

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA – BZA APPLICATION NO. 19175**

Application of Crescent Communities, LLC
And RCP Development Company for Variance
and Special Exception Relief for a
Mixed-Use Development in the C-3-C Zone District

ANC: 6D07

**STATEMENT OF EXISTING AND INTENDED USE AND FINAL STATEMENT OF
SATISFACTION OF BURDEN OF PROOF FOR VARIANCE AND SPECIAL
EXCEPTION RELIEF**

**I. STATEMENT OF EXISTING AND INTENDED USE AND ZONING RELIEF
REQUESTED; ANC 6D SUPPORT FOR THE APPLICATION**

This is an application of Crescent Communities LLC and RCP Development Company (“**Applicant**”)¹ for variance relief from the side yard requirements of Section 775.1, and the loading requirements of Section 2201.1, and special exception relief from the rear yard requirements of Section 774.1 and the roof structure requirements of Section 777 (specifically, Section 411.6) in order to construct a new mixed-use building located at 2 Eye Street, SE (Square 695W, Lot 21, the “**Property**”). The Property is located in the C-3-C Zone District and the Capitol South Transferrable Development Right (TDR) Receiving Zone. The Property is currently improved with a McDonald’s restaurant and associated parking spaces.

On January 11, 2016, ANC 6D adopted a resolution (by a vote of 4-0-1) in support of the application for special exception and variance relief. A copy of that resolution is included as Exhibit 22 of the record in this case.

II. JURISDICTION OF THE BOARD

The Board has jurisdiction to grant the relief requested pursuant to Sections 3103.2 and 3104.1 of the Zoning Regulations.

¹ Crescent Communities LLC and RCP Development Company are the contract purchaser of the property. The current owner of the property, the McDonald’s Corporation, has signed an agent authorization letter which authorizes the Applicant to pursue this application.

III. DESCRIPTION OF THE PROPERTY AND THE SURROUNDING AREA

The Property is located in the Capitol Riverfront neighborhood and has frontage along Eye Street, SE in Ward 6 of the District of Columbia. Immediately to the east of the Property is a curb cut and long drive way that provides access to a car and truck wash facility. There is no access to the Property from a public alley, all vehicular access to the Property occurs from Eye Street, SE.

The Property currently contains 57,867 square feet of land area. An easement exists on the Property which prevents the construction of any structures within nine feet of the western boundary of the Property. In addition, the western lot line of the Property is setback 15 feet from South Capitol Street. The District of Columbia owns the 15 foot wide strip of land (Lot 804) that is located between the Property and the South Capitol Street right-of-way. Lot 804 is effectively used as part of the South Capitol Street right-of-way.

On September 25, 2015, the Zoning Administrator issued a determination letter that concluded the Property is considered to be adjacent to South Capitol Street due to the permanent use by the District of Lot 804 for highway purposes. The Zoning Administrator noted that Lot 804 is encumbered with sidewalks, highway signage and a retaining wall for the I-395 ramp. The Zoning Administrator's letter also referenced the 1961 deed by which the District received title to Lot 804, which included the dedication of a perpetual easement for pilings and a retaining wall for the support of a highway structure over the nine foot strip of the Property discussed above. The Zoning Administrator concluded that since Lot 804 should be considered as part of the South Capitol Street right-of-way for purposes of determining the maximum height permissible under the Zoning Regulations, a building on the Property could achieve a maximum building height of 130 feet and a maximum FAR of 10.0 through the purchase of TDRs.

IV. DESCRIPTION OF THE PROJECT AND ENHANCEMENTS AND MODIFICATIONS TO THE PROJECT SINCE THE INITIAL FILING

The Applicant is proposing the construction of a mixed-use project² on the Property that will be developed in two phases. In total, the project will include approximately 555,523 square feet of gross floor area, approximately 558 residential units, and at least 259 parking spaces (the “Project”). Vehicular access to the proposed loading and parking facilities will occur from a new curb cut along Eye Street, SE that has been located in the approximate middle of the Property, in order to provide sufficient distance to the intersection of South Capitol Street and Eye Street as well as the curb cut for the car wash driveway located immediately to the east of the Property. The building will have a FAR of approximately 9.6 and a maximum building height of 130 feet. The top two floors of the western edge of the building have been setback in order to continue the South Capitol Street view corridor.

