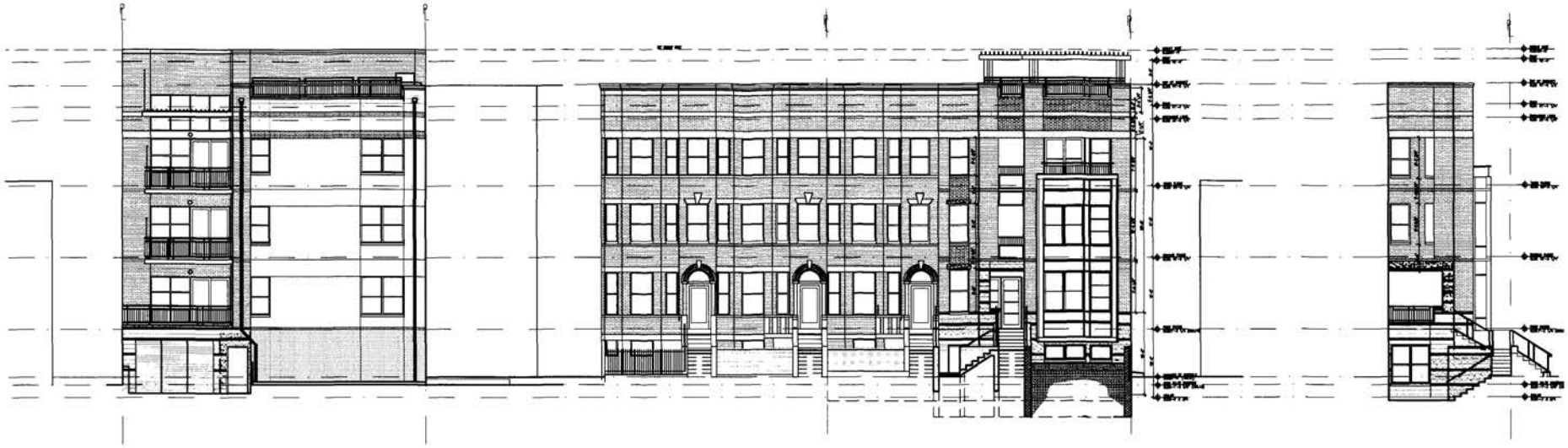
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ASK-7

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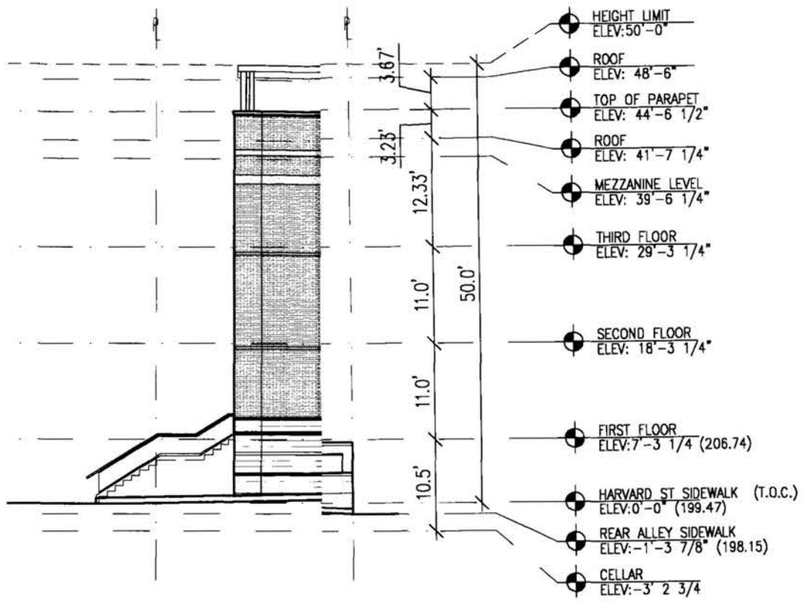
1 / ASK-8 SOUTH ELEVATION

1/16" = 1'-0"

