

GRIFFIN, MURPHY, MOLDENHAUER & WIGGINS, LLP

MARK G. GRIFFIN (DC, MD)
BRIAN P. MURPHY (DC, MD)
ASHLEY E. WIGGINS (DC, MD)
MERIDITH H. MOLDENHAUER (DC, MD)
SAMANTHA MAZO (DC, MD)
Y. AJOKI AGBOOLA (MD, DC*)
MENELIK P. COATES (MD, DC*)
W. LAWRENCE FERRIS (MD, DC*)

PENDING

DIRECT DIAL: (202) 530-7158

DIRECT E-MAIL: SMAZO@WASHLAW.COM

April 6, 2016

VIA IZIS

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

Re: BZA Case No. 19230 (the "Application") - 4424 Georgia Avenue NW (the "Property")

Post April 26th Hearing Supplemental Submission

Dear Chair Heath & Members of the Board:

On behalf of 4424 Georgia Ave LLC (the "Applicant"), we are submitting the following information requested by the Board of Zoning Adjustment ("Board" or "BZA") at the conclusion of the April 26th hearing: 1) Revised sun/shadow studies; 2) Information regarding matter of right development on the Property; 3) Information on parking at 4506 Georgia Avenue NW; 4) Updated Parking Study; and 5) Draft Residential Parking Permit ("RPP") restriction conditions on approval of the Application, information regarding the enforcement of RPP restrictions and potential lease and condominium language.

Each item is discussed more fully below.

1. Revised Shadow Studies

The revised shadow studies ("Revised Shadow Studies") prepared at the request of the Board are attached here at Exhibit "A". Similar to the shadow studies presented to the Board in the April 26 Power Point presentation included in the record at BZA Exhibit No. 42, the Revised Shadow Studies illustrate the projected shadows cast at multiple times of day on December 21, the longest day of the year. However, we believe the Board will find the Revised Shadow Studies to be easier to understand than the studies previously presented, because, as requested by the Board, the Revised Shadow Studies have more pronounced shadows.

Also, as directed by the Board, the Revised Shadow Studies illustrate projected shadows cast by:

- The existing structure, which includes a single-story commercial building on Georgia Avenue and a two-story residential building fronting on Allison Street (the “Existing Structure”);
- The Project proposed in this Application, which is a maximum of 49’-10” in height and is a 7-unit building with more than 1,100 s.f. of cellar and ground floor retail and 5’ rear setback (the “Project”); and
- A matter of right building, which will be discussed more below, but could be at least 58’-10” in height with less than 3,000 s.f. of retail and provide two units of residential and a 15-foot rear-yard setback (the “Matter of Right” building).

As shown on the Revised Shadow Study, shadows cast by the Project and Matter of Right developments are only directed to the west (towards 1104 Allison Street) in the morning, and the shadows cast on that building by the Matter of Right and Project massings are not substantially different than the shadows cast by the existing structure.

By noon and through the early afternoon, the shadows are cast to the north, and the ones from the Project and Matter of Right buildings extend towards the public space and grassy area to the side of the 13-unit apartment building at 4506 Georgia Avenue (“4506 Georgia”).

By 3:00 p.m., shadows are cast to the north and east. For the Project and Matter of Right structures, shadows are projected to be cast across the intersection of Georgia and Allison Streets.

In sum, as shown on the Revised Shadow Studies, the projected shadows from the Project do not amount to undue impact on the light and air of the surrounding buildings. First, the shadow to the west across 1104 Allison is only in the morning and does not appear to be substantially different from the shadow cast by the existing building. Second, the shadows projected for the Project are virtually identical to those that would be cast by a Matter of Right building later in the day to the north and east.¹

Accordingly, as demonstrated in the Revised Shadow Studies, the Project will not have a substantial, undue impact on the light and air of the surrounding buildings, especially as compared to shadows that would be cast by a Matter of Right building on the Property.

2. Proposed Matter of Right Building on the Property

At the end of the April 26th hearing, the Board asked the Applicant to provide information regarding the heights, densities, and uses for a matter of right building on the Property.

