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--PENDING

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March 29, 2016

Marnique Heath, Chairperson
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

**Re: Application No. 19187 — 1212–1218 4th Street NW (Square 513, Lots 155 and 156)
Applicant's Informational Draft Order**

Chairperson Heath and Honorable Members of the Board:

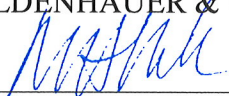
On behalf of 1212–1216 4th Street, LLC, please find enclosed a draft order submitted for informational purposes in response to the Board's request. The draft order enumerates proffers related to parking the Board may wish to make conditions of an approval. Though not seeking parking relief, the Applicant proffers these conditions pursuant to agreements reached with ANC 6E and Sergei Mikhailov, a nearby resident. The Applicant recognizes the Board's discretion to impose such conditions as it sees fit.

Should the Board find the variance standard to be satisfied and deems approval appropriate at its public meeting on April 5, 2016, we note that the Office of Planning is not a party eligible to appeal, there are no parties in opposition, and the application is supported by ANC 6E. Accordingly, the Applicant respectfully requests that a summary order be issued.

Thank you for your attention to this matter.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP


By: Meredith H. Moldenhauer

Board of Zoning Adjustment
District of Columbia
CASE NO. 19187
EXHIBIT NO. 87

Cc: Advisory Neighborhood Commission 6E
c/o Marge Maceda, Chair (via email)
Single Member District 6E04 Commissioner Rachelle Nigro (via email)
Karen Thomas, Office of Planning (via email)

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

INFORMATIONAL DRAFT ORDER¹

Application No. 19187 of 1212–1216 4th Street, LLC, pursuant to § 3104.1 for a special exception to change from one nonconforming use to another (§ 2003) to allow a change from an office use to a neighborhood retail or service establishment, and pursuant to 11 DCMR § 3103.2 for a variance from the requirements regarding lot area (§ 401.11), lot occupancy (§ 403.2), and additions to nonconforming structures (§ 2001.3), to allow expansion of an existing apartment building in the R-4 Zone District at premises 1212–1218 4th Street NW (Square 513, Lots 155 and 156).

HEARING DATE: March 15, 2016
DECISION DATE: April 5, 2016

DECISION AND ORDER

This application was submitted on November 9, 2015, by 1212–1216 4th Street, LLC (the “Applicant”), the owner of the property that is the subject of the application. The application requests special exception relief pursuant to § 3104.1 of the Zoning Regulations to change from one nonconforming use to another (§ 2003) to allow conversion of an office use to a neighborhood retail or service establishment (the “Neighborhood Establishment”), and variance relief under § 3103.2 for the requirements regarding lot area (§ 401.11), lot occupancy (§ 403.2), and additions to nonconforming structures (§ 2001.3) to allow expansion of an existing apartment building (collectively, the “Project”),² in the R-4 Zone District at premises 1212–1218 4th Street NW (Square 513, Lots 155 and 156) (the “Property”). Following a public hearing, the Board voted to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated November 24, 2015, the Office of Zoning provided notice of the application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 6; Advisory Neighborhood Commission (“ANC”) 6E, the ANC for the area in which the Property is located;

¹ This draft order is for informational purposes only and is submitted for the purpose of responding to the Board’s request. There are no parties in opposition, and the application is supported by ANC 6E. Accordingly, the Applicant respectfully requests that a summary order be issued should the Board find the Applicant satisfies the variance standard and grant the relief requested.

² To simplify the degree and areas of relief, the Applicant proffered to the Board to review the application under the more restrictive standards applicable to expansions of existing apartment buildings, even though there are multiple uses at the Property and the Project is more complex than a straightforward expansion. Specifically, the premises at 1212–1214 4th Street NW is an existing apartment house; 1216 4th Street is a mixed-use residential building with an office; and 1218 4th Street is a non-residential property with a history of use as a fuel and oil pump and liquor store. (Exhibits 8B and 8C, Original Building Permits for 1212–1216 4th Street NW; Exhibit 26 at Ex. A, Certificates of Occupancy for 1216–1218 4th Street NW.)

and the representative for ANC Single Member District 6E04. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters on November 24, 2015, providing notice of the hearing to the Applicant, ANC 6E, and the owners of all property within 200 feet of the Property. Notice of the hearing was published in the *D.C. Register* on November 27, 2015 (62 DCR 15308).