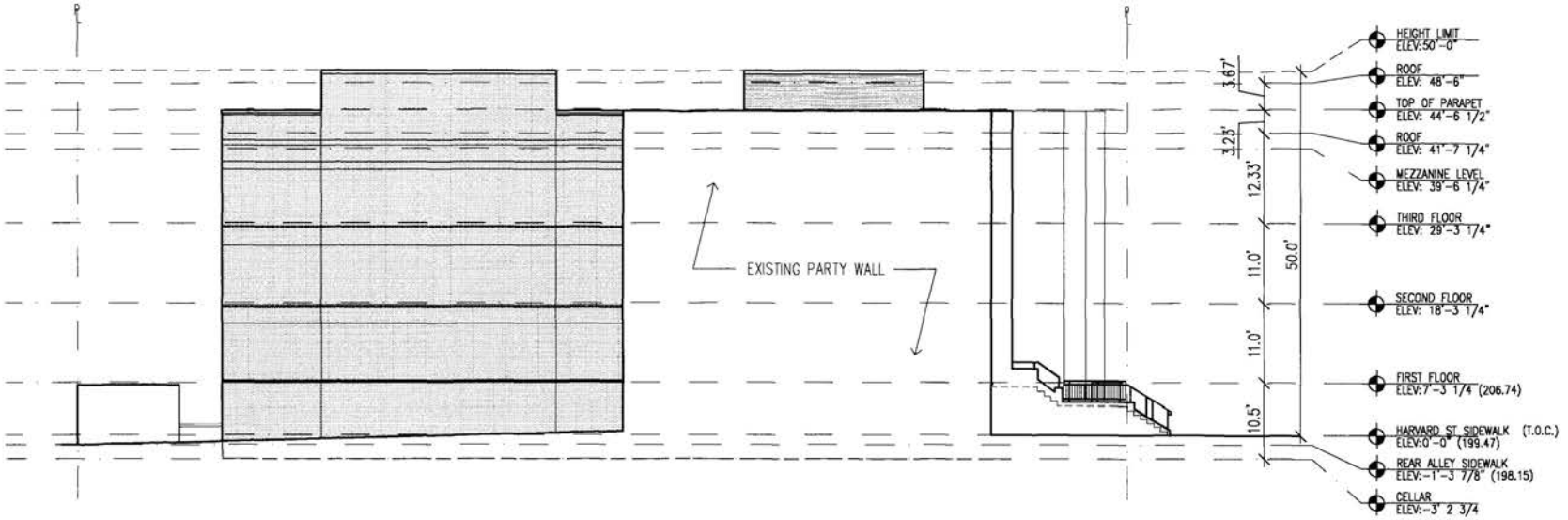
2 / ASK-8 NORTH ELEVATION

1/16" = 1'-0"

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1
ASK-10

EAST ELEVATION

1/16" = 1'-0"

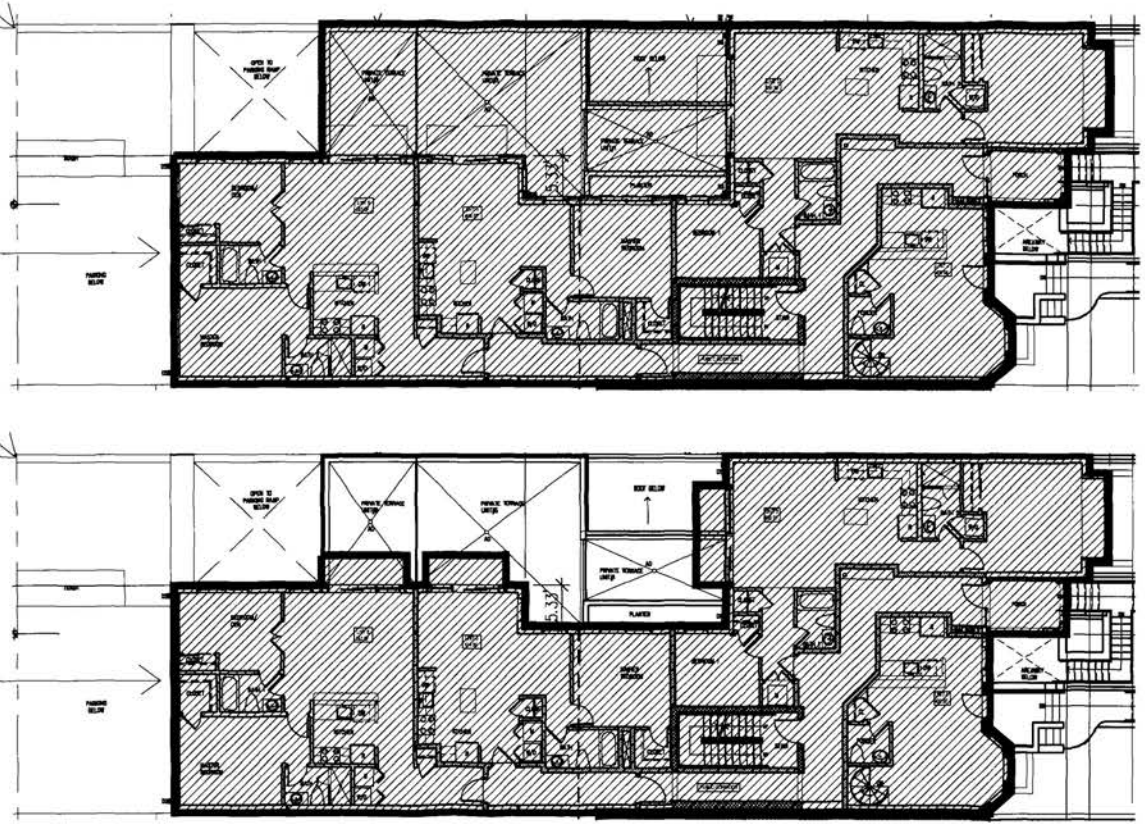
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EXTENTS OF PROPERTY

73 % LOT COVERAGE

EXTENTS OF PROPERTY

60 % LOT COVERAGE



1 / ASK-11 LOT COVERAGE DIAGRAMS

1/16" = 1'-0"

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ASK-11

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