

BZA Application:
4424 Georgia Ave. NW
BZA Case No. 19230

Presented by:
Samantha Mazo
Griffin, Murphy,
Moldenhauer & Wiggins, LLP

Supplemental Presentation for May 24th BZA Hearing



Board of Zoning Adjustment
District of Columbia
CASE NO.19230
EXHIBIT NO.49

Location Map



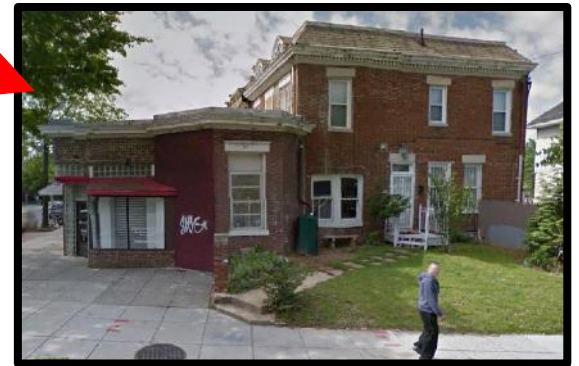
4506 Georgia Avenue NW



915 Allison Street NW



1104 Allison Street NW



4424 Georgia Avenue NW

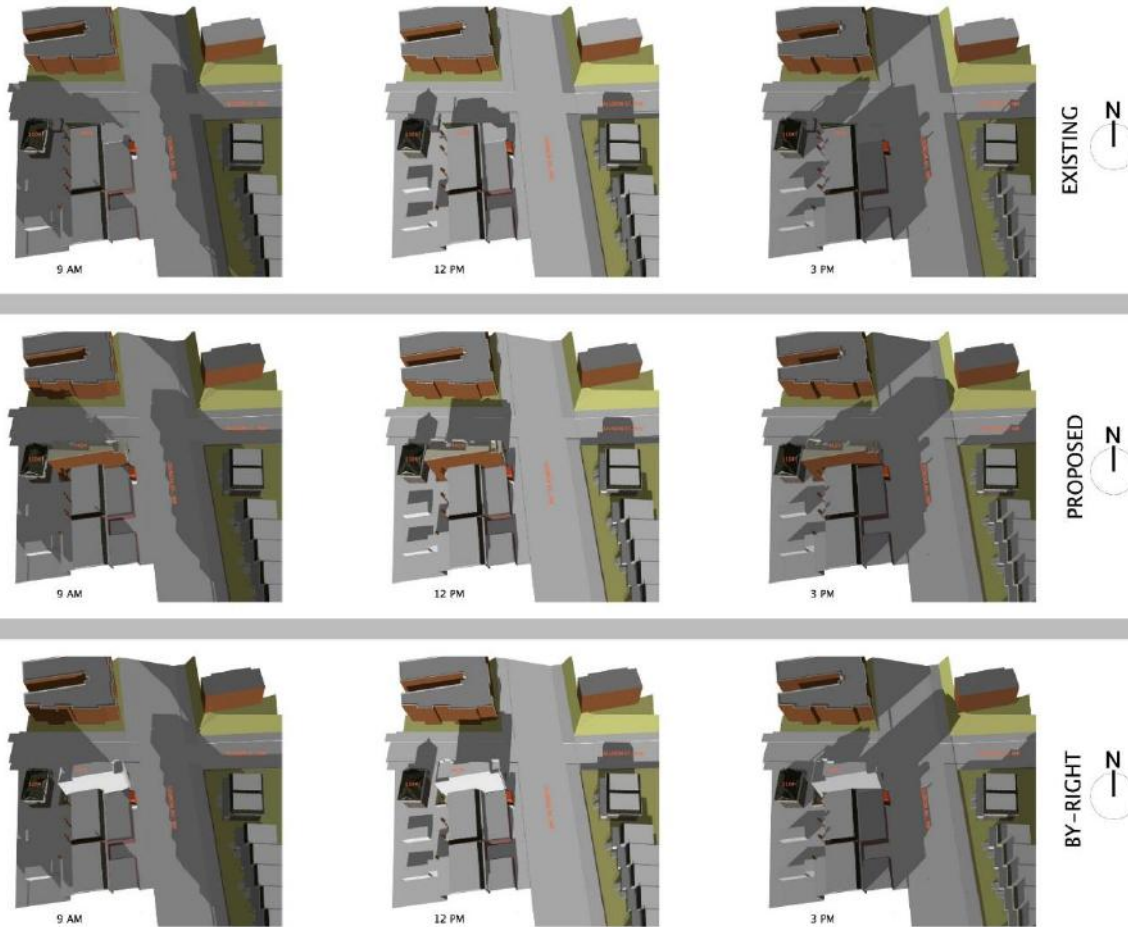


4422 Georgia Avenue NW



Revised Shadow Study:

All images project shadows generated towards the North on
December 21 (Longest Day of the Year)



See enlarged images by hour on following 3 slides.

