

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18272 of KS FBC, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a special exception for roof structures of unequal height pursuant to § 411, and for a variance from the height provisions under § 530, to allow the development of an apartment house as an addition to an existing church building in the DC/SP-1 and DC/SP-2 Districts at 1328 16th Street, N.W. (Square 181, Lot 163).

HEARING DATE: November 15, 2011
DECISION DATE: January 10, 2012

DECISION AND ORDER

KS FBC, LLC ("Applicant"), submitted this self-certified application on July 26, 2011, on behalf of the First Baptist Church of Washington, the owner of the property at 1328 16th Street, N.W., (Square 181, Lot 163) (the "Property"). The Applicant requested special exception relief from § 411.5 to allow roof structures of unequal heights and an area variance from § 530.1 to permit a uniform building height of 90 feet in order to construct an apartment house as an addition to the existing church in the DC/SP-1 and DC/SP-2 Districts. The Applicant withdrew its request for an area variance from § 2115.4 in connection to the location of compact parking spaces as no longer necessary.

The Board of Zoning Adjustment ("BZA" or "Board") convened a hearing on the application on November 15, 2011. Post-hearing submissions were filed with the record on December 2, 2011, and responses thereto were submitted on December 16, 2011. The Board deliberated on the application on January 10, 2012. For the reasons set forth below, the Board concluded that the Applicant has met the burden of proof pursuant to 11 DCMR 3103.2 for an area variance under § 530.1. The Board also concluded that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1 and 411.5.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated August 9, 2011, the Office of Zoning ("OZ") sent notice of the filing of the application to the D.C. Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO.

EXHIBIT NO.

18272
48

Board of Zoning Adjustment
District of Columbia
CASE NO. 18272
EXHIBIT NO. 48

BZA APPLICATION NO. 18272
PAGE NO. 2

Commission ("ANC") 2B, the ANC within which the subject property is located, Single Member District 2B05, and the Councilmember for Ward 2. A public hearing was scheduled for November 15, 2011. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the *D.C. Register*, and on August 25, 2011, sent such notice to the Applicant, ANC 2B, and all owners of property within 200 feet of the subject property.

Request for Party Status. In addition to the Applicant, ANC 2B was automatically a party in this proceeding. Helen A. White, a resident of the Richmond Condominium located at 1401 17th Street, N.W., across O Street to the north of the subject property, and Ms. Stephanie Swerling of 1414 17th Street, N.W., requested opposition party status. A group of 65 Richmond Condominium residents, known as the Richmond Group and represented by George R. Keys, Esq., also requested opposition party status. At the hearing, Ms. White stated that she had received approval to represent the Richmond Condominium Association before the Board as a party in opposition. The Board granted party status to the Richmond Group and Ms. White, on behalf of the Richmond Condominium Association. Ms. Swerling failed to appear at the hearing and the Board denied her request for party status.

Applicant's Case. Carolyn Brown, Esq. and Norman M. Glasgow, Jr., Esq., of Holland & Knight LLP, represented the Applicant. The Applicant presented five witnesses in support of the application: Reverend Haggray, pastor of the First Baptist Church; David Ryder, Moderator of the First Baptist Church; Gary Squire, of Keener-Squire Properties; Eric Colbert, of Eric Colbert and Associates; and Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The Board qualified Mr. Colbert as an expert in architecture and Mr. Sher as an expert in planning and zoning.

Government Reports. OP filed a report with the Board on November 8, 2011, recommending approval of the application. The OP report set forth each of the provisions of 11 DCMR §§ 411.5 and 3104.1 and opined that each is met. The report also opined that the application met the standards of §§ 530.1 and 3103.2. DDOT also filed a report with the Board on November 10, 2011, indicating that it had no objection to the requested relief. (See Exhibits 29 and 30.)

ANC Report. ANC 2B submitted a report to the Board dated September 14, 2011, recommending approval of the application and testified in support of the application at the hearing. (See Exhibit 23.)

Parties in Opposition. The party-opponents objected to the proposed apartment building addition with respect to its alleged adverse effect on the light, air, and enjoyment of their property; the negative impacts of the roof deck; and the shadows cast on the open space and garden area of the Richmond. The party-opponents also opposed the application based on unacceptable traffic impacts on the surrounding streets.

Persons in Support or Opposition. The Dupont Circle Conservancy supported the application. The Board also received letters, e-mails, and petitions with signature lists both in support of, and in opposition to, the application. (See, e.g., Exhibits 24, 36 and 37.)

