March 8, 2019

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VIA IZIS
Frederick Hill, Chairperson
Board of Zoning Adjustment
441 4th Street NW Suite 210S
Washington, DC 20001

Re: BZA Case No. 19722
Applicant's Opposition to Motion to Stay Pending Appeal

Dear Chairperson Hill and Members of the Board:

On behalf of Applicant Kline Operations, LLC (the "Applicant"), please find enclosed an opposition to the "Motion of 450K Cap LLC to Stay BZA Decision and Order Pending Judicial Review by D.C. Court of Appeals." On January 9, 2019, the Board entered an Order approving the subject application, which was appealed to the D.C. Court of Appeals by 450K Cap LLC. As stated in the enclosed filing, there is no basis to grant a stay of the Order approving the application, and the Applicant respectfully requests that the Board deny the Motion filed by 450K Cap LLC.

Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

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CERTIFICATE OF SERVICE

I certify that on March 8, 2019, a copy of this Opposition to Motion to Stay was served via electronic mail, as follows:

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BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF **923-927 5TH STREET NW**
KLINE OPERATIONS, LLC

APPLICANT'S OPPOSITION TO MOTION TO STAY ORDER PENDING APPEAL

I. INTRODUCTION

On January 9, 2019, this Board entered an Order (the "Order") granting the application of Kline Operations, LLC (the "Applicant") for a proposed hotel (the "Project") at 923-927 5th Street NW (the "Property"). 450K CAP LLC ("450K"), a party in opposition to the application, filed an appeal of the Order to the D.C. Court of Appeals. 450K now inappropriately requests a stay of the Order during the appeal without meeting the high burden and only by repurposing arguments it made in opposition to the underlying application.

The Board previously considered 450K's arguments and properly found them unpersuasive and appropriately granted the relief requested.

450K's motion fails on all four conditions under Subtitle Y § 701.3, and the Motion of 450K Cap LLC to Stay BZA Decision and Order Pending Judicial Review by DC Court of Appeals (the "Motion to Stay") should be denied.

II. STANDARD OF REVIEW

Pursuant to Subtitle Y § 701.3, this Board may grant a stay only upon finding that all of the following four factors have been met:

(a) The party seeking the stay is likely to prevail on the merits of the appeal;
(b) Irreparable injury will result if the stay is denied;
(c) Opposing parties will not be harmed by a stay; and
(d) The public interest favors the granting of the stay.

The Board has acknowledged that the party seeking a stay has a high burden. *See* BZA Case No. 19387A, 6/15/17 Hearing Tr. 13-16.

450K's burden on appeal is considerable. The Court of Appeals must uphold decisions made by the "if they rationally flow from findings of fact supported by substantial evidence in the record as a whole." *See Draude v. D.C. Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (1990). The Board's interpretation of the zoning regulations "must be accorded great weight, and must be upheld unless it is plainly erroneous or inconsistent with the regulations." *See Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment,* 141 A.3d 1079, 1082 (2016).

III. ARGUMENT

A. 450K is unlikely to prevail on the merits of an appeal.

450K asserts substantially similar arguments that it made in opposition to the underlying application. 450K claims it is likely to prevail on the merits of an appeal because: (1) there is no exceptional condition facing the Property and (2) the special exception relief for the rear yard would adversely affect 450K's building. *See* Motion to Stay, pg. 2-3; *see* also Ex. 78.[1] The Board previously considered these arguments over the course of four public hearings and a decision meeting; yet, the Board concluded that the Applicant had met its burden for variance and special exception relief. 450K makes no compelling argument as to why the Court of Appeals would overturn the Board's findings and rational decision.

The likelihood to prevail is on the side of the Board, not 450K, as the 26-page Order carefully details the basis for the Board's approval. The evidence in the record is clear that the Property faces an exceptional condition as a confluence of four factors. *See* Order, pg. 18. 450K attacks only one of the four exceptional conditions, claiming that the subject Property is "a

[1] In the underlying matter, 450K argued that the Property was not exceptional because "it is a flat, rectangle property with frontage on 5th Street." *See* Ex. 78, pg. 4; *see also* Ex. 43. 450K also asserted it would face "severe adverse conditions" due to the rear yard relief, which would negatively impact "light and air, as well as privacy and views." *See* Ex. 78, pg. 2-3; *see also* Ex. 43. These arguments were considered by the Board and are reflected in the Order. *See* Order, pg. 15-18.

rectangle" and that "its shape and condition are neither unique nor exceptional." *See* Motion to Stay, pg. 2. The Court is likely to affirm the Board's finding that the Property is an "irregularly shaped" and "uniquely shaped" assemblage of four lots that features a rear lot line that is jogged. *See* Order, pg. 4, 10, 18. The Board specifically concluded that "no other properties in the neighborhood have a 'jogged' shape like the Property." *See* Order, pg. 18. This determination flows rationally from the substantial evidence throughout the case record. *See* Ex. 6, pg. 12-13, Ex. 8, Ex. 39, pg. 13-15.

In regard to the special exception relief, the Board's review is "limited to a determination of whether the exception sought meets the requirements of the regulation." *See First Baptist Church of Washington v. D.C. Bd. of Zoning* Adjustment, 432 A.2d 695, 701 (D.C. 1981). The Board made extensive findings that the special exception relief from the rear yard requirements would not have an adverse impact on neighboring properties, including 450K. In particular, the Board credited the Applicant's sun study, the 10-foot-wide buffer from 450K's building, the Applicant's redesign of the Project so that there are no windows facing directly into 450K's building, the nature of the proposed hotel use, and inclusion of translucent window treatments. *See* Order, pg. 7-8, 15-17. The Board also noted that 450K's building was much taller than the proposed Project and was built with "at-risk" windows facing the Property. *See* Order, pg. 16. All of these findings are supported by substantial evidence in the written record and from oral testimony. *See* Ex. 39, 52, 68, 90; *see also* Hearing Tr. 4/4/18, 6/20/18).