The Applicant and its architects first met with representatives of ANC 6D in December of 2015 to review the application. At the conclusion of that meeting, ANC 6D representatives asked the Applicant to continue to refine and enhance the appearance of the Project’s South Capitol Street façade. As a result of further study and in response to the comments from the ANC 6D Commissioners, the Applicant made the following enhancements and modifications to the Project:

- Direct access to the ground level residential units along the northern portion of the South Capitol Street frontage are provided;
- The South Capitol Street façade has been revised to provide greater depth by recessing the middle of the façade from the 2nd to the 11th floors with an expansive glass portion that will be in the same plane as the retail base. The top two recessed

² At the current time, the Applicant envisions a portion of the ground floor devoted to retail use.

floors will be treated with a different material in order to better integrate the setback to the north and the south.

- A line of glass balconies has been added to the southwest and northwest corners of the building.

Renderings, plans, elevations and sections of the Project are attached as Exhibit A.

V. THE APPLICATION MEETS THE REQUIREMENTS FOR SPECIAL EXCEPTION RELIEF FOR THE PROPOSED ROOF STRUCTURES PURSUANT TO SECTIONS 411.11 AND 3104.1 OF THE ZONING REGULATIONS

The Applicant initially sought special exception relief pursuant to Sections 3104.1 and 411.11 from the requirements of Section 777 (411.3 and 411.5), that the roof structure be a single roof structure and that the roof structure be of uniform height. On January 8, 2016, amendments to the penthouse requirements of the Zoning Regulations were adopted which make it no longer necessary for the Applicant to seek relief for the varying heights of the penthouses and relief for having a rooftop egress stairwell enclosure that is separate from the penthouse (which includes communal recreation space) on the first phase of the Project. Section 411.6 of the newly adopted regulations states:

All penthouses shall be placed in one (1) enclosure, and shall harmonize with the main structure in architectural character, material, and color; except that a rooftop egress stairwell enclosure not containing any other form of habitable or mechanical space may be contained within a separate enclosure.

The Applicant is still requesting special exception relief for the penthouses in the second phase of this Project, as there will be two penthouses, one penthouse that includes communal recreation space and the elevator overrun, and a second penthouse that will include communal recreation space and a rooftop egress stairwell enclosure.

In order to obtain the requested relief, the special exception must be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and must not tend to

affect adversely the use of neighboring property in accordance with the Zoning Regulations and Maps. 11 DCMR Section 3104.1.

A. The Requested Relief is in Harmony with the General Purpose and Intent of the Zoning Regulations and Zoning Maps

The general purpose and intent of the Zoning Regulations and Zoning Maps is to promote the public health, safety, morals, convenience, order, prosperity, and general welfare. 11 DCMR Section 101.1. Specifically, the requested relief must take into consideration the character of the respective districts as well as the suitability of each district for the uses permitted; and must be designed to encourage the stability of districts and land values. Id. at Section 101.2.

Section 411.11 of the newly adopted regulations notes that the BZA may grant a special exception from Section 411.6 upon a showing that:

- (a) Operating difficulties such as meeting Building Code requirements for roof access and stairwell separation or elevator stack location to achieve reasonable efficiencies in lower floors; size of building lot; or other conditions relating to the building or surrounding area make full compliance unduly restrictive, prohibitively costly or unreasonable;
- (b) The intent and purpose of this chapter and this title will not be materially impaired by the structure; and
- (c) The light and air of adjacent buildings will not be affected adversely.

The size of this Project (approximately 558 residential units) requires that it be constructed in two phases. The proposed roof structures for the second phase seek to provide an appropriate amount of communal recreation space that does not detract from the overall appearance of the roof level. Connecting the two penthouses on the second phase is unduly restrictive and will potentially create more of an impact on neighboring properties than if the penthouses were connected to create a single enclosure. Due to the siting of the building on the Property and the location and treatment of the proposed penthouse structures, the separate penthouses in the

second phase of the Project will not affect the light and air of neighboring properties and granting the requested relief will not adversely affect the use of any neighboring property. In fact, allowing separate roof structures for the communal recreation spaces on the roof of the second phase will allow more light and air for the internal courtyard and the neighboring property to the east.