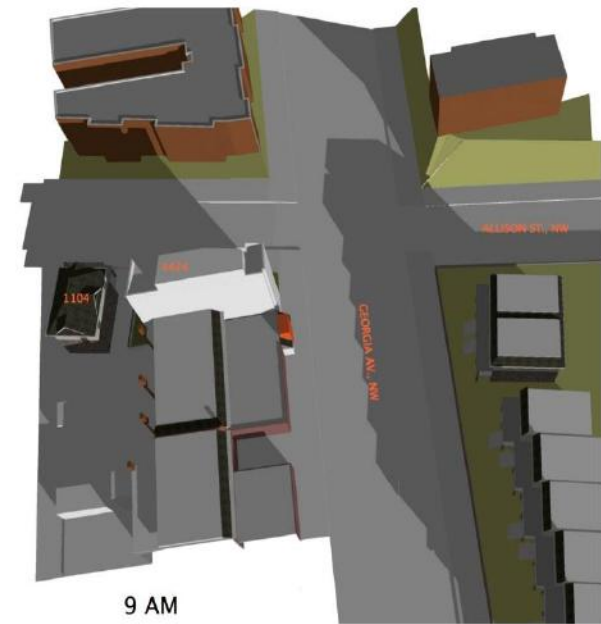
Enlarged Shadow Study Images: 9 AM



Existing



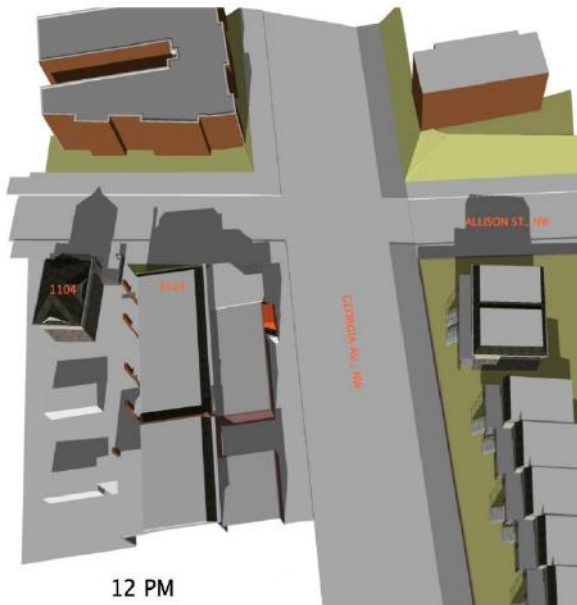
Proposed



Matter of Right



Enlarged Shadow Study Images: 12 PM



12 PM

Existing



12 PM

Proposed