The Board gave due consideration to 450K's arguments, but found them to be unpersuasive. 450K offers no further basis as to why it is likely to prevail on the merits of its appeal. It's motion is devoid of substantive argument and its attempt to repurpose the same arguments falls flat. The Board must find that 450K has failed to satisfy the first prong of Subtitle

Y § 701.3, as the evidence in the record and the Board's substantive Order result in an unlikely the Court of Appeals will disrupt the Board's findings in the Order.

B. <u>450K does not face irreparable injury.</u>

Based on the legal standard and the shallow arguments presented, 450K does not face irreparable injury if the stay is denied. 450K continues to repurpose losing arguments from the underlying case and now asserts them as meeting the standard for "irreparable injury." 450K argues it will face irreparable injury as a result of the rear yard relief, traffic and congestion due to loading along the Property's rear alley, and general concerns regarding parking and noise. *See* Motion to Stay, pg. 1-2.[2] In approving the application, the Board expressly found that these factors did not constitute an adverse effect to 450K or a detriment to the public good. *See* Order, pg. 15, 20-22. It is unclear how these same conditions could now constitute the higher standard of "irreparable injury."

To find irreparable injury "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *See Kuflom v. D.C. Bureau of Motor Vehicle Services*, 543, A.2d 340, 344 (D.C. 1988) (*quoting Virginia Petroleum Jobbers Assoc. v. Federal Power Com.*, 259 F.2d 921, 925 (1958)). The Board has found that "economic loss does not, in and of itself, constitute irreparable harm . . . recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *See* BZA Case No. 18027 (*quoting Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (1985)).

450K argues irreparable injury through general zoning concerns that would result once the Project is built. In BZA Case No. 17532-B, the Board found that the movant would not suffer

[2] 450K made these similar arguments in the underlying case at Ex. 43 and Ex. 78.

irreparably injury due to construction of the approved project. *See* BZA Case No. 17532-B, pg. 2. Nonetheless, the Applicant has not begun construction of the Project. Even if the Applicant did proceed with construction, a property owner who constructs a building during the pendency of an appeal does so at its own risk. *See* BZA Case No. 17532-B (*quoting Coneen v. Speedy Muffler King, Inc./Bloor Automotive, Inc.*, 568 A.2d 700 (Pa. Commw. Ct. 1989)). In other words, 450K's perceived injuries cannot be irreparable because other remedies are available.

450K does not meet the second condition for a stay as it does not face any irreparable injury during the pendency of the appeal.

C. <u>The Applicant will be harmed if a stay is imposed.</u>

The Applicant will face harm if a stay is imposed; thus, a stay is not proper. There is a financial burden to carrying the Property that will be exacerbated by further delay. Further, the Applicant will not be able to commence the permitting and construction phase of the Project if a stay is imposed. The permitting phase itself is lengthy. Although construction of the Project would be "at risk" during the appeal, the Applicant has the right to proceed pursuant to the Order.

450K argues that the Project "is on hold because of [the Applicant's] own decision to seek . . . variances and special exceptions" and that a delay is "self-inflicted." *See* Motion to Stay, pg. 3. This is a completely circular and self-serving argument that fails to satisfy 450K's burden and is unsupported by the law.

A stay would harm the Applicant and is inappropriate, especially in light of the fact that the underlying case was comprehensive. This case was pending before the Board for over 5.5 months. The Board held four hearings and a decision meeting. The record is extensive, with over 95 exhibits. 450K participated as a party and presented all of its arguments to the Board. The Board considered these arguments, but found that the Applicant had met its burden for zoning

relief. Further delay in constructing the Project would be harmful and unwarranted as 450K has taken advantage of all possible delay tactics with no evidence or legal support.

D. The public interest does not favor granting a stay.

Finally, the public interest does not favor granting a stay of the Order. Throughout this process, the Applicant engaged in the appropriate channels, attended numerous community meetings, and actively sought input from the community and neighbors, including 450K. Advisory Neighborhood Commission 6E supported the project.

The public interest would support development of vacant and unutilized sites in the middle of the downtown area. The Project proposes to improve a long-vacant lot with a vibrant hotel use in the bustling Mount Vernon Triangle neighborhood. The Office of Planning supported the Project and the zoning relief, and the Department of Transportation had no objection. 450K claims that it is "eager to see development of this vacant site," but its repeated challenges to the Project indicate otherwise. *See* Ex. 78, pg. 1.

The Board's process and procedures for this case are a textbook example of how the zoning process should work. The Board held numerous hearings, allowing members of the public, including 450K, to participate and express issues and concerns. The public interest favors allowing the Applicant to proceed with the Project.

IV. CONCLUSION

450K does not meet any of the four conditions required to meet its significant burden for a stay of the Order under Subtitle Y § 701.3. 450K attempts to repurpose arguments it made during the underlying proceedings. The Board gave due consideration to these arguments, but found that the Applicant had met its burden for zoning relief. Accordingly, 450K's Motion to Stay should be denied.

Respectfully Submitted,

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