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The Property is located at Lot 163 in Square 181 and has street frontage along 16th Street, 17th Street, and O Street, N.W., Washington, D.C. The property is split-zoned DC/SP-1 and DC/SP-2. The west portion of the parking lot fronting 17th Street is located in the SP-2 District for a depth of 40 feet. The remainder of the site is located in the SP-1 District, encompassing the church, the church annex, and the east end of the parking lot. The property fronts on three streets: 16th Street, O Street, and 17th Street.
2. The SP Districts are medium and medium-high density areas designed to preserve and protect areas adjacent to commercial districts that contain a mix of row houses, apartments, offices and institutions, including buildings of historic and architectural merit. The SP-1 District permits a maximum density of 4.0 floor area ratio ("FAR"), all of which may be devoted to residential uses. Other permitted uses are limited to 2.5 FAR. The maximum permitted height in the SP-1 District is 65 feet, with roof structures permitted to rise another 18.5 feet above the roof level. Under the Inclusionary Zoning ("IZ") regulations, a residential building may be built to a density of 4.8 FAR and constructed to a height of 70 feet. The maximum permitted lot occupancy in the SP-1 District is 80%.
3. The SP-2 District permits a maximum height of 90 feet and a maximum density of 6.0 FAR, all of which may be devoted to residential uses. Under IZ, the density may be increased to 7.2 FAR and the lot occupancy may be increased from 80% to 90%. Other permitted uses are limited to 3.5 FAR. The Applicant's project is a residential addition that increases the gross floor area by more than 50% and thus is subject to the IZ requirements and may avail itself of the bonus standards.
4. Lot 163 measures 96.5 feet wide along 16th Street and extends 426.17 feet deep along O Street, with a total land area of 43,287 square feet. The east portion of the site on 16th Street is improved with the First Baptist Church of Washington. A school and an administration wing are located at the back of the church. The rear portion of the site is improved with a surface parking lot with 36 parking spaces. The property falls within the boundaries of the 16th Street and Dupont Circle Historic Districts, and abuts the Massachusetts Avenue Historic District. The First Baptist Church contributes to the character of the 16th Street Historic District.
5. The First Baptist Church of Washington was founded in 1802 and has had a continuing presence in the nation's capital since that time. The church moved to its current location in the 1890s and the first services were held in the present sanctuary on Christmas Day 1955. The annex was constructed during the 1980s. It houses the Sunday school, social programs, including Alcoholics Anonymous, Narcotics Anonymous, other small churches without their own facilities, and the Child Development Center ("CDC"), which has space for approximately 80 children under the age of five, many of whom live within walking distance

of the church.

6. The Property is located in the east end of Dupont Circle and is surrounded on three sides by high-density residential and commercial buildings. Across the alley to the south are the Airline Pilots Building and the Johns Hopkins University Rome Building, each of which rises to a height of 90 feet and fronts on Massachusetts Avenue. To the west across 17th Street are the Boston House Condominium and the Bay State Apartments at the corner of Massachusetts Avenue, which are 87 feet and 90 feet in height, respectively. The Richmond Condominium, across O Street to the north, is also 90 feet in height. The Australian Embassy, located to the south of the church at the corner of 16th Street and Massachusetts Avenue, is another 90-foot structure in the immediate vicinity of the proposed apartment building.

The Applicant's Project

7. The Applicant proposes to construct a nine-story apartment building as an addition to the existing church. The addition will be located on the existing parking lot immediately behind the church annex at the southeast corner of 17th and O Streets, N.W. The main lobby entrance to the residential building will front on 17th Street.
8. The building will connect with the church annex at the ground floor level through a covered passageway and at the mezzanine/first parking level. The covered passageway from O Street will also provide vehicular access to a drop-off area at the interior of the site, which will also serve as an open plaza for church events. Parking and loading facilities are located at the rear alley and can be accessed from 17th Street.
9. The overall density of the apartment building addition will be 2.6 FAR, or a total of 3.77 FAR including the church.
10. The overall height of the addition will be 90 feet, which is permitted in the SP-2 portion of the site. The SP-1 portion of the property, however, only permits a height of 70 feet under the IZ regulations. Consequently, the Applicant is seeking a variance from the height limitations for the SP-1 District.
11. The Applicant proposes to construct the enclosure wall around the elevator override equipment to a height of 18 feet, and the remainder of the roof structure to a height of 13 feet. Subsection 537.1 provides that the provisions of § 411, which regulates roof structures in residence zones, also applies to SP Districts. Subsection 411.5 requires that "enclosing walls from roof level shall be of equal height." The Applicant therefore seeks special exception relief from this requirement.
12. The D.C. Historic Preservation Review Board ("HPRB") reviewed the design of the addition as proposed with a uniform height of 90 feet and roof structure enclosure walls of unequal height. The HPRB found the concept not incompatible with the historic district and consistent with the purposes of the Historic Landmark and Historic District Protection Act of

