

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

1899 Penn Property LLC
1899 Pennsylvania Avenue, N.W. (Square 105, Lot 843)

Preliminary Statement of Compliance with the Burden of Proof

I. Introduction

1899 Penn Property LLC, the owner of the property at 1899 Pennsylvania Ave., N.W. (Square 105, Lot 843) (“Applicant”), submits this statement through undersigned counsel in support of its application for relief from 11-C DCMR § 1500.3(d) to allow habitable penthouse space within the restricted zone surrounding the White House. The property is located in the D-6 Zone, as shown on a copy of the zoning map included as Attachment A.

II. Background

A. The Property

The property at 1899 Pennsylvania Avenue, N.W., (Square 105, Lot 843) (“Property”) is located at the northeast corner of 19th and H Streets, N.W., at the intersection with Pennsylvania Avenue. Lot 843 has a land area of approximately 19,302 square feet and is improved with a 11-story building. It is one of five structures that form a single building for zoning purposes on Record Lot 62 in Square 105.¹ See Attachment B. The building at 1899 Pennsylvania Avenue, N.W., was constructed in two phases approximately 90 years apart. Its structural skeleton dates from 1913-14 when an 11-story building known as the Commerce Building was constructed on the site prior to the enactment of the District’s first zoning regulations in 1920. The building underwent a major renovation in 2001-02 when all but the structural framing was demolished. The original exterior skin was replaced with a modern glass façade and new mechanical systems were installed in 2003, the Property became part of the single building that is now located on Record Lot 62.

B. The Surrounding Area

The Property is located in a high-density commercial area along the Pennsylvania Avenue corridor west of the White House. The area is comprised of commercial office buildings with ground floor retail-service space. The majority of these structures are constructed to their full zoning envelope. The International Monetary Fund is located across Pennsylvania Avenue to the south. Other international entities have offices in the immediate vicinity and the White House is located three blocks to the east. The Farragut North Metrorail Station is just one block to the north. The Property is located in the White House security area bounded by I Street, N.W., to the north; Constitution Avenue, N.W., to the south; 19th Street, N.W., to the west, and

¹ The other components of the single building are 1800 I Street, N.W. (Lot 847), 818 18th Street, N.W. (Lot 846), 1801 Pennsylvania Avenue, N.W. (Lot 845), and 1875 Pennsylvania Avenue, N.W. (Lot 844).

13th Street, N.W., to the east, where penthouse habitable space is restricted under 11-C DCMR § 1500.3(d).

III. Description of Proposal

The Applicant intends to enlarge the existing mechanical penthouse on the roof of the building to provide habitable penthouse space for the use and enjoyment of tenants of the building. The existing penthouse occupies approximately 3,991 square feet of the roof area and is 18.5 feet in height. The Applicant proposes to expand the penthouse area with approximately 2,215 square feet of habitable space, as shown on page 14 of the architectural drawings included with this application. The overall height of the habitable penthouse would be 14 feet as measured from the roof slab, and lower than the existing mechanical penthouse height, as permitted under Subtitle C § 1500.9. The new penthouse area it would be set back from the roof edge a distance of 16 feet, thus exceeding the required 1:1 setback. The total penthouse area including both habitable and mechanical space has a floor area ratio (“FAR”) of less than 0.4.

IV. Jurisdiction of the Board

The Board of Zoning Adjustment (“Board” or “BZA”) has jurisdiction to grant variance relief pursuant to 11-X DCMR § 1000.1 and special exception relief pursuant to 11-X DCMR § 901.

V. Compliance with the Standard of Review

A. Variance versus Special Exception Relief

The Board has applied different standards of review to four application requesting variance relief from Subtitle C § 1500.3(d). In three instances, the Board evaluated the applications as area variances. In the most recent case decided in April 2021, however, the Board determined that the application was more appropriately characterized as a use variance. *See* BZA Order No. 20428 issued May 5, 2021. The Board approved all four applications through summary orders and, consequently, none of the decisions provides any findings of fact or conclusions of law explaining why the relief was changed to a use variance. Without such legal rationale, under the principle of *stare decisis*, an applicant cannot necessarily rely on the Board’s most recent decision as controlling precedent. *See Springer v. District of Columbia Dep’t of Employment Serv.*, 743 A.2d 1213, 1221 (D.C. 1999) (“when an agency departs from its prior practice or rule, it ‘must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”) (internal citations omitted).