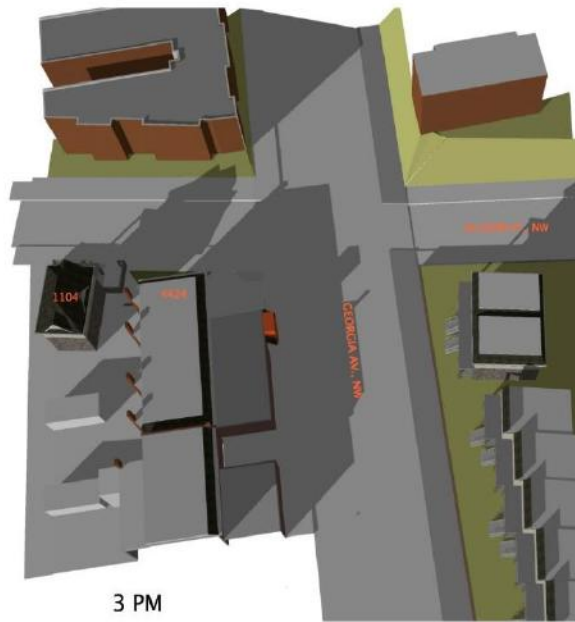


12 PM

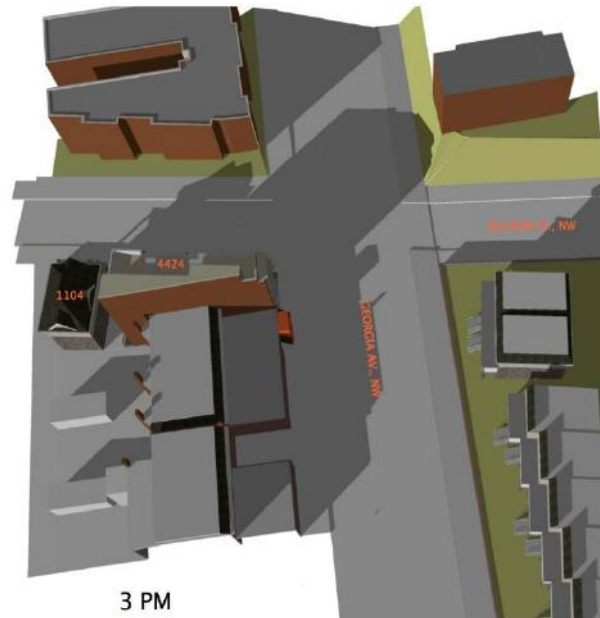
Matter of Right



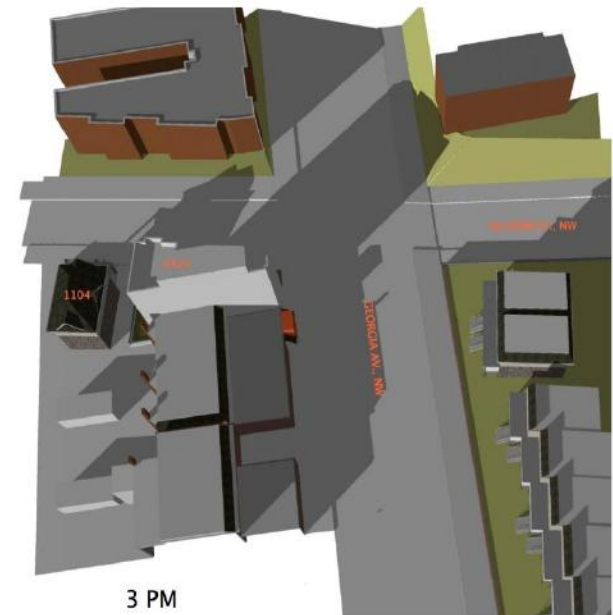
Enlarged Shadow Study Images: 3 PM



Existing



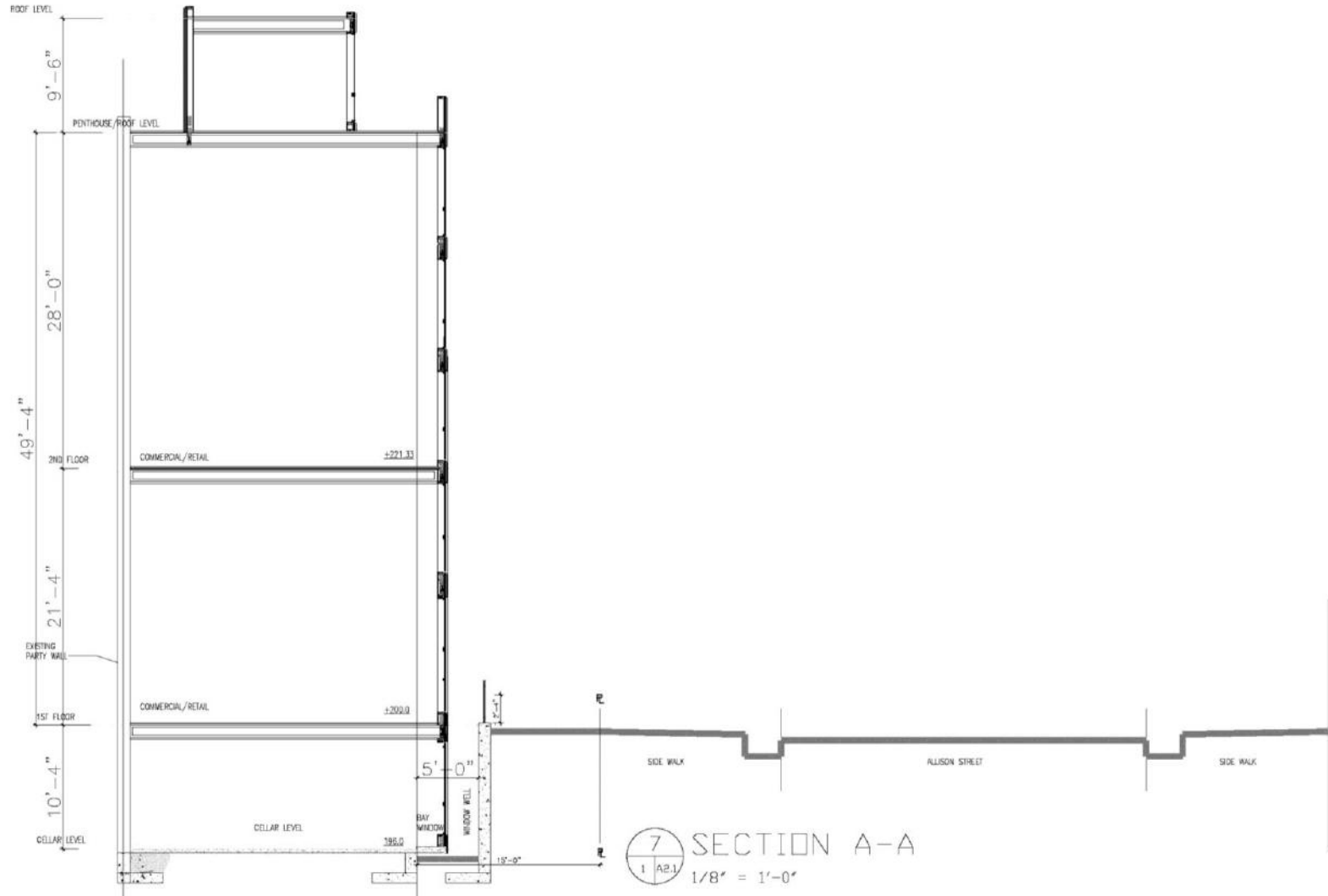
Proposed