Party Status. The Applicant and ANC 6E were automatically parties to this proceeding. On February 8, 2016, Sergei Mikhailov, a nearby resident, filed a request for party status. (Exhibit 23.) However, on March 14, 2016, prior to the hearing on the application, Mr. Mikhailov filed a rescission of his party status request, stating that the Applicant had resolved his concerns and that he now supported the application. (Exhibit 31.) Included in Mr. Mikhailov's rescission letter were conditions related to the parking plan for the Project, which the Applicant agreed to proffer to the Board pursuant to the resolution it reached with Mr. Mikhailov. On March 14, 2016, the Applicant filed an addendum to its Prehearing Statement proffering these conditions. (Exhibit 34.) The conditions are as follows:

1. The Applicant shall provide a minimum of 27 parking spaces as part of the Project;
2. The Applicant shall limit the number of parking spaces available to the residents of the Project to one parking space per dwelling unit or not to exceed 22 parking spaces being utilized by those residents.
3. The Applicant shall make the parking spaces available to all property owners within 200 feet (the "Nearby Property Owners") as follows: Six months after the issuance of a Certificate of Occupancy for the Project or six months after 75% of the dwelling units for the Project have been sold or leased, whichever date is later, notice shall be given to the Nearby Property Owners stating that they shall have 30 days from the date of the notice to send a letter of intent to purchase or lease the remaining parking spaces available after parking spaces have been offered to the residents of the Project. The parking spaces shall be available to the Nearby Property Owners for purchase or lease on a first-come, first-serve basis, at a 15% discount of the current market rate sale or rent price for covered parking spaces in Mt. Vernon Square.

In addition to these conditions, Mr. Mikhailov's rescission letter also referenced conditions that the Applicant agreed to proffer when it sought and received the support of ANC 6E.

No other persons requested party status.

Applicant's Case. The Applicant provided evidence and testimony describing the Project — to demolish the two existing garages on the Property and to preserve and add to the existing historic structure on the Property (the "Historic Structure"). The resulting structure will be a mixed-use building with 22 residential units and 760 square feet of space for the proposed Neighborhood Establishment. The Project will also include a below-grade level for parking and a total of 27 parking spaces.

OP Report. By memorandum dated March 8, 2016, OP recommended denial of the application. (Exhibit 29.) OP stated that granting the requested variance relief would permit expansion of an

apartment building beyond the density and lot occupancy anticipated in the R-4 Zoning District. OP stated further that the Property does not exhibit any exceptional situation that would result in a practical difficulty in renovating the Property within the zoning restrictions. OP stated that the Project could result in undue impacts in other properties in the area and would present substantial and unjustified harm to the Zoning Regulations, specifically, the intent of the R-4 Zone District to be a predominantly rowhouse zone and not an apartment zone.³

With respect to the requested special exception relief under § 2003, OP stated that the commercial uses on the Property had lapsed for a three-year period, which under § 2005.1 constitutes prima facie evidence of no intention to resume active operation as a nonconforming use. Once a nonconforming use has been abandoned, subsequent use of a property must conform to the regulations. OP stated that the Applicant had not submitted evidence indicating an intent to continue the nonconforming commercial uses and that a building permit had been issued to a previous owner for conversion from office space to a two-family flat. Accordingly, OP stated that it could not proceed with an analysis of the requested special exception because the use seemed to have been converted to a conforming residential use.

DDOT Report. By memorandum dated March 8, 2016, DDOT indicated that it had no objection to the requested relief. (Exhibit 30.)

ANC Report. By letter dated March 6, 2016, ANC 6E indicated that, at a duly noticed meeting on March 1, 2016, the ANC voted, with a quorum present, 5-1-0 to support the application. The ANC indicated further that it voted 4-2-0 to support a Letter of Revisions and Proffers that the Applicant presented to the ANC, along with two additional conditions requested by the ANC. (Exhibit 28) On March 1, 2016, the Applicant submitted an addendum to its Prehearing Statement confirming and attaching the Letter of Revisions and Proffers. (Exhibit 27.)