VI. THE APPLICATION SATISFIES THE SPECIAL EXCEPTION STANDARDS OF SECTION 774

Section 774.1 requires that a building in the C-3-C Zone District provide a rear yard of 2 ½ inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 12 feet. Therefore, a 130 foot tall building is required to provide a rear yard of 27.08 feet. However, Section 774.9(c) of the Zoning Regulations notes that in the case of a corner lot, a court complying with the width requirements for a closed court can be provided in lieu of a rear yard. Section 774.2 notes that the Board of Zoning Adjustment may waive the rear yard requirements in a C-3-C Zone District if the standards in Sections 774.3-774.6 are met.

This Project is not providing a rear yard, however it is providing an irregularly shaped closed court along the rear of the building and along the eastern edge of the building. This court is 15 feet deep for the majority of the building along the rear of the property and 15 feet deep for a majority of the building along the eastern edge of the property (a series of saw tooth projections are proposed along the eastern edge of the building). As noted above, the Zoning Administrator has determined that the District of Columbia owned property to the west of the Property is used by the District for public right-of-way purposes. If this Property was a corner lot, which in effect it is, then no rear yard relief would be necessary, as the Project includes an irregularly shaped closed court which would satisfy the requirements of Section 774.9(c).

However, the Project also satisfies the standards for Special Exception relief enumerated in Sections 774.3-774.6.

A. Satisfaction of the Standards Enumerated in Section 774 for Special Exception Relief

774.3 Apartment and office windows shall be separated from other buildings that contain facing windows a distance sufficient to provide light and air and to protect the privacy of building occupants.

The windows along the rear of the Project and the eastern side of the Project have been carefully sited and located in order to provide sufficient light and air and to protect the privacy of residents of the Project and any future residents or office users on the adjacent properties. The majority of these windows are setback 15 feet from the property line.

774.4 In determining distances between windows in buildings facing each other, the angle of sight lines and the distance of penetration of sight lines into habitable rooms shall be sufficient to provide adequate light and privacy to the rooms.

The proposed windows on the rear and side of the Project allow for sufficient light and privacy for residents of the Project and any future residents or office users on the adjacent properties.

774.5 The building plan shall include provisions for adequate off-street service functions, including parking and loading areas and access points.

All vehicular access to the parking and loading facilities will be provided from Eye Street, SE.

The Project provides adequate off-street loading and parking facilities.

774.6 Upon receiving an application for an approval under § 774.2, the Board shall submit the application to the D.C. Office of Planning for coordination review, report, and impact assessment, along with reviews in writing of all relevant District of Columbia departments and agencies including the Departments of Transportation and Housing and Community Development and, if a historic district or historic landmark is involved, the State Historic Preservation Officer.

Since the filing of this application, the Applicant and its design team have been working with representatives of the Office of Planning and the Department of Transportation to address any concerns regarding the Project. The Applicant's Transportation Engineer submitted a Comprehensive Transportation Review ("CTR") Scoping Form to DDOT on December 18, 2015. Comments on that scoping form were received from DDOT on January 15, 2016. As a result, the Applicant's Transportation Engineer was not able to submit the CTR to DDOT by January 20, 2016, as required by 11 DCMR § 3113.9. The Applicant made DDOT aware of this and DDOT representatives did not raise any objection to the Applicant filing the CTR with this statement. The completed CTR is attached to this statement as Exhibit B.

VII. THE APPLICATION SATISFIES THE VARIANCE STANDARDS

This application seeks relief from the side yard requirement on the western side of the proposed building and the requirement to provide a 55-foot loading berth in a project that includes more than 50 residential units. The Project will provide two 30-foot loading berths, rather than the single 55-foot loading berth. In the C-3-C Zone District, a side yard is not required to be provided. However, if a side yard is provided, it shall be at least two inches wide for each foot of height of the building, but in no case shall the width of the side yard be less than 6 feet. Thus, a 130 foot tall building, if it includes a side yard, must provide a side yard of at least 21.66 feet wide.

As noted above, the western nine feet of the Property is subject to an easement that prohibits the construction of any buildings within the easement area. Due to this easement, the building is setback nine feet from the western property line. This creates a non-conforming side yard on the western side of the building. On the eastern side of the building, no side yard is provided. In addition, the Property does not have access to an alley. As noted above, a curb cut

and long drive way that provides access to a car and truck wash facility is located immediately to the east of the Property. Therefore, all vehicular access to loading and parking facilities must come from Eye Street.