Matter of Right

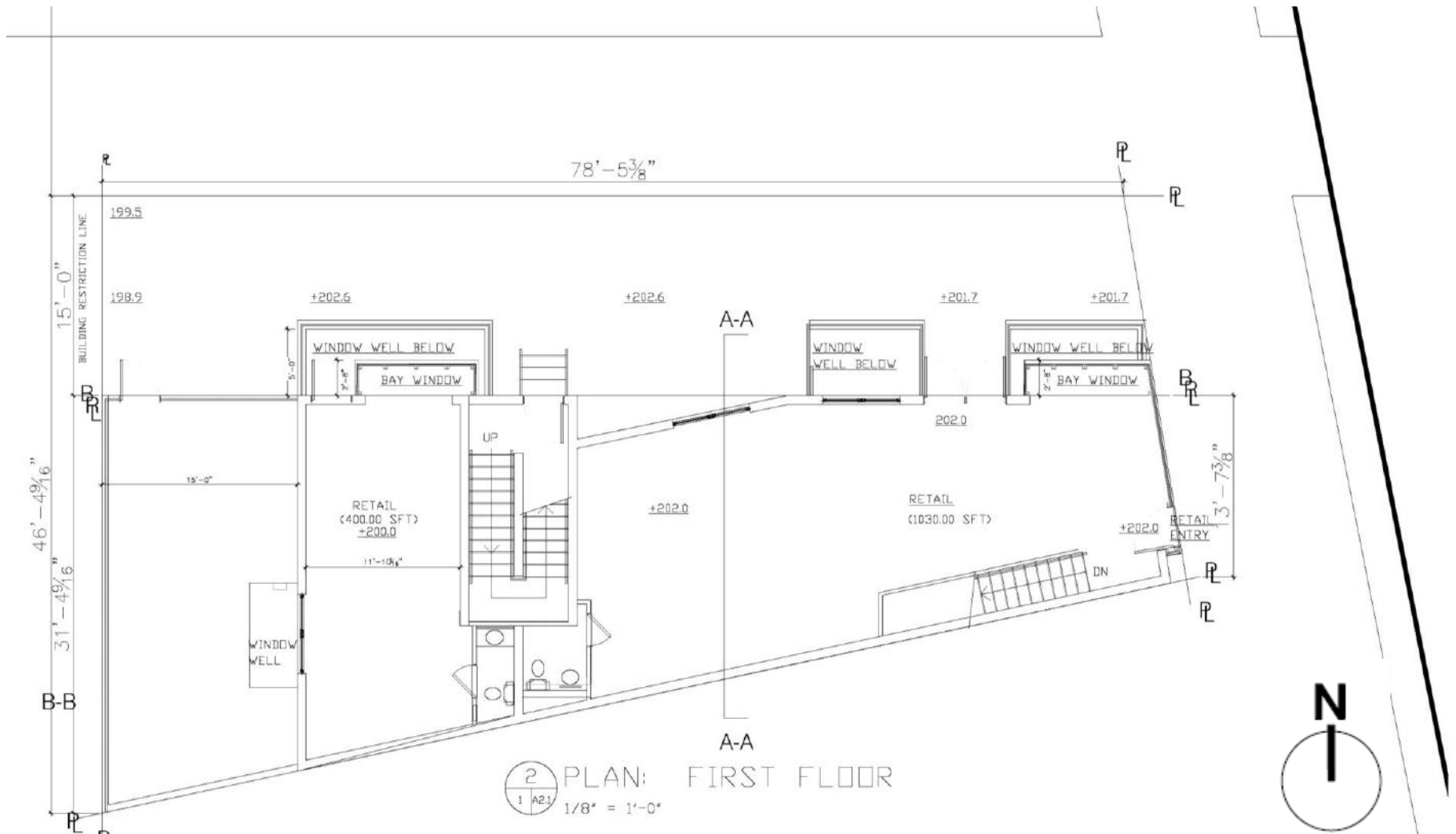


Proposed 100% Retail Matter of Right Building (two stories of retail with cellar & penthouse): **Section**



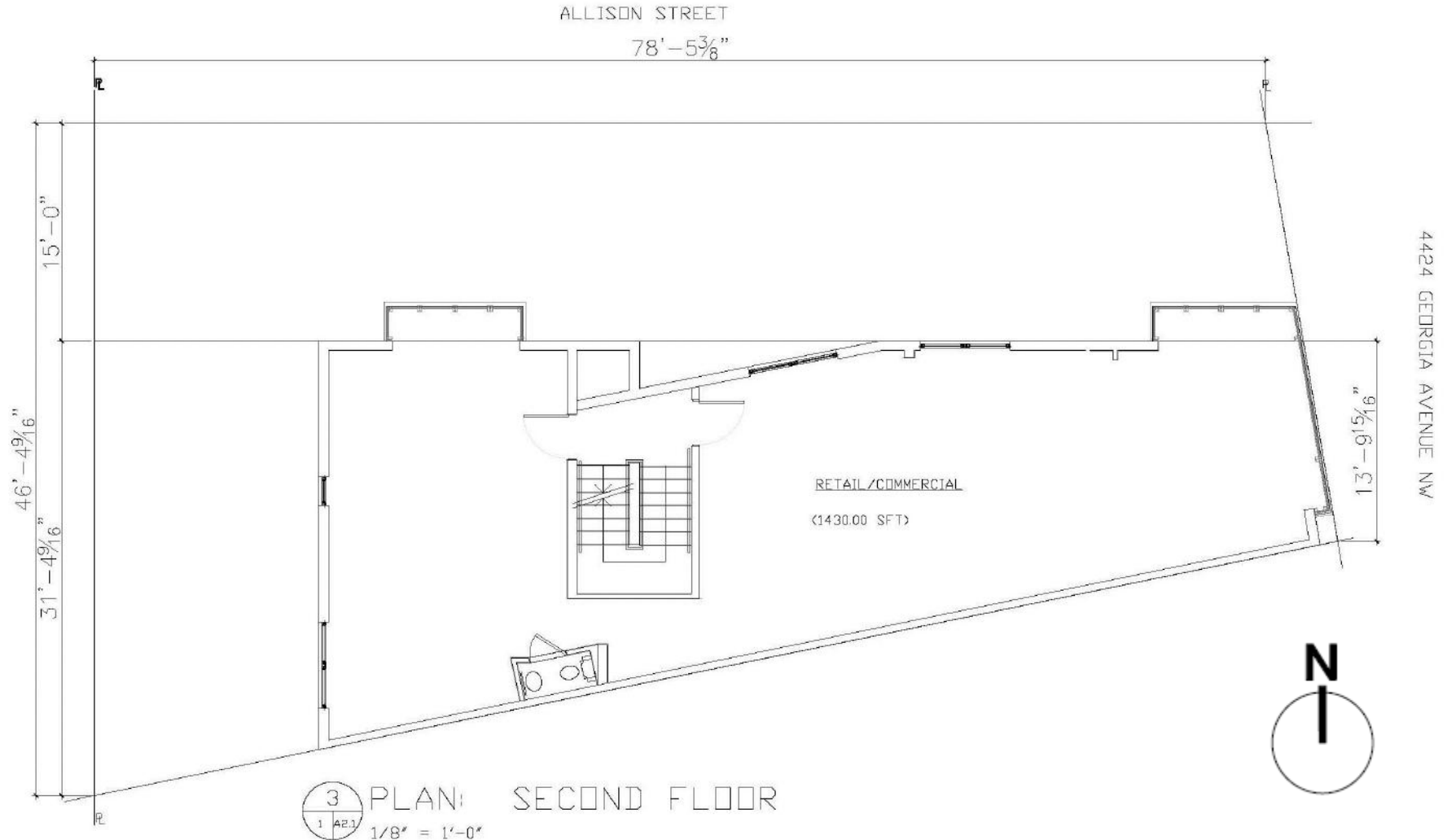
Proposed 100% Retail Matter of Right Building