At the March 15, 2016 public hearing on the application, the Board heard testimony from Rachelle Nigro, the representative for Single Member District (“SMD”) 6E04, the SMD in which the Property is located. Commissioner Nigro reaffirmed the ANC’s support for the Project and reiterated that the community’s primary concerns related to parking. (March 15, 2016 Public Hearing Video (“Hearing”) at 4:30:20–4:42:17)⁴

Persons in support or opposition. No persons appeared to testify in support or opposition of the Application. Shawn Montgomery, a member of the Church of the Living God (the “Church”), located at 1206 4th Street NW, provided testimony neither in support nor opposition. Mr. Montgomery testified that the Church’s primary concerns were related to parking, as well as the need to maintain the Property and ensure that there would be no structural effects on the Church as a result of the excavation needed to construct the Project’s underground parking level. (Hearing at 4:42:58 —4:44:32)

³ In its report, OP also stated that relief for the requirements regarding nonconforming structures (§ 2001.3) was also necessary. The Applicant subsequently amended its application to request a variance from this requirement as well.

⁴ Note that, while the ANC’s report requested a minimum of 29 parking spaces, Commissioner Nigro testified at the March 15, 2016 public hearing that she had reviewed the latest submission from the Applicant (which indicated that 27 spaces would be provided) and that this submission is acceptable. (Hearing at 4:38:46–4:39:00)

FINDINGS OF FACT

The Property and Surrounding Area

1. The Property is comprised of Lots 155 and 156 in Square 513, which includes street addresses for 1212–1218 4th Street NW.
2. Together, the lots have approximately 9,954 square feet of land area located at the intersection of 4th Street NW and Ridge Street NW.
3. The Property is within the R-4 Zone District and is located in the Mount Vernon Square Historic District.
4. The Property is currently improved with a two-story row structure that extends across 1212–1216 4th Street and is a contributing structure in the Mount Vernon Square Historic District. The Property is also currently improved with a garage to the rear of the Historic Structure, as well as a larger commercial garage at 1218 4th Street (the “Commercial Garage”).
5. The Historic Structure consists of a six-unit apartment building located at 1212–1214 4th Street (the “Apartment Building”) and a mixed-use building with an office on the first floor and two residential units above, located at 1216 4th Street (the “Mixed-Use Building”).
6. Both Lot 155 and Lot 156 have a long history of non-residential uses postdating 1958. In 1961, a Certificate of Occupancy was granted for the Commercial Garage for use as an oil and gas pump and storage facility for trucks and cars. In 1964, another Certificate of Occupancy was issued for the Commercial Garage to be used by Lucky Liquors, Inc. as a retail beverage store with food and tobacco products. In 1974, the Mixed-Use Building was granted a Certificate of Occupancy to operate a taxicab office. In 1978, another Certificate of Occupancy was issued for the Mixed-Use Building to operate a general cleaning office. These are the most recent Certificates of Occupancy available on public record for the Property.
7. Square 513 is located in an R-4 Zone District that abuts several high-density zones. The square is bordered on the north and east by R-5-B Zone Districts, and is bordered to the south by a R-5-B/Downtown Development (“DD”) Overlay District. The Walter E. Washington Convention Center (the “Convention Center”) is approximately two blocks east of the square, and the highly-trafficked New York Avenue runs approximately one block south and east of the square.
8. There are several multi-family residential buildings in Square 513, including an apartment building on the adjacent property to the south at 1210 4th Street NW. Across Ridge Street from the Property is a set of six flats at 1220–1230 4th Street NW, which have a relatively large massing.