1978,; D.C. Official Code § 6-1101 *et seq.*

The Variance Relief

Exceptional Conditions

13. The record lot is exceptionally narrow (96.5 feet) in comparison to its length (426.17 feet) along O Street. The site is also unusually large, with no other site equaling its size in this area north of Massachusetts Avenue. The property is split-zoned, with the SP-2 District extending only to a depth of 40 feet from 17th Street.
14. The site is already improved with the existing First Baptist Church building and its annex, which limits the area available for new construction to approximately 30% of the lot. Due to historic preservation constraints and the massing of the existing church, no new development can be located over the church building. Any new construction over the annex building would require the temporary closure of that facility and disruption of church operations and programs that take place in the annex.
15. The buildings have extensive deferred maintenance issues in excess of \$5 million that jeopardize their mechanical and structural longevity and historic integrity. In addition, the church will also need to allocate (i) approximately \$39,500 per year for an annualized maintenance fund over the next 25 years, and (ii) approximately \$424,000 annually to build up a separate reserve for future capital costs. The church's current revenues are insufficient to fund these costs.

Practical Difficulties

16. There would be significant design difficulties with the proposed development if the Applicant were forced to comply with the height limitations of each of the zone districts. The SP-2 portion of the building would have a relatively small floor plate of approximately 40 feet by 86 feet, with a total area of 3,440 square feet. In order to accommodate the highest part of the building, the service core would need to be located in this section of the building, which would include two egress stairs and three elevators. It would be impractical and inefficient to create a design that would stop two of the elevators at the 70-foot level and continue only one of the elevators to the top two floors. Because of the 40-foot depth for the SP-2 portion of the site, the Applicant would either have to design completely different units on the top two floors from what is designed for the lower floors, resulting in expensive and awkward plumbing, electrical risers, and column shifts, or the building would end up with a single-loaded corridor, which is a very inefficient use of space. A significant part of the SP-2 floorplate would end up being devoted to service elements, dramatically devaluing the highest floors, which generate the greatest return in a building. In addition, at least one more egress staircase would be required on the east side of the building, further reducing the useable space in the building. Additional difficulties would include the placement of the mechanical equipment on two different roofs at two different heights.

17. It would be equally impractical to spread the mass of the proposed apartment building to the portion of the site occupied by the annex, either by demolishing the annex or constructing over it. Either option would not only disrupt normal church activities, including the Sunday School and office administration, it would also interfere with the numerous community groups that use the building, including Alcoholics Anonymous, Narcotics Anonymous, and other small churches without their own facilities. The greatest hardship would likely be felt by the families in the CDC, which has space for approximately 80 children under the age of five, many of whom live within walking distance of the church. If the administrative building were demolished, the CDC would have to relocate and, possibly even shut down for the duration of construction. The CDC and other social programs could be without space for as long as three years under this scenario.
18. If the Applicant were to limit construction to the parking lot and comply with the height restrictions of each zone district, the new building would not be sufficiently large enough to generate the income necessary to pay for the deferred maintenance and build up reserves for future maintenance and to implement church programs, including the CDC.
19. The funds to be applied to these costs will come out of the revenue stream from the lease payments from the developer to the church. The lease agreement between First Baptist Church and Keener-Squire Properties will generate an annual payment of approximately \$750,000 to \$1,000,000 annually, including CPI adjustments, to the church.
20. These payments will help satisfy the deferred maintenance costs, the annual maintenance fund and the separate building reserve as more fully described in finding of fact number 15. The payments will also help sustain the religious programs, services, and ministries of the First Baptist Church, which are central to the tenets of its faith and critical to the continuing exercise of its religious beliefs. The church currently has an annual deficit of approximately \$300,000 for operations and programs.
21. The annual payments are based upon the proposed residential building with a unit count of approximately 218 apartments. Compliance with the height limitations of 70 feet would reduce the size of the building by approximately 24 %, resulting in 166 units. A reduction in the number of units would increase the operating expenses per unit and the costs per space for the required off-street parking also increase significantly. As a result, the economics of the project become unattractive to the developer.