First Floor

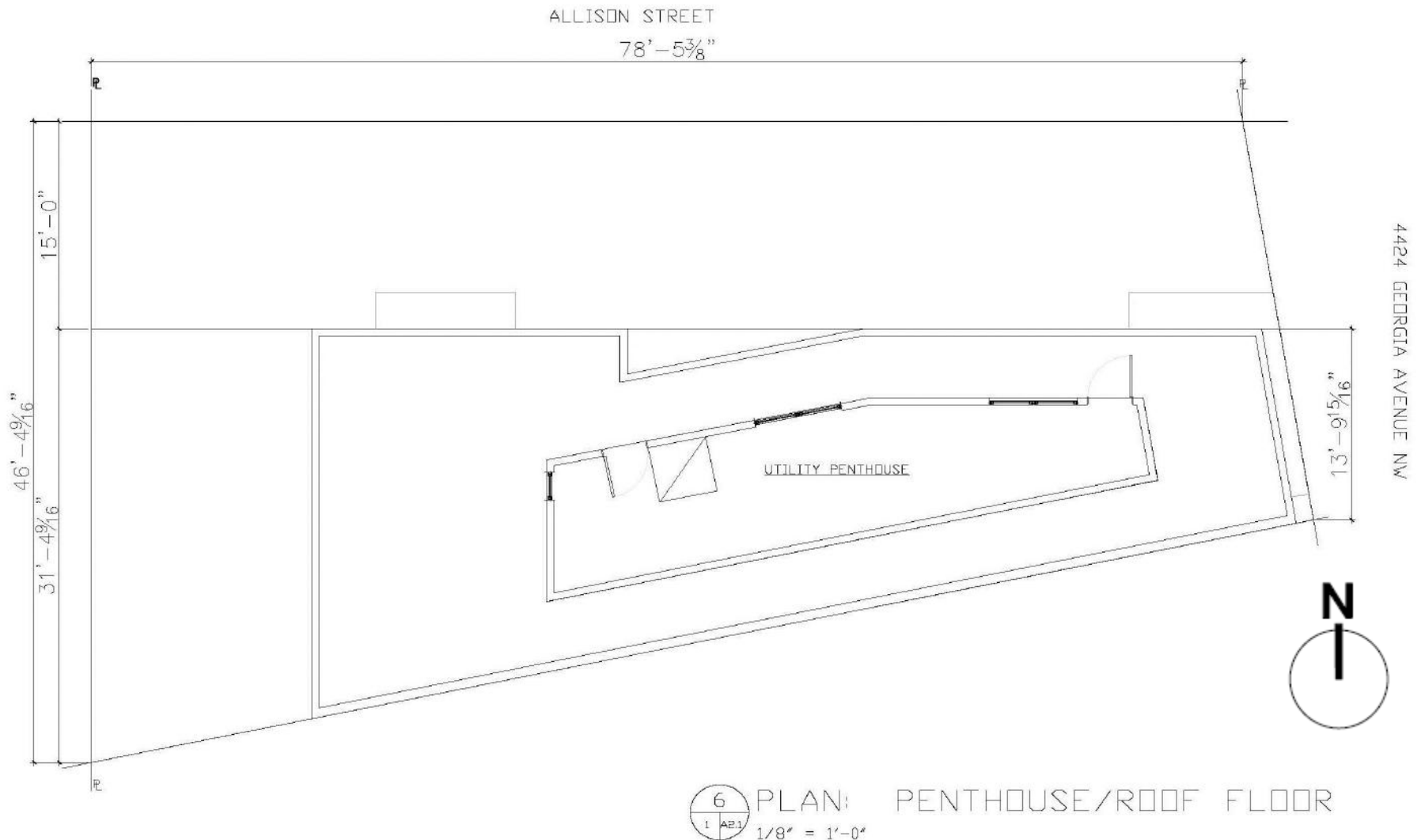


Proposed 100% Retail Matter of Right Building

Second Floor

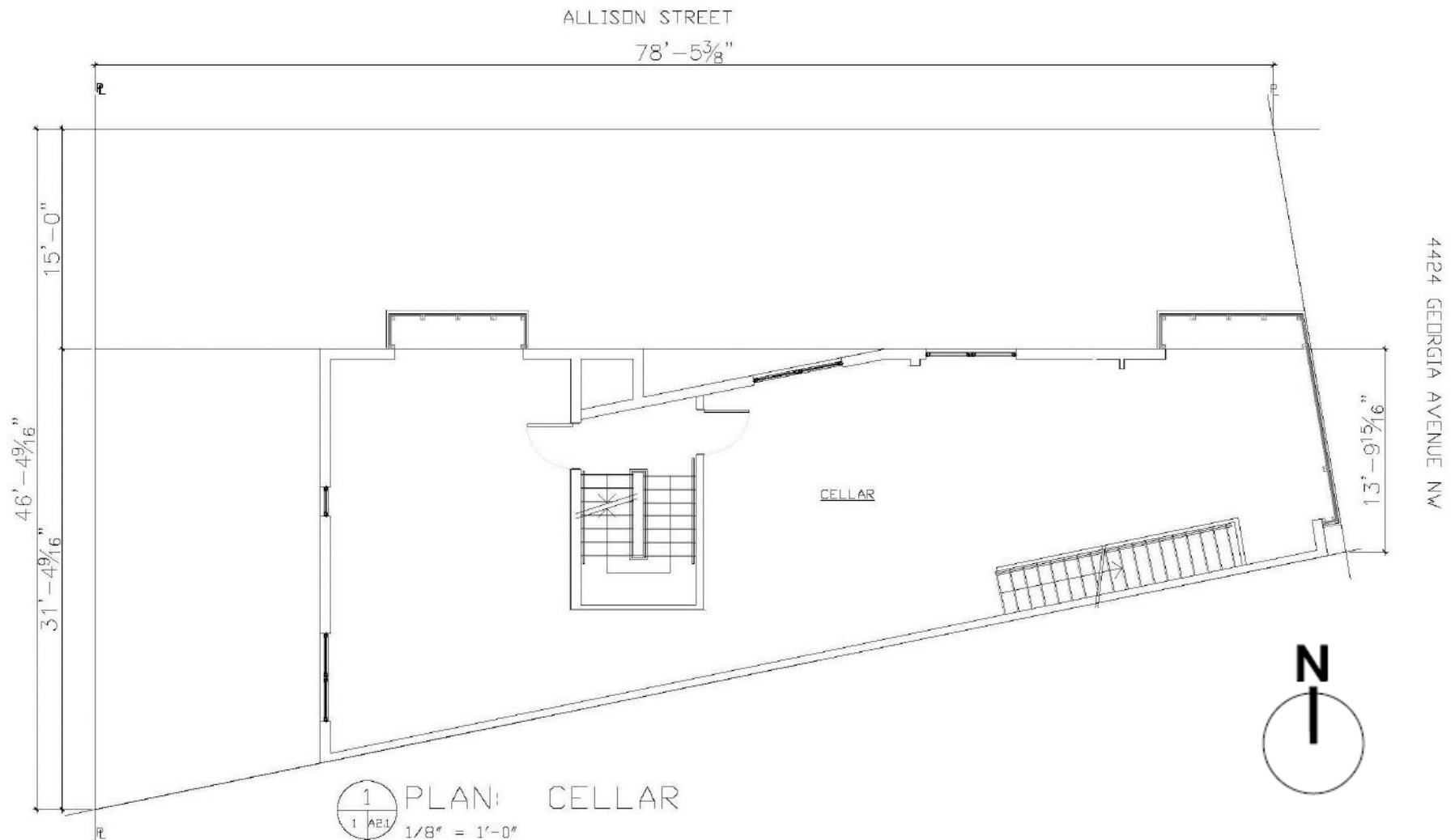


Proposed 100% Retail Matter of Right Building Penthouse – No retail uses



Proposed 100% Retail Matter of Right Building

Cellar – No retail uses



100% Retail Building Satisfies C-2-A Matter of Right Requirements

Standard	C-2-A-Requirement	Proposed in 100% retail building	Matter of right requirement satisfied
Height (11 DCMR § 770.1)	Max: 50'	49' – 4" Two stories of retail: 21'-4" and 28', each	Yes
Penthouses (11 DCMR § 770.6)	12', except 15' for penthouse mechanical space	9' – 6"	Yes
Density (11 DCMR § 771.2)	Max: 1.5 FAR (non-residential)	0.92 FAR (Total of 2,860 s.f. of retail/ 3,103 s.f. lot size)	Yes
Percentage of Lot Occupancy (11 DCMR § 772.1)	Max: 60%	46% (1,430 s.f. building footprint / 3,103 s.f. lot size)	Yes
Rear Yard (11 DCMR § 774.1)	Min: 15'	15'	Yes
Side Yard (11 DCMR § 775.5)	N/A	N/A	Yes
Courts (11 DCMR § 776.1)	N/A	N/A	
Parking (11 DCMR § 2101.1)	Retail or service establishments: In excess of 3,000 s.f., 1 space for each additional 300 s.f. of gross floor area and cellar floor area	2,860 s.f. of retail proposed in building. No parking spaces required	Yes

No Off Street Parking at 4506 Georgia

Courtyard between 4506 and 4510 Georgia Avenue: Used for trash – no parking spaces



Rear of 4506 Georgia Avenue as seen from Allison Street NW- no parking spaces in the rear



Certificate of Occupancy: 4506 Georgia

Department of Community and Regulatory Affairs Building and Land Regulation Administration 841 North Capitol Street, N.E. Room 410 Washington, D.C. 20002 Tel: (202) 442-2474 Fax: (202) 442-4402				
C of O				
CERTIFICATE OF OCCUPANCY				
PERMIT NO. CO 57515		THIS PERMIT IS VALID ONLY FOR THE PREMISES OF THE PROJECT ADDRESS		
DATE: 7/1/2003				
ADDRESS: 4506 GEORGIA AVE NW	FLOOR(S): BASEMENT 1ST & 2ND FL.	PARCEL ID: 2915 (square)	LOT: 0000 (sq ft)	BLK: 0005 (sq ft)
WARD: 4		ZONE: R4		
PERMISSION IS HEREBY GRANTED TO: CORPORATION: TRANSITIONAL HOUSING CORPORATION ID No.: 900491		TRADING AS:		
APPROVED USES: APARTMENT BUILDING		PREVIOUS USES: APARTMENT BUILDING		