To that end, as the Board is aware, the Property is zoned C-2-A, which is a “Community Business Center District” zone that “is designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the District of Columbia outside of the central core...” and “permit[s] development to medium proportions.” 11 DCMR §§ 720.2, 720.4. Matter

¹ It is established, horn book law “that the effect of a proposed use on neighboring properties will not support a denial of a special permit [such as variance or special exception] unless the effect is greater than that of uses permitted in the district without special permit [i.e. uses, heights, etc permitted as a matter of right].” 3 R.M. Anderson, AMERICAN LAW OF ZONING para. 21.14, at 692 (3d ed. 1986)

of right uses permitted in the C-2-A Zone District include apartment houses, retail, catering, laundry, antique store, department store, restaurant and office uses amongst others. *See* 11 DCMR §§ 721.1- 721.8.

Development standards in the C-2-A Zone permit maximum heights of 50 feet; densities of 2.5 FAR (of which 1.5 FAR may be retail); 60% lot occupancy; 15-foot rear yards and limitations on side yards and courts where applicable. *See* 11 DCMR §§ 770, 771, 772, 774, 775 & 776. Also, 12 and 15-foot tall penthouses are permitted above the 50'-maximum building height pursuant to *See* 11 DCMR § 770.6.

As to parking, existing residential structures without current parking spaces, such as the residential portion of the Existing Structure are entitled to one parking space credit pursuant to prior Zoning Administrator's interpretations provided that four feet of the structure is retained. Generally, in the C-2-A Zone, one parking space is required for every two residential units, and for retail, no parking space is required if less than 3,000 s.f. of retail are provided. *See* 11 DCMR § 2101.1.

Based on the above requirements, as shown on Exhibit "B", if the Applicant retains four feet of the existing residential structure to be entitled to a parking credit, then, assuming a compliant 15-foot rear yard is provided, the Applicant could maximize the FAR and construct a building 58'-10" in height (49'-4" for stories 1 through 5, with a 9'-6" penthouse) with 1,430 s.f. of retail and two flats. The footprint and bulk of such a building is illustrated in Exhibit "B", and a proposed massing of a Matter of Right building is illustrated in the Revised Shadow Studies.

Furthermore, even without retaining the a portion of the residential building and obtaining a parking credit to allow residential on site, the Applicant could, as a matter of right, construct a 58'-10" building with two stories of retail, each approximately 24'-8" tall, and a 9'- 6" penthouse.

Either of these options could be permitted as a matter of right without conditions imposed by the Board. These matter of right options could provide a structure that is almost 10 feet taller than the proposed Project, with approximately the same massing and density.

3. No Off-Street Parking at 4506 Georgia

During the hearing, Board members asked whether the apartment building at 4506 Georgia provided off-street parking spaces for residents. As shown on the zoning map image below, 4506 Georgia is located directly to the north of the Property across Allison Street.



The property at 4506 Georgia has a Certificate of Occupancy for 13 units and is owned by the Transitional Housing Corporation, as shown on the property's C of O included at Exhibit "C". 4506 Georgia provides no off-street parking spaces for its residents based on field observations documented in the photos attached at Exhibit "D".

4. Updated Parking Study

At the Board's request, Gorove Slade Associates, Inc. conducted a count of available parking spaces on Friday, April 29 and Saturday, April 30 to determine parking availability in the surrounding neighborhood during weekends. That study was submitted to DDOT on May 5 (the "Updated Parking Study"), and a copy of that study is attached here at Exhibit "E". Similar to the April 11 parking study at BZA Exhibit No. 33E, the Updated Parking Study observes adequate on-street parking in both "RPP" and "Unrestricted" parking spaces to accommodate vehicles owned by residents of the Project.

The findings in the Updated Parking Study further confirm that in addition to the availability of on-street parking, the Applicant's proposed Transportation Demand Mitigation ("TDM") measures (including the RPP restrictions, as will be discussed below), and the available, nearby transit sufficiently mitigate potential adverse impacts from granting a parking waiver in this case.

5. RPP

As discussed in the prior filings and during the April 26th hearing, as a condition to approval of the Application, the Applicant has proposed to prohibit residents from obtaining RPP-related permit(s) for the property from the D.C. Department of Motor Vehicles ("DMV").² The Board requested that the Applicant provide (a) draft language for RPP restrictions conditions to be placed on a BZA approval of the Application; (b) information on the enforceability of these conditions; (c) proposals for ways to market an RPP-restricted project to make potential residents aware of the restrictions

² The Applicant notes that it has not determined if the building will provide units for rent or sale. Accordingly, the discussion of RPP will address both circumstances.

prior to choosing to rent or own; and (d) examples of documents requiring RPP restrictions recorded in the District's land records.