No Harm to Public Good or Zone Plan

22. The granting of the height variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan. The predominant height of the immediately surrounding buildings is 90 feet. The additional height would not result in more density than permitted as a matter of right. The proposed FAR is 2.61, whereas the site permits a blended FAR of 4.99. Further, the Historic Preservation Review Board approved the proposed height as compatible with the two historic

districts in which the site is located.

23. The Applicant prepared shadow studies, which were supplemented by the Applicant and the Richmond Group in post-hearing submissions. Each of the studies indicated that the proposed apartment building with its requested height variance would have no appreciable effect on the Richmond units or the garden, particularly when compared to a building that could be constructed on the site as a matter of right.
24. The Richmond Condominium and the Wildlife Federation Building, located to the east of the Richmond, cast the most significant shadows on the Richmond garden. In contrast, the proposed apartment building on the church site only begins to cast shadows of a few feet on the Richmond and the garden during the equinoxes, and are only slightly more and differently configured than the shadows cast by a matter of right building. The Richmond garden will continue to receive direct sunlight for two to three hours, during lunchtimes, even within one month of the winter solstice. There is no effect on the light and air of the garden during growing season.

The Special Exception Relief

25. As noted, § 411.5 of the Zoning Regulations requires penthouse enclosure walls to be of equal height as measured from the roof level. (See also 11 DCMR § 530.5.) A maximum height of 18.5 feet is permitted for the penthouse structure.
26. The Applicant proposes a roof structure enclosure wall with two heights: 18 feet at the elevator and mechanical penthouse and 13 feet for the remainder of the penthouse walls. In order to comply with the provisions of § 411.5, the Applicant would need to increase the penthouse enclosure walls to a uniform height of 18 feet. In doing so, however, the Applicant would unnecessarily increase the visibility of the roof structure from the street, which would have a negative impact on the surrounding historic community.

CONCLUSIONS OF LAW

Variance Relief

Standard of Review

The Applicant seeks an area variance from the maximum height restrictions under § 530 to allow construction of an apartment house addition to the existing First Baptist Church of Washington at 1328 16th Street, N.W. (Square 181, Lot 163). Under § 8 of the Zoning Act (D.C. Code § 6-641.07(g)(3) (2001 ed.)), 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; and (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 Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), *quoting*

BZA APPLICATION NO. 18272
PAGE NO. 8

Roumel v. District of Columbia Bd. of Zoning Adjustment, 417 A.2d 405, 408 (D.C. 1980). See, also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Applicants for an area variance need to demonstrate that they will encounter “practical difficulties” in the development of the property if the variance is not granted. See, *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972) (noting that “area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden”). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be “unnecessarily burdensome.” See, *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

The burden of proof for variance relief as to the first two elements is lessened for non-profits or public service organizations, such as the First Baptist Church. *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1098 (D.C. 1979) (“the BZA may be more flexible when it assesses a non-profit organization, which is a well-established element of our governmental system.... [p]ublic need for the use is an important factor in granting or denying a variance....”); accord *Draude v. District of Columbia Board of Zoning Adjustment*, 527 A.2d 1242, 1255-56 (D.C. 1987). However, when “a public service organization applies for an area variance in accordance with *Monaco*, it must show (1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought.” *Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1256 (D.C. 1987).

Finally, where a property is located in an overlay district, satisfaction of the third prong of the variance test also requires proof that the overlay’s purposes will not be substantially impaired. See, e.g., *Application No. 17614 of 1825 19th Street, LLC* (2007); *Application No. 16827 of The Stuart Building LLC* (2002).

As discussed below, the Board concludes that the Applicant has met its burden of proof for an area variance from the building height restrictions of § 530.1 of the regulations. The Board further concludes that the Applicant met this standard without the need to utilize the flexibility available to a non-profit, although it clearly was entitled to and met that more lenient standard as well.

Exceptional and Extraordinary Conditions

The Board concludes that the subject property is affected by a confluence of several exceptional and extraordinary conditions. First, the property is already improved with an existing church building, which has been deemed to contribute to the character of the 16th Street Historic District. See, *Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (an exceptional or extraordinary situation or condition may encompass the buildings on a property, not merely the land itself, and may arise from a “confluence of factors”). Second, the church includes an annex that houses the Sunday school, social programs, the child development

center and administrative offices that are active on the weekdays and weekends. The buildings have extensive deferred maintenance issues in excess of \$5 million that jeopardize their mechanical and structural longevity and historic integrity. Third, the site is a combination of an unusually large parcel with frontage on three streets that is also split-zoned. Finally, the lot is exceptionally narrow in comparison to its length along O Street.