TYPE: LOAD CHANGE	BSA NO.:	OCCUPIED SQ. FOOTAGE: 11,900	OCCUP. LOAD: 13	EXPIRATION DATE: NONE
DESCRIPTION OF USE: APARTMENT BUILDING 13 UNITS (1)				FEE: \$336.00 \$488.00
THIS CERTIFICATE SHALL BE POSTED CONSPICUOUSLY ON THE ABOVE PREMISES AT ALL TIMES. IT IS VALID INDEFINITELY, unless an expiration date is stated, VALID ONLY for the premises at the above address or part thereof, and for the purpose(s) indicated above, and IS NOT TRANSFERABLE to another property or premises under ANY conditions. ANY CHANGE in the type of building, ownership of building, or other circumstances, with respect to this Certificate shall be in full compliance with applicable laws and regulations.				
David A. Clark DIRECTOR		PERMIT CLERK: ADEMOLA SHITTU <i>Ademola Shittu</i>		

Proposed Complete List of Conditions



- Investigate the installation of a TransitScreen.
- Three long-term bike spaces to the Project.
- Work with DDOT to determine the location of a future Capital Bikeshare Station.
- Schedule and locate deliveries so as not interfere or restrict parking on Allison Street.
- Offer an annual carsharing or Capital Bikeshare membership for all new tenant for a period of 5 years.
- Residents will be restricted from obtaining Residential Permit Parking (RPP) stickers

Proposed RPP Restriction Condition Nos. 1 - 3:

Documentation of RPP Restriction

1. If the units are rentals, all residential leases will include provisions that prohibit residents from obtaining RPP under penalty of fines and possible lease termination. If the units are owned as condominium, the condominium documents, public offering statement & bylaws would include language restricting owners from obtaining RPP. Those documents would state that 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.
2. Before obtaining a Certificate of Occupancy, the Applicant would need to record a covenant against the property among the land records prohibiting any lessee or owner of residential units from obtaining an RPP.
3. Condominium Documents and/or leases shall include written authorization from each unit owner or tenant that allows the DMW 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.