The Project and the Relief Requested

9. The Applicant proposes to combine Lots 155 and 156, raze the existing garages on the Property, and renovate and construct an addition to the existing Historic Structure.
10. The result will be a three-story mixed-use building with 22 residential units and 760 square feet of space for a neighborhood servicing retail or service establishment on the ground floor. The Project will also include a below-grade level for parking and a total of 27 parking spaces.
11. The Applicant proposes to convert the existing office use in the Mixed-Use Building into the proposed Neighborhood Establishment. An office is a nonconforming use in the R-4 District, as are retail and service establishments.
12. Under § 2003, the Board may permit, by special exception, a change from one nonconforming use to any nonconforming use permitted as a matter of right in the most restrictive zone district in which the existing nonconforming use is permitted as a matter of right. The most restrictive district in which an office use is permitted as a matter of right is the C-1 Zone District. The Applicant proposes to convert the existing office to a retail or service establishment permitted as matter of right in the C-1 Zone District, such as a coffee shop, bike repair shop, bakery, or dry cleaner.
13. The Neighborhood Establishment will not have an adverse effect on the surrounding area and will not create any deleterious external effects. Rather, it will provide a much-needed neighborhood-oriented service that will improve the immediate community.
14. The Property has not been used for any nonconforming use since before the Applicant purchased the Property in 2012.
15. In 2008, a previous owner of the Property was issued a building permit, Permit No. B115244 for 1216 4th Street NW. (OP Report at Exhibit 29 at page 8.)
16. Dr. Sahr Bockai, the Applicant's authorized agent, testified at the March 15, 2016 hearing that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. (Hearing at 3:39:11–3:39:18)
17. Under § 401.11, an existing apartment building may not be expanded to increase the number of dwelling units unless there are 900 square feet of land area for each dwelling unit. The Project will have 22 units with a land area of 9,954 square feet, or approximately 453 square feet per dwelling unit. Accordingly, the Applicant requests variance relief from the minimum lot area requirements.
18. Under § 403.2, an expansion of an existing apartment building is limited to 40% lot occupancy. The Applicant requests variance relief to construct a building with a lot occupancy of 75%.

19. The Property currently has a lot occupancy of 41%. Accordingly, the Applicant requests a variance from § 2001.3 to permit an addition to a nonconforming structure.
20. The Applicant in working with the community made the following changes to the Project and proffered the following conditions:
- A. Reduced the massing and removed an originally proposed penthouse;
 - B. Revised the façade along Ridge Street NE to resemble rowhomes;
 - C. Included neighborhood servicing retail space as part of the Project;
 - D. Increased parking at the Project;
 - E. Reduced the unit count to 22 units;
 - F. Agreed to offer excess parking to owners of property within 200 feet of the property and a purchase price or rental rate at 15% below market rate; and
 - G. Imposed Residential Parking Permit (“RPP”) restrictions by including restrictions in the condominium documents recorded against the Property, as follows:
 - i. The Applicant/Condo Board shall include in its condominium documentation a provision that prohibits residents/owners from obtaining an RPP for the Property from the D.C. Department of Motor Vehicles (“DMV”), under penalty of fine(s) against the condominium unit owner;
 - ii. The Applicant/Condo Board shall obtain written authorizations from each owner, either through a deed provision or another written document that allows the DMV to release the Applicant/Condo Board any and all records of that resident/owner requesting or receiving an RPP for the Property;
 - iii. The Applicant/Condo Board shall monitor resident/owner compliance with the RPP lease restriction by requesting from the DMV, every six months, any and all records of residents/owners requesting or receiving RPPs for the Property, and shall provide annually the Condominium Board the results of its inquiries; and
 - iv. The Applicant/Condo Board shall record a covenant against the Property among the Land Records of the District of Columbia prohibiting any owner of the Property from obtaining an RPP for the building approved as part of this application.

Exceptional Situation or Condition

21. The Property is exceptionally large, with 9,954 square feet of lot area.

22. Square 513 is located in a unique R-4 Zone District that abuts higher density R-5-B Zone Districts on three sides and is located near the Convention Center, Downtown, and New York Avenue.
23. The Property has been devoted to various residential and commercial uses, including nonconforming uses dating back to at least 1961. The Property is currently improved with an apartment house, a mixed-use building with a ground-floor office and residential units above, and a garage devoted to various commercial uses.
24. Because of the variety of uses and structures on the Property, the Project is an unusual hybrid development that is partly a conversion of a non-residential structure and also partly an expansion of an existing apartment house.
25. The interior layout of the existing Historic Structure on the Property is highly inefficient due to multiple interior renovations over the years. Though originally two structures, the Apartment Building and Mixed-Use Building now intercommunicate on the first floor. Additionally, the electrical box that controls the entire structure is located in the basement of the Mixed-Use Building.
26. The Historic Structure is in a severely dilapidated condition, having suffered from electrical and water damage. The ceiling has collapsed in many of the room and a portion of the stairway in the Mixed-Use Building has also collapsed. The basement of the Mixed-Use Building has holes that make the footing visible. Further, the Historic Structure has become infested with stray and feral animals.
27. The Historic Structure is a contributing structure in the Mount Vernon Square Historic District. In discussions with the D.C. Historic Preservation Office (“HPO”), staff indicated that HPO would require retention of the entire structure and would not support construction of a new structure that is face-on-line with the existing Historic Structure. Accordingly, the proposed addition will be set back 20 feet from the Historic Structure’s front façade.
28. As demonstrated in detail in the financial pro forma submitted by the Applicant (Exhibit 26), there are significant base renovation costs associated with any redevelopment of the Property due to its severely dilapidated condition and the need to preserve the Historic Structure.
29. Because the Property has been used as an oil and gas pump, the Applicant may need to conduct environmental studies and perform environmental remediation in order to complete the Project.