The purpose of this line of inquiry is to better understand the realistic implications of imposing RPP restrictions as a condition of the Application's approval by the Board. Taking these issues in turn:

a. Draft RPP Restriction Conditions

The Applicant proposes the following conditions ("RPP Conditions") to be placed on approval of the Application.³ If the Application is approved, the conditions would be recorded in a covenant in the land records and would run with the land for the life of the Project approved in the Application, meaning that such conditions would apply to all future owners, operators or managers of the Project:

- If the Project is to be rented, the Applicant⁴ shall include in its residential leases provisions that prohibit residents from obtaining RPP from the DMV under penalty of lease termination if the units are rentals. If the Project's units are owned as a condominium, pursuant to the D.C. Condominium Act set out at D.C. Code § 42-1901 *etc*, the condominium documents, public offering statement & bylaws (collectively the "Condominium Documents") would include similar language restricting owners from obtaining RPP and make clear than an owner who violated the RPP restriction could be subject to fines, as well as potential notification to the mortgagor that could trigger default and/or condominium liens. The Applicant would also be required to record a covenant in the land records that provides that the provisions in the Condominium Documents related to the RPP restriction may not be amended or removed.
- Prior to obtaining a Certificate of Occupancy for the Project, the Applicant, shall record a covenant against the Property among the Land Records of the District of Columbia prohibiting any lessee or owner of residential units in the Project from obtaining an RPP for the Project approved in the BZA Order.
- The Project's Condominium Documents and/or residential leases shall include written authorization from each unit owner or tenant that allows the DMV to release to the condominium board and/or the Applicant any and all records of that owner/tenant requesting or receiving an RPP for the Property
- The condominium board, if the Project is sold as condominiums, or the Applicant if the Project is a rental building, shall monitor owner/ tenant compliance with the RPP lease restriction by requesting from the DMV, every six months, any and all records of residential tenants requesting or receiving RPPs for the Property. Either the condominium board or the Applicant, as applicable, shall provide updates on the status of these FOIA requests semi-annually to the Single Member District representative for the Property to share with the other the ANC Commissioners.

³ Similar conditions have been approved the Board in prior cases.

⁴ In the discussion of the RPP Restriction Covenants, the term "Applicant" also refers to any and all successor and assigns to the Applicant.

- Marketing for the sale or rental of the units in the Project, be it on the Project's marketing webpage, MRIS (the real estate listing service), or written handouts would clearly identify that the Project was "car-free" and that potential owners and/or tenants would be restricted from obtaining RPP.

b. Enforceability

As members of the Board pointed out during the April 26th hearing, it is the DMV that issues RPP permits. Accordingly, the Board raised questions about the enforceability of the proposed RPP Conditions on the Project. In response to those questions, the Applicant will first outline the enforceability of a proposed conditions; second, it will address enforceability with DMV; and third, it will outline how the Applicant (as the landlord) or the condominium board could enforce the RPP restriction on the tenants or owners.

i. Enforceability of BZA Orders

Section 3205 of the Zoning Regulations explicitly mandates compliance with conditions in orders. Accordingly, the RPP Conditions would need to be complied with by the Applicant as set forth in the Zoning Regulations. In particular, because one of the proposed conditions would require that, prior to the issuance of a Certificate of Occupancy for the Project, a covenant be recorded in the land records against the Property prohibiting any lessee or owner from obtaining RPP, pursuant to 11 DCMR § 3205.2, "each term and condition in the covenant shall be treated as a condition to the issuance of the ... certificate of occupancy."

Next, if there is a concern that the RPP Conditions are not being applied correctly, then an action could be filed by the Office of Zoning in the District's Office of Administrative Hearings claiming violation of the Board's Order. Section 3201.1 of the Zoning Regulations directs that daily monetary penalties be paid by any land owner found to be in violation of the terms of a Board Order. Further, 11 DCMR § 3201.2 states that,

The Office of the Attorney General of the District of Columbia, or any neighboring property owner or occupant who would be specially damaged by any violation of this title, may, in addition to all other remedies provided by law, institute injunction or other appropriate action or proceedings to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use; or to correct or abate a violation; or to prevent the occupancy of the buildings, structure, or land.