Proposed RPP Restriction Condition Nos 4-5:

Monitoring and Marketing RPP Restrictions

4. The condominium board or the Applicant 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.

5. Marketing for the sale or rental of the units in the Project, be it on the Project's marketing webpage, MRIS 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.

Enforceability of BZA Orders

- Section 3205 of the Zoning Regulations mandates compliance with conditions in order.
- A covenant would be recorded in the land records against the Property prohibiting any lessee or owner from obtaining RPP, making the order run with the land pursuant to 11 DCMR § 3205.2
- 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.
- Pursuant to 11 DCMR § § 3201.1 and 3201.2, daily fines could be levied and injunctive action to stop construction or occupancy of the project could be taken, if a violation of a BZA condition is determined.

Enforcement of the RPP Conditions Through the DMV

- ❑ The DMV issues RPP permits.
- ❑ The legal issue is whether the DMV can provide the Applicant or a subsequent condo board with information on residents who applied for, or received, RPPs.
- ❑ DMV requires that requests for such information be submitted under the D.C. Freedom of Information Act (“FOIA”).
- ❑ DMV has stated that any FOIA responses would be limited by the federal and local Driver Protection Acts.
- ❑ Those laws prohibit the distribution of personal information associated with drivers’ records except when the driver makes an express written authorization to release the information.
- ❑ As set forth in the RPP conditions, the residents of the Project will be required to provide such express written authorization as part of the lease/ condo documents.

Example of FOIA Request and Response

LAW OFFICES
GRIFFIN, MURPHY, MOLDEHAUER & WIGGINS, LLP

MARK G. GRIFFIN (DC, MD)
BRIAN P. MURPHY (DC, MD)
ASHLEY E. WIGGINS (DC, MD, VA)
MEREDITH H. MOLDEHAUER (DC, MD, VA)
ERIC M. DANIEL (MD, DC)

FOIA Request – Department of Motor Vehicles

November 21, 2013

David Glasser
District of Columbia Department of Motor Vehicles
95 M Street, SW
Washington, DC 20024-3622

Re: Freedom of Information Act Request

Dear Mr. Glasser:

This is a request under the Freedom of Information Act, DC Code §§ 2-531-539.

Requester Name:	Eric M. Daniel
Organization:	Griffin, Murphy, Moldenhauer & Wiggins, LLP
Address:	1912 Sunderland Place, NW Washington, DC 20036
Phone Number:	(202) 530-7159
Email address:	edaniel@washlaw.com

I request that the District of Columbia Department of Motor Vehicles provide the total number of vehicles currently registered in the District of Columbia at the following addresses:

1. 1400 Florida Ave NE, Washington, DC 20002
2. 1513 Benning Rd NE, Washington, DC 20002
3. 1600 Maryland Ave NE, Washington, DC 20002
4. 949 Barnaby St SE Washington, DC 20032

Note that this request does not seek information about the specific cars registered or identities of the person who has registered the vehicle, but rather only a total number of cars registered at each address.

If you deny any or all of the records or portions of records, please cite each specific exemption under DC Code § 2-534 that you feel justifies the refusal to release the information and notify me of appeal procedures available.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF MOTOR VEHICLES



December 5, 2013

Eric M. Daniel, Esq.
Griffin, Murphy, Moldenhauer & Wiggins, LLP
1912 Sunderland Place, NW
Washington, DC 20036

Re: Freedom of Information Act Request, received November 21, 2013

Dear Mr. Daniel:

This letter is in response to your Freedom of Information Act ("FOIA") request received via email wherein you requested the following:

"...the total number of vehicles currently registered in the District of Columbia at the following addresses:

1. 1400 Florida Ave NE, Washington, DC 20002
2. 1513 Benning Rd NE, Washington, DC 20002
3. 1600 Maryland Ave NE, Washington, DC 20002
4. 949 Barnaby St SE, Washington, DC 20032."

DMV is only required to release records under FOIA and is not required to answer questions. As a courtesy, the Department of Motor Vehicles responds as follows:

1. 1400 Florida Ave NE, Washington, DC 20002 – 2
2. 1513 Benning Rd NE, Washington, DC 20002 - none
3. 1600 Maryland Ave NE Washington, DC 20002 - none
4. 949 Barnaby St SE Washington, DC 20032 - none

Sincerely,


David M. Glasser
General Counsel & Acting FOIA Officer

Sent by email only: edaniel@washlaw.com

95 M Street, S.W. Washington, D.C. 20024 Ph.: 202-727-2200 FAX: 202-727-1010

Applicant's Enforcement of the RPP Conditions on Tenants or Owners

- If the Project is rented to tenants, the lease language would make clear that obtaining RPP would be in violation of the terms of the lease, and could result in fines or possible lease termination.
- 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.
- An owner's violation of the Condominium Documents to obtain RPP could result in fines, as well as cause 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.

Case Law Supports Condo Bylaw's Restriction & Enforcement

- "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)
- 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
- "It 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)

Notification of RPP Restriction to Potential Owners

- 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.
- The RPP Restriction language would be included in the Project's public offering statement.
- 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.

Marketing The Project As RPP Restricted

- Marketing materials (webpage, MRIS, handouts) would make clear that the project was car-free and that all residents would be subject to the RPP conditions.
- The Applicant's goal would be to attract residents who do not currently own, or intend to own, cars.
- 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.

Examples of Recorded Documents with RPP Restrictions

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 may be subject to lease termination. This prohibition may only be modified or repealed if the BZA issues an order modifying or releasing the property from this requirement. However, a handicapped tenant would not be restricted from applying for a handicapped parking space through DMV/ DDOT.

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

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. Unit Owner hereby grants the Condo Board the right to request information from the DMV to determine Unit Owner’s compliance with this provision. Unit Owner expressly grants this express written authorization in compliance with DC code so that Condo Board may receive the requested information. However, a handicapped Unit Owner would not be restricted from applying for a handicapped parking space through DMV/ DDOT.”