Practical Difficulties

30. As demonstrated in the Applicant’s financial pro forma and as testified by Dr. Bockai at the March 15, 2016 hearing, a redevelopment of the Property that results in a building

with less than 22 residential units would not be financially feasible. (Hearing at 3:38:08–3:38:45) Specifically, while the Project as proposed is expected to provide a modest return on investment (“ROI”) of 5.03%, a project with only 15 residential units would provide a nominal ROI of 3.08%, which is not viable. (Exhibit 26.) Further, a project with only the 11 units permitted as a matter of right would provide an ROI of 0.68%. (*Id.*) A return of 0.68% or 3.08% is not reasonable and poses a financial difficulty in developing the Property as a matter of right or with a lower degree of relief needed.

31. As testified by Ron Schneck, the architect for the Project, a matter of right development with 11 units and 40% lot occupancy could not have been accomplished at the Property without seeking some type of relief from the Zoning Regulations. The Property is improved with a purpose-built apartment building that is a contributing structure in the Mt. Vernon Square Historic District, and which has an existing lot occupancy of 41%. The Historic Structure cannot be demolished, and any addition to the Historic Structure would require relief from the lot occupancy and nonconforming structure requirements of the Zoning Regulations. (See, Hearing at 3:49:18- 3:49:29 and at 3:59:07-4:01:37)
32. In redeveloping the Property, the Applicant will face similar challenges to those common for conversions of non-residential buildings — such as substantial internal reconfiguration and possible environmental study and remediation. Nonetheless, the Project is subject to the more stringent zoning requirements applicable to expansions of existing apartment houses. Specifically, under § 403.2, conversions of non-residential buildings are limited to 60% lot occupancy while expansions of apartment houses are limited to only 40% lot occupancy. Further, conversions may seek relief from minimum lot area requirements under the less stringent special exception standard under § 337, whereas expansions may only seek lot area relief as a variance.

No Substantial Detriment to the Public Good or Zone Plan

33. The Project will complement the surrounding neighborhood and will have a massing similar to or smaller than several nearby apartment buildings and other residential structures. For example, the Project will have a somewhat smaller massing than the set of flats directly across Ridge Street at 1220–1230 4th Street NW. The Project will maintain the status of this unique R-4 Zone District, which is located adjacent to higher density zone districts and commercial areas.
34. The Project will rehabilitate a long-vacant and dilapidated property and will replace the existing dilapidated Commercial Garage on Ridge Street NW with a rowhome-type façade that extends the character of the other dwellings on Ridge Street to the end of the block and provides a continuous transition to 4th Street. In doing so, the Project will achieve urban planning principles by activating the streetscape.

35. In response to requests from the surrounding community, the Project will include a neighborhood servicing retail or service establishment and will provide 27 parking spaces, well above the seven spaces required under the Zoning Regulations.⁵
36. When the Zoning Commission amended the R-4 regulations in Z.C. Case No. 14-11, it created a special exception for minimum lot area requirements for conversions of non-residential buildings under § 337 in order to encourage such conversions. Although this Project is not eligible for relief under § 337, granting lot area relief in this case is within the spirit of the R-4 regulations, as adopted in Z.C. Case No. 14-11, because the Project adaptively reuses a property previously devoted to non-residential uses.

CONCLUSIONS OF LAW AND OPINION

The Applicant requests special exception and variance relief to construct the Project. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2016), to grant special exceptions, as provided in the Zoning Regulations, where it will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to adversely affect the use of neighboring property, subject to specific conditions. 11 DCMR § 3104.1.

The Board is also authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(3), to grant variance relief 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 the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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. 11 DCMR § 3103.2.