Practical Difficulties

The confluence of these exceptional and extraordinary conditions creates practical difficulties for the Applicant in complying with the height restrictions requirements of the Zoning Regulations. *See, Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1979) (uniqueness may stem from a confluence of factors).

If the Applicant were forced to comply with the height limitations of the SP-1 District, the annex would need to be demolished in order to accommodate all the residential density necessary to generate income for the deferred maintenance and reserve funds. Demolition of the annex, or even construction over the annex, however, would not only disrupt normal church activities, including the Sunday School and office administration, it would also interfere with the numerous community groups that use the building, including Alcoholics Anonymous, Narcotics Anonymous, and other small churches without their own facilities. Perhaps the greatest hardship would be felt by the families utilizing the CDC, which would have to relocate and, possibly even shut down for the duration of construction. The CDC and other social programs could be without space for as long as three years under this scenario.

Constructing the building to unequal heights – 90 feet in the SP-2 portion of the site and 70 feet in the SP-1 area – is also very problematic from a design standpoint. It would create an extremely inefficient floor plate for the taller portion of the building and would dramatically devalue the higher floors. Constructing a two-height building would likely make the project economically unattractive. Without a viable project, the church will not be able to generate the revenue necessary to undertake \$5 million worth of deferred maintenance, establish a reserve for ongoing maintenance, and sustain its core religious ministries, some of which operate at a deficit.

Thus, the Applicant has demonstrated that the specific design it wants to build constitutes an institutional necessity for the church, not merely the most desired of various options, and it has explained precisely how the needed design features require the specific variance sought consistent with *Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1256 (D.C. 1987).

No Harm to Public Good or Zone Plan

The requested 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. As noted, this includes the purposes of the Dupont Circle Overlay, which are stated in § 1501.4.

The surrounding buildings on 17th Street and Massachusetts Avenue are constructed to a height of 90 feet. The variance relief will allow the Applicant to maximize residential use to the extent reasonably possible in a downtown location where residential use is encouraged. Most of the site is designated for high-density residential use on the Future Land Use Map, with the O Street frontage designated medium-density residential. Even with the variance relief, the maximum residential density on site would be 2.6 FAR, which falls below what the Comprehensive Plan would otherwise allow. The overall density (residential and church) is only 3.77 FAR, which is approximately 20% less than the overlay-permitted residential density on site of 4.99 FAR. The Board notes that the HPRB concluded that the proposed height to be compatible with the surrounding buildings in the historic districts. (*See* 11 DCMR § 1501.4(a), (b), and (c).)

The height increase on the SP-1 portion of the site will not create any undue adverse impacts on light and air of the Richmond Condominium and garden, or on other surrounding properties. As indicated on both the Applicant's and the opponent's shadow studies, there is no appreciable difference between the shadows cast by the proposed apartment building and a matter-of-right building. The Richmond garden and open space will be protected and preserved, in advancement of the purposes of the Dupont Circle Overlay District. (*See* 11 DCMR § 1501.4(e).)

The Applicant's reconfiguration of the roof deck and limitations on its use also adequately address any concerns with the increased height of the building and its related rooftop recreational space. As discussed above, the roof structure and associated roof deck have been pushed south away from the Richmond Condominium and plantings and green space will screen the area from view. Limitations on hours of use will also protect the Richmond residents from adverse noise impacts.

The Board also concludes that the requested relief can be granted without any deleterious effects on traffic or transportation. Significantly, the Applicant has not requested any relief with respect to parking or loading requirements for the building. Moreover, the building will be constructed to lower density than is otherwise permitted on the site as a matter of right. Consequently, the traffic generated by the building would be less than what otherwise would occur with a matter-of-right apartment house. The project will encourage "the free circulation of vehicles through public streets and alleys" and thus is consistent with the purposes of the Dupont Circle Overlay. (*See* 11 DCMR § 1501.4 (g).)

The integrity of the zone plan would not be impaired by the granting of the variance. The SP zoning "incentivizes" residential development. The proposed project's scale would be consistent with nearby residential development, and the property would remain under-developed in density under the applicable zoning, consistent with the purposes of the Dupont Circle Overlay. (11 DCMR § 1501.4 (a).)