Accordingly, pursuant to these strong provisions in the Zoning Regulations, if the RPP Conditions are not being applied correctly, daily fines could be levied and injunctive action to stop construction or occupancy of the Project could be taken.

ii. Enforcement of the RPP Conditions through the DMV

Once it is determined that the Office of Zoning, Office of the Attorney General, and specifically damaged neighboring property owners can seek to enforce the RPP Conditions, the next issue to address is how the Applicant (and/or its successors and assigns) can require the DMV to provide

information on any RPP applications filed by the Project's future residents in violation of the lease or Condominium Document terms. The main legal issue would be whether DDOT or DMV would be able to provide the Applicant with information on residents who applied for or received RPPs, if that has occurred.

DMV requires that requests for such information be submitted under the D.C. Freedom of Information Act ("FOIA"). In the past, DMV has stated that any FOIA responses would be limited by the federal and local Driver Privacy Protection Acts. Those laws prohibit the distribution of any personal information associated with drivers' records except under limited circumstances, including when the driver makes an express written authorization to release the information. See 18 U.S.C. 2721(b)(11) and D.C. Official Code § 50-1401.01b(c)(12), copies of which are attached as Exhibit "F".

As set forth in the RPP Conditions above, the residents of the Project will be required to provide such express written authorization. Since driving in the District of Columbia is a privilege and not a right, this would be a reasonable request to the Project's future residents.

iii. Applicant's Enforcement of the RPP Conditions on tenants or owners

The Board also asked how the Applicant could enforce the RPP Conditions on future residents. First, if the Project is rented to tenants, the conditions make clear that obtaining RPP would be in violation of the terms of the lease that could result in eviction of the tenant. Proposed lease language on this issue is included in Section "d" below. Ultimately, if challenged, such eviction, like all evictions, could be reviewed by a Judge in the District's Landlord and Tenant Court.

Next, if the Project is sold as condominiums, it is black letter law that such a restriction in the Condominium Documents would be enforceable against owners. "A condominium instrument, such as the bylaws, is a contract between the unit owners and the condominium association." *1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009). Further, condominium bylaws, by statutory definition, are a set of rules "providing for the self-government of the condominium by an association of all the unit owners." D.C. Code § 42-1903.01. Moreover, "[I]t is well established that the governing body of a condominium enjoys broad authority in regulating the affairs of the property. . . . '[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of unit owners since they are living in such close proximity . . . , each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.'" *Johnson v. Hobson*, 505 A.2d 1313, 1317 (D.C. 1986).

Accordingly, an owner's violation of the Condominium Documents to obtain RPP could result in fines, as well as causes notification to the bank or other mortgagor that hold the mortgage to the unit that could trigger default on the mortgage and/or condominium liens.

Furthermore, under the D.C. Condominium Act D.C. Code § 42-1904.02, a potential condominium owner has 15 days to review the public offering statement that is part of the Condominium Documents before settling on the unit. As set forth above, the RPP restriction language would be included in the Project's public offering statement. Accordingly, under the law, a potential owner could decide not to purchase a unit within that 15-day period if he or she determines the RPP conditions to be too restrictive (or for any other reason set out in the public offering statement).

c. Marketing the Project as RPP restricted

In response to the Board's concern that future residents should know about the RPP Conditions prior to signing a lease or sales contract, one of the proposed conditions is that marketing materials associated with the Project would make clear that the Project was car-free and that all residents would be subject to the RPP Conditions.

This could be achieved by including clear language on the Project's marketing website and in any MRIS listing or other real estate listing. Also, printed material designed to market the Project should also include language regarding the RPP Conditions.

The Applicant's goal would be to publicly market the Project as "car-free" so as to attract residents who do not currently own, or intend to own, cars. There are significant cost savings associated with having no car, both because residents would not need to pay the costs associated with car ownership (such as the price of the car purchase or lease, car insurance, taxes, gas, etc.), but also in relationship to the per-unit rental or purchase price, as units with parking often cost more.

Accordingly, the Applicant strongly believes there is a market for car-free residents who wish to live in this amenity-rich neighborhood that is well-served by transit. With these marketing measures in place, the Applicant expects that potential residents will be well advised that the Project will be car-free, and should they choose to own cars, they would be in violation of the lease or the condominium by laws if they obtain RPP permits.