Special Exception under Section 2003

The Applicant requests a special exception under § 2003 to convert the existing office use in the Mixed-Use Building into the proposed Neighborhood Establishment. The Board concludes that the Applicant has met its burden of proof for the requested relief.

An office is a nonconforming use in the R-4 District, as are retail and service establishments. Under § 2003, the Board may permit a change from one nonconforming use to any nonconforming use permitted as a matter in the most restrictive zone district in which the existing nonconforming use is permitted as a matter of right. The most restrictive district in which an office use is permitted as a matter of right is the C-1 Zone District. The Neighborhood Establishment will be a retail or service establishment permitted as matter of right in the C-1 Zone District, such as a coffee shop, bike repair shop, bakery, or dry cleaner.

⁵ Under § 2101.1, an apartment building in the R-4 Zone District must provide one parking space for every three dwelling units.

The Board finds that the Neighborhood Establishment will not adversely affect the present character or future development of the surrounding area, nor will it create any deleterious external effects, as required by §§ 2003.2 and 2003.3. To the contrary, the Neighborhood Establishment will provide much-needed retail or services in a neighborhood facility, as permitted under § 2003.5. This will benefit the surrounding community and was specifically requested by the community.

The existing nonconforming office use has never been changed to a conforming or more restrictive use, as required by § 2003.4. Although OP's report indicated that a previous owner had been issued a building permit to convert the office in the Mixed-Use Building to a two-family flat, the documentation that OP attached to its report provided conflicting and ambiguous information as to whether the permit authorized conversion of the office space or only the second story dwelling. In any event, there is no evidence that work was ever begun under this permit.

Still, the Property has not been used for a nonconforming use since the Applicant purchased the Property in 2012. Section 2005.1 prohibits resumption of a nonconforming use once it has been abandoned, and states, in relevant part:

[d]iscontinuance for any reason of a nonconforming use of a structure or of land . . . for a period of more than three (3) years, shall be construed as prima facie evidence of no intention to resume active operation as a nonconforming use. Any subsequent use shall conform to the regulations of the district in which the use is located.

“The test [for abandonment] in the District of Columbia continues to be (1) *the intent to abandon*, and (2) some overt act or failure to act which carries the implication of abandonment.” *Application No. 17902 of Joseph Park* (2009) (quoting *George Wash. Univ. v. District of Columbia Bd. of Zoning Adjustment*, 429 A.2d 1342, 1345 (D.C. 1981))(emphasis added). As the Board explained in *Park*, § 2005.1 provides that discontinuance for three years or more creates a presumption of abandonment, but this presumption may be rebutted “if the owner of the nonconforming use can make the appropriate showing that *he did not intend*” to abandon the use. *Id.* (Emphasis added). Here, the Board credits the testimony of Dr. Bockai, the Applicant's authorized agent, that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. Accordingly, the Applicant is not prohibited from converting the office use to the proposed Neighborhood Establishment under § 2003. Further, the Board finds that no modifications to the proposal are necessary under § 2003.7. Thus, the Applicant satisfies the requirements for relief under § 2003.

Variances for Lot Area, Lot Occupancy, and Nonconforming Structure Requirements

The D.C. Court of Appeals has read the Zoning Act and Regulations to impose a three-part test for granting an area variance. The Applicant “must show that (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) 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.” *Fleischman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 560 (D.C. 2011) (quotations and citations omitted).

The Applicant requests variance relief from the regulations regarding lot area under § 401.11, lot occupancy under § 403.2, and additions to nonconforming structures under § 2001.3. The Board concludes that the Applicant has met its burden of proof for the requested area variances.

A. Exceptional Situation or Condition

The Board finds that, based on a confluence of factors, an exceptional circumstance exists at the Property. The Property is exceptionally large and is located in a unique R-4 Zone District that abuts higher density R-5-B Zone Districts on three sides and is near the Convention Center, Downtown, and New York Avenue. The Property has been devoted to residential uses and various commercial uses that date back to at least 1961. The Property is currently improved with structures that were most recently used as an apartment house, a mixed-use building with a ground-floor office and residential units above, and a garage devoted to various commercial uses. This variety of uses and structures is unusual and results in the Project being a unique hybrid development that is partly a conversion of a non-residential structure and also partly an expansion of an existing apartment house.