Special Exception

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief will be in harmony with the general purpose and intent of the

BZA APPLICATION NO. 18272
PAGE NO. 11

Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. Similar to the variance analysis, the Board “reads the general § 3104 standards as encompassing not only the general purposes of the Zoning Regulations, but also the specific purposes of the Overlay in which the property is located.” *Application No. 17337 of N Street Follies, Ltd.* (2010). Thus, this Applicant must demonstrate harmony with the purposes of the Dupont Circle Overlay as stated in § 1501.4. Certain special exceptions must also meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicants also had to meet the requirements of § 411.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board’s discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and “if the applicant meets its burden, the Board ordinarily must grant the application.” *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

Here, the Applicant could build the penthouse wall to a uniform height of 18 feet to enclose the elevator override equipment and the remainder of the rooftop penthouse. Instead, in order to minimize the appearance of the penthouse enclosure wall, the Applicant proposes to lower its height to 13 feet and only extending the walls of the elevator and mechanical penthouse to a height of 18 feet. The surrounding walls will be of quality material to integrate them into the overall design of the building. If the Applicant were to comply with the requirement for penthouse walls of equal height, it would need to increase the height of the proposed penthouse enclosure walls by another five feet. Such an action would unnecessarily increase the visibility of the roof structure from the street, thereby negatively affecting the surrounding historic community. Instead, the proposed design protects the integrity of the contributing buildings and allows a scale of development consistent with the nature and character of the Dupont Circle area in height and bulk, in conformance with the purposes of the Dupont Circle Overlay. (11 DCMR § 1501.4 (a) and (b).)

The Board concludes that the Applicant has met its burden of proof for special exception relief. The proposed penthouse enclosure walls of unequal height meet the spirit and intent of the regulations to exercise a reasonable degree of architectural control over roof structures. The Applicant’s proposal reduces a majority of the penthouse height to 13 feet, thereby protecting the architectural integrity of the historic districts in which it is located. The application also meets the requirements of § 3104.1 that it not adversely affect neighboring properties and that it be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps. While the parties in opposition raised concerns about the potential adverse effects of the proposed roof deck, those concerns have been adequately addressed by the conditions and design adjustments the Applicant will implement. The roof structure and associated roof deck have been set back away from the O Street elevation of the building, with plantings and green space introduced along the north roof edge to act as a buffer to residents of the Richmond. The roof

deck will be closed from 10:00 p.m. to 8:00 a.m., Sunday through Thursday, and from 11:00 p.m. to 8:00 a.m. on Friday and Saturday. Based on the findings of fact and the reasons discussed herein, the Board concludes that the requested special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. The lowered height of the penthouse wall and the configuration of the roof deck will not have any adverse impacts on the open garden of the Richmond Condominium and will protect the light, air, and privacy of that garden, in conformance with § 1501.4 (e).

Great Weight to ANC

Section 13(b)(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code § 1-309.10(d)(A)), requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 2B recommended approval of the requested relief. The Board accords the ANC recommendation the great weight to which it is entitled and concurs in its recommendation.

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Code § 6-623.04) to give great weight to OP recommendations. The Board also concurs with OP's recommendation that the zoning relief should be granted.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for an area variance under § 530.1, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested 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. The Board also concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1 and 411.5, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that the application is hereby **GRANTED, SUBJECT** to the approved plans, as shown on Exhibit 27, and with the following **CONDITIONS**:

1. The roof deck shall be closed to residents and guests of the building from 10:00 p.m. to 8:00 a.m., Sunday through Thursday, and from 11:00 p.m. to 8:00 a.m., Friday and Saturday.

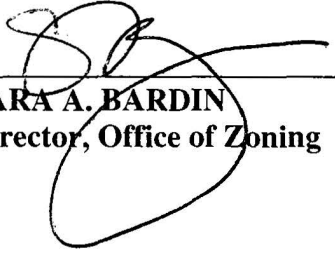
2. The Applicant shall have the flexibility to modify the mix and location of units, and to modify the design of the building to address any comments from the D.C. Historic Preservation Review Board during final review of the project so long as the modifications do not require any additional areas of zoning relief.

VOTE: 5-0-0 (Meridith H. Moldenhauer, Nicole C. Sorg, Peter G. May, and Lloyd J. Jordan to Approve; Jeffrey L. Hinkle to Approve by absentee ballot)

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY:


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 01 2012

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

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

BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.