The burden of proof for area variance relief is well established. The Applicant must demonstrate that the property is affected by an exceptional or extraordinary situation or condition, that the strict application of the Zoning Regulations will result in a practical difficulty to the Applicant, and that the granting of the variance will not cause substantial detriment to the public good nor substantially impair the intent, purpose or integrity of the zone plan. Palmer v. D.C. Bd. of Zoning Adj., 287 A.2d 535, 541 (D.C. 1972). As outlined below, the Applicant demonstrates that the Property meets the three-part test for area variance relief.

A. The Property is affected by an Exceptional Situation or Condition

The Court of Appeals held in Clerics of St. Viator v. D.C. Bd. of Zoning Adj., 320 A. 2d. 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property, not just the land. The Court in Monaco v. D.C. Bd. of Zoning Adj., 407 A.2d 1091 (D.C. 1979) went even further and noted that the exceptional situation or condition is not limited to the land or the physical improvements on the land, but applies also to the history of the property. Furthermore, the Court of Appeals held in Gilmartin v. D.C. Board of Zoning Adjustment, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition on the property. Rather, it may arise from a “confluence of factors.” Id. Finally, it is not necessary that the Property be unreservedly unique. Rather, applicants must prove that a property is affected by a condition that is unique to the property and not related to general conditions in the neighborhood

Here, like in Monaco, there are a series of factors that contribute to the uniqueness of the Property. First, the Property is adjacent to a 15 foot strip of land owned by the District of Columbia which is used for public right-of-way purposes. This in effect makes the Property the corner lot located at the intersection of South Capitol Street and Eye Street. Second, the Property is subject to a nine foot wide easement, which is to be used for support structures for the I-395 freeway, along its western edge. Finally, the Property does not have any alley access and there is an existing curb cut immediately adjacent to the Property to the east. Therefore, all vehicular access to the Property will solely be from Eye Street and that access needs to occur from a curb cut that provides an appropriate distance between the intersection of South Capitol Street and Eye Street and the curb cut for the car wash driveway. All of these factors are relevant to the determination that this Property is unique and subject to an exceptional situation or condition.

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

The requested relief is for an area variance, and the appropriate test is whether the strict application of the zoning regulations results in a “practical difficulty.” In reviewing the standard for practical difficulty, the D.C. Court of Appeals stated in Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C. App. 1972), that “[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.” In area variances, applicants are not required to show “undue hardship” but must satisfy only “the lower ‘practical difficulty’ standards.” Tyler v. D.C. Bd. of Zoning Adj., 606 A.2d 1362, 1365 (D.C. 1992) (citing Gilmartin v. Bd. of Zoning Adj., 579 A.2d 1164, 1167 (D.C. 1990)). Finally, it is well settled that the BZA may consider “a wide range of factors in determining whether there is an ‘unnecessary burden’ or ‘practical difficulty’ Increased

expense and inconvenience to applicant for a variance are among the factors for BZA's consideration.” Gilmartin, 579 A.2d at 1171 (citing Barbour v. D.C. Bd. of Zoning Adj., 358 A.2d 326, 327 (D.C. 1976)); see also Tyler v. D.C. Bd. of Zoning Adj., 606 A.2d 1362, 1367 (D.C. 1992). Other factors to be considered by the BZA include: “the severity of the variance(s) requested”; “the weight of the burden of strict compliance”; and “the effect the proposed variance(s) would have on the overall zone plan.” Gilmartin, 579 A.2d at 1171. Thus, to demonstrate practical difficulty, an applicant must show that strict compliance with the regulations is burdensome, not impossible. Here, the Applicant meets this standard for both the side yard relief and the loading berth relief.

The C-3-C Zone does not require a side yard. However, the easement on the Property requires that the building be setback at least 9 feet from the western property line which creates a non-confirming side yard. If the Applicant were required to meet the full side yard setback requirement, 21.66 feet, the developable area on the Property would be significantly constrained. Moreover, a 21.66 foot setback from the property line, plus the 15 feet of the adjacent District owned property, would result in a setback from the sidewalk along South Capitol Street of over 36 feet. This abnormally large setback from a public street would be contrary to the District’s planning goals of creating a strong street presence for development along South Capitol Street. For these reasons, the Applicant faces a practical difficulty in satisfying the side yard requirement along the western portion of the Property.