To further complicate the issue, on February 25, 2021, the Zoning Commission took proposed action in Z.C. Case No. 14-13E to allow penthouse habitable space in the White House restricted zone as a special exception under proposed Subtitle C § 1501.1(d). The proposed text of that provision is as follows:

On any building within an area bound by I Street, N.W. to the north; Constitution Avenue, N.W. to the south; 19th street, N.W. to the west, and 13th Street, N.W. to

the east, penthouse habitable space or publicly accessible rooftop deck on the highest roof of the building, shall be permitted only if approved by the Board of Zoning Adjustment as a special exception under Subtitle X, Chapter 9, and with written approval by the U.S. Secret Service.

Z.C. Case No. 14-13E, Exhibit No. 7A3, at 10 (Office of Planning Hearing Report, January 11, 2021) (proposed Subtitle C § 1501.1(d)).

The Applicant has been advised by the Office of Attorney General that the notice of final rulemaking will be issued in the next several months. Thereafter, the proposed amendments will undergo a 30-comment period before they become effective. No substantive changes are anticipated to proposed Subtitle C § 1501.1(d) and the new regulations are projected to be in effect by the time this application is scheduled for a hearing in the next four to five months.

Given the uncertainty over which variance standard to apply, and the high likelihood the text amendments will be in effect prior to a hearing in this matter, the Applicant is evaluating this application against both the current variance standards and, in the alternative, the special exception test, as contemplated under proposed Subtitle C § 1501.1(d). The Applicant is proceeding in this manner in order to ensure a reasonable timeframe for potential approval. The Applicant will supplement the record, as necessary, should the adopted amendments deviate from the proposed language the Commission voted upon at its February 25, 2021, meeting.

B. Compliance with the Variance Standard

The Board may grant variance relief where an applicant demonstrates that the property is (i) affected by an exceptional or extraordinary conditions; (ii) that creates practical difficulties or undue hardship in complying with the strict application of the regulations; and (iii) that the relief can be granted without substantial detriment to the public good and without impairing the intent, purpose or integrity of the zone plan. *See French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (quoting *Roumel v. D.C. Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *Capitol Hill Restoration Society, Inc. v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987); *see also St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 269 (D.C. 2017) (“the District’s zoning authorities are authorized to grant an area variance ...”). As set forth below, the Applicant meets the test for variance relief from 11-C DCMR § 1500.3(d).

1. Exceptional or Extraordinary Conditions Affecting the Property

The Property is affected by the exceptional and extraordinary condition of being a structure that pre-dates the earliest zoning regulations in the District of Columbia while also being part of a much larger single building for zoning purposes. At the time of its construction, the building’s measuring point was at the midpoint on 19th Street, N.W. and was constructed to a height of approximately 129 feet. As a result of its inclusion in the single lot covenant on Lot 92, its measuring point is now located at the midpoint of 1800 I Street, N.W., which is approximately seven to eight feet higher. This differential is just two to three feet less than the amount needed to construct an additional floor on the building. Finally, although the structure

was completely renovated 20 years ago, it is still an underutilized asset on one of the most prominent segments of Pennsylvania Avenue only blocks from the White House.

2. *Strict Application of the Regulations Would Create Practical Difficulties or an Undue Hardship.*

Strict application of the restriction against habitable penthouse space within the White House security zone creates practical difficulties and undue hardships for the Applicant. Because of its location in the security zone, the building is at a competitive disadvantage in the Class A office market where other buildings outside the restricted zone are able to provide habitable penthouses. Additionally, due to the insufficiency of the grade differential between the former and current measuring point, the Applicant is unable to construct an additional floor as an alternative to habitable penthouse space that would obviate the need for relief. While joining with the larger single building on Lot 62 enabled the Property to eliminate its nonconforming rear yard, which is favored by the Zoning Regulations, it is still unable to achieve the full height permitted under the Zoning Regulations, rendering it underutilized in a highly competitive market.