Additionally, the interior layout of the existing Historic Structure on the Property is highly inefficient due to multiple interior renovations over the years. The Historic Structure is in a severely dilapidated condition, having suffered from electrical and water damage. Further, the Historic Structure has become infested with stray and feral animals. Nonetheless, because the Historic Structure is a contributing structure in the Mount Vernon Square Historic District, the Applicant is retaining the structure and the proposed addition will be set back 20 feet from the front façade. Due to the Property’s severely dilapidated condition and the need to preserve the Historic Structure, there are significant base renovation costs associated with any redevelopment of the Property, as demonstrated in the Applicant’s financial pro forma. Relatedly, because the Property has been used as an oil and gas pump, the Applicant may need to conduct environmental studies and perform environmental remediation in order to complete the Project. All of these factors combined result in an exceptional circumstance affecting the Property.

B. Practical Difficulties

Due to the exceptional circumstances affecting the Property, the Applicant will face practical difficulties if zoning requirements are strictly imposed. A project with less than 22 residential units would not be financially feasible. While the Project as proposed is expected to provide a modest ROI of 5.03%, a project with only 15 residential units would result in an ROI of 3.08%. Further, a project with only the 11 units permitted as a matter of right would provide an ROI of 0.68%. The Board has repeatedly found that financial hardship may constitute a practical difficulty in variance cases. *See Application No. 17446 of Pauline S. Ney* (2006); (finding practical difficulty based on economic burden); *Application No. 16573 of Martin E. Hardy* (2000) (“The Board may consider the economic hardship in evaluating the applicant’s

practical difficulties”). This is also well supported by the decisions of the D.C. Court of Appeals. See *Tyler v. District of Columbia Bd. of Zoning Adjustment*, 606 A.2d 1362, 1367 (D.C. 1992) (“[E]conomic use of property may properly be considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variances cases.”) (quotation and citation omitted); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990) (“Increased expense and inconvenience to applicants for a variance are among the proper factors for BZA’s consideration”) (internal citation omitted). Likewise here, the Board finds that financial hardship poses a practical difficulty in this case.

Further, in redeveloping the Property, the Applicant will face similar challenges to those common for conversions of non-residential buildings — such as substantial internal reconfiguration and possible environmental study and remediation. Nonetheless, the Project is subject to the more stringent zoning requirements applicable to expansions of existing apartment houses. These more stringent regulations also pose a practical difficulty for the Applicant.

C. No Detriment to the Public Good or Zone Plan

The Board concludes that the Project will not result in substantial detriment to the public good or substantial impairment of the intent, purpose, and integrity of the zone plan. The Project will complement the surrounding neighborhood and will have a massing similar to or smaller than several nearby apartment buildings and other residential structures. For example, the Project will have a somewhat smaller massing than the set of flats directly across Ridge Street at 1220–1230 4th Street NW. Thus, the Project will maintain the status of this unique R-4 Zone District, which is located adjacent to higher density zone districts and commercial areas.

The Project will rehabilitate a long-vacant property and will replace the existing dilapidated Commercial Garage on Ridge Street NW with a rowhome-type façade that extends the character of the other dwellings on Ridge Street to the end of the block and provides a continuous transition to 4th Street. In doing so, the Project will achieve urban planning principles by activating the streetscape. Further, in response to requests from the surrounding community, the Project will include the proposed Neighborhood Establishment and will provide 27 parking spaces, well above the seven spaces required under the Zoning Regulations. Further, the Project has the backing of ANC 6E and the surrounding community, which reaffirms that there will be no detriment to the public good by granting the requested relief.

Moreover, the Project is within the intent of the zone plan, specifically, as embodied in the R-4 regulations. When the Zoning Commission amended the R-4 regulations in Z.C. Case No. 14-11, it created a special exception for minimum lot area requirements for conversions of non-residential buildings under § 337 in order to encourage such conversions. Although this Project is not eligible for relief under § 337, granting lot area relief in this case is within the spirit of the R-4 regulations, as adopted in Z.C. Case No. 14-11, because the Project adaptively reuses a property previously devoted to non-residential uses. Importantly, the Project will further one of the main purposes of the variance procedure — to “prevent usable land from remaining idle.” *Palmer v. District of Columbia Bd. of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). Accordingly, the Project will not impair the zone plan.