The Applicant is also faced with a practical difficulty in satisfying the requirement to provide a 55-foot loading berth on the Property. Due to the lack of alley access to the Property, all trucks that are accessing the loading facilities in the Project must do so from Eye Street. In an initial meeting with OP and DDOT representatives on this project (on June 17, 2015), the

Applicant proposed a curb cut from Eye Street that was adjacent to the curb cut for the car wash facility. DDOT representatives voiced their concern with having the two curb cuts adjacent to each other. As a result of responding to that concern, the Applicant placed the Eye Street curb cut in the approximate middle of the Property.

Access to the proposed loading docks and the covered area adjacent to the loading docks has been designed in order to accommodate trucks that will utilize 30-foot loading berths, which are entirely adequate to satisfy the loading needs for the Project³. Providing appropriate turning radii for the size of trucks that would use a 55-foot loading berth would result in significant unutilized area on the Property as it could not be used for residential or retail purposes. This unutilized area would also result in a significant financial burden on the Applicant. A truck turning diagram depicting the movements of a WB-50 truck is attached as Exhibit C. This diagram shows that:

- WB-50 maneuvers would require additional space to be allocated from the ground-floor residential units and mail room. Additionally the ramp down to the parking garage would have to be relocated.
- Some design of the central plaza would be required.
- Outbound WB-50 Maneuvers require a very wide turn to get from the driveway to South Capitol Street.
- WB-50 trucks would need to turn onto Eye Street from the far left lane of South Capitol Street.

In addition, the Court of Appeals has noted that “the severity of the variance(s) requested”; “the weight of the burden of strict compliance”; and “the effect the proposed variance(s) would have on the overall zone plan” are factors that can be used by the BZA to determine whether the practical difficulty standard has been satisfied. On January 14, 2016, the Zoning Commission adopted the Zoning Regulations Rewrite (“ZRR”) and announced that those new regulations would go into effect on September 6, 2016. Once the new regulations become

³ Incorporating these loading docks into the building also allows for the removal of one of the existing curb cuts used for the McDonald’s drive-thru.

effective, it will not be necessary for a residential building with more than 50 units to provide a 55-foot loading berth. In this application we are requesting relief from a requirement that the Zoning Commission has already determined is no longer necessary and will no longer be effective on September 6, 2016. Thus, the severity of the variance requested and the effect of the proposed variance on the overall zone plan are virtually non-existent. If a building permit was filed for this exact loading plan on September 6, 2016, no variance relief would be necessary. For these reasons, the Applicant is faced with a practical difficulty in satisfying the requirement to provide a 55-foot loading berth in the Project.

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

The requested variance relief can be granted without impairing the intent, purpose and integrity of the Zone Plan. Neither of the requested variances will create adverse impacts on the surrounding community. The lot that is located immediately adjacent to the western boundary of the Property, which includes the non-conforming side yard, is only 15 feet wide and is owned by the District of Columbia. This District of Columbia owned land is used for public right-of-way purposes and will likely never be developed given its narrow width and current uses. Granting the requested side yard relief will bring the Project closer to the sidewalk along South Capitol Street and will create a more lively and inviting pedestrian environment.

The Project will include two 30-foot loading berths and two service/delivery parking spaces. As noted in the attached CTR, these loading berths and service/delivery parking spaces will be able to adequately handle all of the loading needs of the proposed uses in the Project. No adverse impacts will occur on the surrounding properties as a result of granting relief from the requirement to provide a 55-foot loading berth.

VIII. LIST OF WITNESSES AND OUTLINES OF WITNESS TESTIMONY

The Applicant will provide testimony from the following expert witnesses in this case:

- Federico Olivera Sala – Associate Principal, SK+I Architecture, and Dennis E. Connors – Associate, SK+I Architecture, proposed experts in architecture; and
- Dan Van Pelt – Principal, Traffic Engineering, Gorove/Slade Associates, Inc., proposed expert in traffic engineering.

Their resumes and outlines of their expected testimony are included in Exhibit D.

IX. CONCLUSION

For all of the above-mentioned reasons, the Applicant has satisfied the legal standards for variance and special exception relief and respectfully requests that the BZA approve this application.

Respectfully submitted,

GOULSTON & STORRS

By: 
Paul Tummonds