In addition, as discussed above, although not specifically "marketing", the RPP Conditions would be disclosed in the Project's public offering statement, which all potential owners are legally required to have 15 days to review prior to closing. Accordingly, if a potential owner did not see the marketing materials regarding the RPP restriction, that owner would still have 15 days to cancel the purchase contract after receiving the public offering statement.

d. Examples of Recorded Documents with RPP Restrictions

At the Board's request, attached at Exhibit "G", is one Declaration of Covenants prohibiting residents from applying for RPP. This covenant is recorded in the District's land records and runs with the land during the life of the building addressed therein.

Pursuant to the RPP Conditions, the Applicant would file a similar covenant in the land records for the Property that would run for the life of the Project.

A residential lease for a unit in the Project could include the language similar to what is shown below, to the full extent permitted by law:

TENANT IS PROHIBITED, AND HEREBY ACKNOWLEDGES AND AGREES THAT HE/SHE IS PROHIBITED, FROM OBTAINING A RESIDENTIAL PARKING PERMIT FROM THE DC DEPARTMENT OF MOTOR VEHICLES FOR THE SUBJECT PREMISES, PURSUANT TO THE CONDITIONS OF BOARD OF ZONING ADJUSTMENT ("BZA") ORDER NO. [XXXX] TENANT HEREBY GRANTS LANDLORD THE RIGHT TO REQUEST INFORMATION FROM THE DEPARTMENT OF MOTOR

VEHICLES TO DETERMINE TENANT'S COMPLIANCE WITH THIS PROVISION TENANT EXPRESSLY GRANTS THIS EXPRESS WRITTEN AUTHORIZATION IN COMPLIANCE WITH DC CODE SO THAT LANDLORD MAY RECEIVE THE REQUESTED INFORMATION. ANY TENANT FOUND TO BE IN VIOLATION OF THIS PROVISION SHALL BE SUBJECT TO LEASE TERMINATION THIS PROHIBITION MAY ONLY BE MODIFIED OR REPEALED IF THE BZA ISSUES AN ORDER MODIFYNG OR RELEASING THE PROPERTY FROM THIS REQUIREMENT

Furthermore, Condominium Documents for the Project could include language similar to the below:

Section [xx]: Residential Parking Permit Restrictions

Pursuant to the District of Columbia Board of Zoning Adjustment's Decision and Order dated [xxx] for Application No. [xx], all present and future Unit Owners and their tenants, licensees, invitees, servants, agents, employees and any other person or persons who are permitted to use the Condominium shall not obtain a Residential Parking Permit ("RPP") at the building for the life of the Project. The Declarant shall file a covenant in the Land Records of the District of Columbia pertaining to these parking restrictions.

Based on the above, it is clear that a Board order approving the Application could include detailed RPP Conditions, similar to those referenced above. Further, once approved by the Board, these conditions would be enforceable by the Office of Zoning, the Office of the Attorney General and/or significantly damaged neighboring property owner, through litigation to the Office of Administrative Hearings and the Courts, and by the Applicant through FOIAs to the DMV.

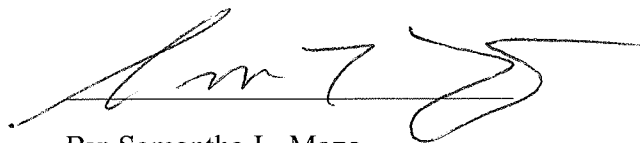
Moreover, as explained above, there are specific efforts the Applicant could take to market the Project to potential residents interested in a "car-free" lifestyle and who will be aware of the RPP restrictions prior to leasing or owning. Further, covenants restricting residents from obtaining RPP would be recorded in the District's land records and that residential leases and Condominium Documents will be drafted to require future residents to comply with the RPP restrictions, similar to those recorded and drafted for other RPP-restricted developments.

As such, the Applicant's proposed RPP Conditions are realistic, and the Applicant has documented the ways in which a Project with these restrictions could be marketed and how such covenants would be recorded in the land records to run with the land during the life of the Project.

With this filing, we believe that the matters raised by the Board at the April 26th hearing have been addressed. We will be happy to respond to questions at the May 24th hearing.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP

A handwritten signature in black ink, appearing to read 'S. Mazo', written over a horizontal line.

By: Samantha L. Mazo

Enclosures

CC (via email):

John-Paul Hayworth, SMD 4C07
Taalib-Din A. Uqdah, ANC 4C Commissioner
Steve Mordfin, Office of Planning
Robyn Jackson, DDOT