3. *No Substantial Detriment to the Public Good or Impairment to the Intent, Purpose, or Integrity of the Zone Plan.*

The requested relief will not create any substantial detriment to the public good and will not impair the intent, purpose or integrity of the zone plan. The proposed habitable penthouse complies with the height, bulk and setback requirements for penthouses in the D-6 District. It has been attractively designed to enhance the appearance of Pennsylvania Avenue, N.W., and promote favorable conditions for the general welfare, prosperity, and economic well-being of the city, in furtherance of the District's Zoning Act.

The proposed habitable penthouse space likewise does not undermine or impair the intent of the White House security zone. This provision was included in the Zoning Regulations at the request of the U.S. Secret Service, whose primary concern stemmed from potential risks created by residential penthouses devoted to residential uses. In comments to the Zoning Commission, the Secret Service noted that “[u]nlike penthouses that are open to the public for commercial purposes, such as rooftop restaurants or swimming pools, *residential penthouses* can easily be used to shield an occupant’s activities – to include activities intended to harm Secret Service protectees – from view.” See Exhibit 74, Zoning Commission Cas No. 14-13 (April 30, 2015) (emphasis added). Here, the habitable penthouse would not be used for residential purposes but instead would be open to tenants of the commercial office building, in furtherance of the general purpose and intent of the security zone. The Secret Service has supported habitable penthouses devoted to commercial uses within the restricted zone, including 1700 Pennsylvania Avenue, N.W., which is directly across the street from the Old Executive Office Building, as well as several others. The U.S. Secret Service will review the current application to ensure it likewise complies with its strict security concerns for the protection of the White House area.

C. The Special Exception Standard in the Alternative

In the alternative, the Applicant meets the test for special exception relief under the provisions of proposed Subtitle 1501.1(d) in Z.C. Case No. 14-13E. Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning district, provided the specific regulatory requirements for the relief requested are satisfied. The D.C. Court of Appeals has emphasized the narrow scope of the Board's discretion in reviewing special exception applications. If the specific requirements of the regulation are met, the Board is generally precluded from denying the application. *See National Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984, 986 n.1 (D.C. 2000); *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C. 1995); *see also Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973).

In order for the Board to grant special exception relief, an applicant must demonstrate that the special exception:

- (a) will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
- (b) will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map; and
- (c) Will meet such special conditions as may be specified in the Zoning Regulations.

11-C DCMR § 901.2; *see also* D.C. Official Code § 6-641.07(g)(2).

The Applicant meets the standard for special exception relief from the restriction on habitable penthouse space in the White House security zone under proposed Subtitle C § 1501.1(d), as described below.

D. Compliance with the Special Exception Standard

1. *The special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.*

The penthouse expansion will conform to the requirements of the D-6 zone district with respect to height, bulk, and setback requirements, and will harmonize with the general purpose and intent of the Zoning Regulations and Zoning Maps. It will provide accessory space for commercial office uses, as permitted in the D-6 District. Thus, the proposed habitable penthouse space at the Property will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.

2. *The special exception will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps.*

The proposed special exception will not tend to affect adversely the use of neighboring properties. The area is characterized by similar commercial office buildings, many of which have usable rooftop amenity spaces. The immediate building to the east features an architectural embellishment that screens the Property from the adjacent roof and does not affect adversely the the commercial office uses within the structure.

3. *The special exception will meet such special conditions as may be specified by this title [the Zoning Regulations].*

Proposed Subtitle C § 1501.1(d) requires the Applicant to secure approval from the U.S. Secret Service for habitable penthouse within the restrict zone. The Applicant will be contacting the Secret Service to obtain its approval well in advance of the hearing.

VII. Community Outreach Statement

The Applicant will seek comments from Advisory Neighborhood Commission (“ANC”) 2B prior to any hearing scheduled on this case.

VIII. Conclusion

Based on the foregoing and the materials submitted with this application, the Applicant meets the standards for variance relief for habitable penthouse space in the White House security zone under Subtitle C § 1500.1(d). In the alternative, the Applicant likewise meets the special exception standards under the proposed provisions of Subtitle C § 1501.1(d) in Z.C. Case No. 14-13E. The Applicant will supplement this submission no later than 21 days in advance of the hearing scheduled on this matter.

Respectfully submitted,

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By: 
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