Great Weight

In deciding to grant or deny applications for zoning relief, the Board is required to give “great weight” to OP’s recommendation. D.C. Official Code § 6-623.04. The Board must demonstrate in its findings that it considered OP’s views and must provide a reasoned basis for any disagreement with it. *Glenbrook Rd. Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 605 A.2d 22, 34 (D.C. 1992) (internal citation omitted). In this case, OP recommended denial of the application. In its report, OP stated that granting the requested variance relief would permit expansion of an apartment building beyond the density and lot occupancy anticipated in the R-4 Zones District. OP further stated that the Property does not exhibit any exceptional situation that would result in a practical difficulty in renovating the proposed combined structure within the zoning restrictions. OP stated that the number of units and the proposed lot occupancy could result in undue impacts in other properties in the area.⁶ Further, OP stated that the Project would present substantial and unjustified harm to the Zoning Regulations, specifically, the intent of the R-4 Zone District to be a predominantly rowhouse zone and not an apartment zone.

The Board does not find OP’s recommendation persuasive in this case. As discussed in detail above, there are a number of factors in this case that result in the Property being affected by an exceptional situation: the Property is relatively large; it is located in a unique R-4 Zone District bordering higher density areas on three sides; it has a long history of various commercial uses resulting in the Project being an unusual hybrid development; the Property is in a severely dilapidated state; it is improved with a structure that contributes to the Mount Vernon Square Historic District and must be preserved; and the Property’s prior use as a gas and oil pump may necessitate environmental studies and potential remediation. Moreover, this exceptional circumstance poses practical difficulties for a matter-of-right redevelopment of the Property. Specifically, the Property’s dilapidated state and historic status create significant base renovation costs for any redevelopment of the Property, making a matter-of-right project financially infeasible. Further, the Board disagrees with OP’s conclusion that granting the requested relief would result in substantial detriment to the public good or the zone plan. As discussed above, the Project will rehabilitate a long-vacant property with a development that is in keeping with the surrounding neighborhood and has the backing of ANC 6E and the community. This will further one of the main objectives of the variance procedure, which is to prevent land from remaining idle.

With respect to the requested special exception relief under § 2003, OP’s report indicated that, because the commercial uses on the Property had lapsed for a three-year period, this constitutes prima facie evidence, under § 2005.1, of no intention to resume active operation as a nonconforming use, thus requiring that subsequent use of a property conform to the zoning regulations. OP stated that the Applicant had not submitted evidence indicating an intent to continue the nonconforming commercial uses and that a building permit was issued to a previous

⁶ OP also noted that the Project had not yet been submitted to the Historic Preservation Review Board (“HPRB”) for review for compatibility with the Mount Vernon Square Historic District. However, HPRB review is separate from an application with this Board for zoning relief, and an applicant seeking zoning relief is not required to obtain HPRB approval prior to seeking zoning relief.

owner for conversion from office space to a two-family flat. Accordingly, OP stated that it could not proceed with an analysis of the requested special exception because the use seemed to have been converted to a conforming residential use.

For the reasons discussed above, the Board finds that the Applicant has satisfied the requirements for relief under § 2003. First, as discussed above, although OP stated in its report that a previous owner had been issued a building permit to convert the office in the Mixed-Use Building to a two-family flat, the reports attached to OP's report are inconclusive. In any event, there is no evidence that work was ever begun under this permit.

Further, the Applicant provided sufficient evidence at the March 15, 2016 hearing to overcome the presumption of abandonment under § 2005.1. Again, the Board credits the testimony of Dr. Bockai that, to his knowledge, there has never been an intent to abandon the commercial uses on the Property. Accordingly, the Board finds that the concerns raised by OP regarding a potential abandonment of the commercial use of the Property have been addressed.

The Board must also give "great weight" to the issues and concerns that the affected ANC raises in its written report. Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)). In this case, ANC 6E submitted a letter in support of the Project, subject to the conditions outlined above related to parking. The Board finds the ANC's recommendation of approval persuasive in this case and has given the ANC the great weight due in reaching its decision.

Accordingly, it is **ORDERED** that the application is **GRANTED SUBJECT** to the following **CONDITIONS**:

[Insert conditions, of those outlined above, that the Board may see fit to impose]

VOTE:

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

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