No Rear Alley Access



No Prescriptive Easement

1. No express access easement.
2. Prescriptive Easements can only be used by the D.C. Superior Court.
3. Any request to the D.C. Superior Court would not satisfy the legal standards because the owner has not owned the property for the required 15 years.

RPP Does Not Violate the FHA

- The Fair Housing Act, 42 U.S.C. 3601 et. seq. outlawed the refusal to sell or rent a dwelling to any person because of race, color, religion, sex, national origin, disability, and the presence of children.
- The Fair Housing Act does not guarantee a right to a residential parking permit, and Residential parking permit restrictions are outside the Act's scope.
- The RPP restriction applies equally to all tenants or owners, regardless of their of race, color, religion, sex, familial status, or national origin.
- The Applicant will advertise the units to *all*, regardless of their race, color, religion, sex, familial status or national origin.
- No one will be forced to live at the Property; all tenants or owners will choose to live there knowing of the RPP restriction.

Community Outreach

- On-site with Commissioner Hayworth: February 19
- **TWO** on-site Community Meetings: February 25 and March 20
 - ▣ Attended by at least 8 neighbors, including two representatives of 1104 Georgia Avenue (the property to the west along Allison Street).
 - ▣ Issues raised:
 - Parking
 - Successful Retail
 - Design of Building
 - Creating 5 foot rear yard
- Presentation to the ANC: March 9
- ANC vote to support the Project: April 13.
- The Applicant has twice filed revised plans to the BZA based on concerns and comments made by the ANC and the neighbors.

Legal Standard for Variance Relief Satisfied in this Case

- Under D.C. Code §6-641.07(g)(3) and 11 DCMR §3103.2, the Board is authorized to grant an area variance where it finds that three conditions exist:
 - (1) The property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition;
 - (2) The owner would encounter practical difficulties if the zoning regulations were strictly applied; and
 - (3) The variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.
- See *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); see also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

Case Law on Uniqueness

- The unique or exceptional situation may arise from a confluence of factors which affect a single property. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).
- The phrase “exceptional situation or condition” in the variance test applies not only to the land, but also to the existence and the configuration of a building on the land. See, *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974).

Uniqueness: Satisfied

- **The Property is unusual and affected by an exceptional situation and condition:**
 - **Corner Location:** Corner lot on Georgia Avenue and Allison Street NW, Surrounding properties to the west and south are commercially zoned.
 - **No Rear Alley Access:** Landlocked property with no rear alley access. No off-street parking is possible without a curb cut,
 - **Trapezoidal- Shaped Property:** The front property line on Georgia Avenue is approximately 16' – 6" narrower than the rear property line.
 - **15-Foot Building Restriction Line Along Allison Street:** 15-foot building restriction line along the Allison Street frontage. This restricts the width of the project to approximately 13' – 7.5" in the front along Georgia Avenue and 31'-4.5" in rear.
 - **Ground Floor Commercial Nature of the Properties to the South Along Georgia Avenue:** The Applicant wants to continue the long-term commercial nature of the block by developing space for successful retail as part of this project.

Property Lines

4424 Georgia Avenue NW – Property Lines



Photo taken during March 20, 2016 on-site Community Meeting. Property lines identified using garden hose. As shown, the property has no alley access.

Property Is Unique in the Square



Case Law on Practical Difficulty

- Area variances only require proof of practical difficulties, while use variances require proof of hardship, a somewhat greater burden; See *Palmer v. District of Columbia Bd. Of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(
- Practical difficulties have been found when compliance with the Zoning Regulations would be “unnecessarily burdensome.” See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).
- The Court has found that self-created hardship is not a factor to be considered in an application for an area variance, because that factor applies only to a use variance. See *Assoc. for Preservation of 17000 Block of N Street NW et. Al. v. DC BZA*, 384 A.2d 674 (1978); See also, *Salsbery v. District of Columbia Board of Zoning Adjustment*, D.C. App., 357 A.2d 402, 404 (1976).

Practical Difficulty Resulting From Property Uniqueness: Satisfied

- **Parking (§2101.1):** The Project is required to provide four parking spaces pursuant to §2101.1. But, as a result of the landlocked, corner location of the Property, the Project cannot provide any parking spaces on site.
- **Rear Yard (§774.1):** Pursuant to 11 DCMR §774.1, a 15-foot rear yard would be required. The Project is providing a five-foot rear yard. The existence of the unique features of this property would result in practical difficulty for the Applicant if the zoning relief is not provided.
 - Irregular trapezoidal shape: Results in the bulk of building being located in the rear, where the property is the widest. Mandating a rear yard in the property's widest area would be unnecessarily burdensome and would create severe programmatic inefficiencies.
 - BRL area: Results in the building being narrow and located to the west and south. A 15-foot setback from the rear property line in addition to the existing building restriction area would further truncate the developable building footprint by approximately 19%, causing a practical difficulty for the Applicant.
 - Georgia Avenue Retail: The Applicant wants to retain commercial use along the Georgia Avenue frontage. But, this would be practically difficult without a rear yard variance, because it would be hard to provide separate commercial and residential, as a required by code.

Max Developable Area Without Variance



No substantial detriment to the public good or zone plan: Satisfied

- The requested variances can be granted without causing substantial detriment to the public good and without substantial impairment to the intent, purpose, or integrity of the Zone Plan. The Project is in line with the C-2-A zoning and goals.
- As to parking, the Property is well served by the surrounding transit network, there is supply of available on-street parking, and the requested variance from the minimum parking requirement will not have a substantial impact on the public good.
- Also, the Applicant has agreed to certain TDM measures, including ineligibility for RPP, bike spaces and car or bike sharing membership.
- With respect to the rear yard relief, the project provides a 5' rear yard, which will provide 11 feet between the properties to allow light and air.
- The sun study shows that the shadow impact on the adjacent property on Allison Street will be limited to the morning.