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October 30, 2015

FILED VIA EMAIL

Anthony Hood, Chairman
Zoning Commission of the District of Columbia
441 4th Street, N.W., Suite 210
Washington, D.C. 20001

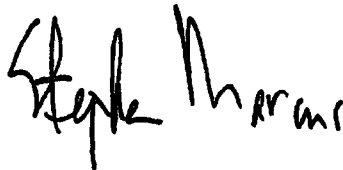
Re: Z.C. Case No. 06-11L – St. Mary's Episcopal Church's Responses to Hillel's Proposed Findings of and Conclusion of Law Relating to Application of Hillel at The George Washington University for Variance Relief and Special Exceptions

Dear Chairman Hood:

Enclosed are St. Mary's Episcopal Church's Responses to Hillel's Proposed Findings of Fact and Conclusions of Law.

Please let me know if you have any questions concerning the attached submission.

Respectfully,



Stephen H. Marcus

Enclosure:

cc: David Avitabile (Counsel for Hillel)
Patrick Kennedy (ANC-2A Chair)
Barbara Kahlow (WECA Secretary-Treasurer)

ZONING COMMISSION
District of Columbia
CASE NO. **06-11L**
EXHIBIT NO. **80**
EXHIBIT NO.80

**ST. MARY'S EPISCOPAL CHURCH'S
RESPONSES TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
HILLEL AT THE GEORGE WASHINGTON UNIVERSITY AND THE GEORGE
WASHINGTON UNIVERSITY
Z.C. Case No. 06-11L**

HEARING DATE: June 23, 2014

DECISION DATE: November 9, 2015

INTRODUCTION

The application filed by Hillel at The George Washington University ("Hillel") for variance relief and a special exception should be denied. Hillel has failed to satisfy every one of the three prongs of the three-part test for obtaining an area variance: (i) the property is unique because of some physical aspect or other extraordinary or exceptional situation or condition inherent in the property; (ii) strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and (iii) granting the variance will do no harm to the public good or to the zoning plan. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

Hillel fails to satisfy the first prong – exceptional circumstances -- because there is nothing unique about its Property and it has not proffered evidence that supports a finding that its Proposed Building is an "institutional necessity." Hillel fails to satisfy the second prong – practical difficulty -- because it has not shown, as it must under *Draude v. District of Columbia Bd. of Zoning Adj.*, 527 A.2d 1242, 1256 (D.C. 1979) that (i) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (ii) precisely how the needed design features require the specific variance sought. And finally, Hillel fails to satisfy the third prong – no harm to the public good -- because its Project presents substantial risks to St. Mary's Church – an historic, fragile, and architecturally significant church that has been an important institution in Foggy Bottom for 125 years.¹

ST. MARY'S RESPONSES TO HILLEL'S PROPOSED FINDINGS OF FACT

Application, Parties and Hearing

3. Hillel's application for variance and special exception relief is for a four-story building of which the top two floors will be leased to the University for 20 years. The University will use 9,387 square feet or 41.48 percent of the total gross floor area. Ex. 73 at 4. Hillel presented no evidence at the Zoning Commission hearing held on June 23, 2014 (the "Hearing") of any actual plans to use the space to be leased to the University after its 20-year lease expires.

¹ St. Mary's incorporates by reference into this Response its letter to Chairman Hood and the other members of the Zoning Commission, dated October 30, 2015, responding to Hillel's Post-Hearing Submission.

9. The Zoning Commission voted to deny the Church's request for a continuance but did not provide reasons for its decision. Tr. 16-17.

11. The Zoning Commission qualified Elba Morales as an expert in architecture but did not "conclude[] that Mrs. Morales' extensive experience as a lead project designer on multiple projects qualified her as an expert witness." The Zoning Commission qualified Mic Burns as an expert in the development and construction aspects of architecture but did not otherwise characterize the basis for his qualification. Tr. 24 and 28.

Hillel failed to provide any written or oral testimony relating to any engineering plans to set monitoring thresholds during the Project to avoid damage to St. Mary's during demolition, excavation or construction. In sharp contrast, St. Mary's provided the un rebutted testimony of its expert, John Matteo, who was qualified as an expert in the field of structural engineering. Mr. Matteo testified as to the critical importance of having a design process that sequences underpinning, having performance criteria that set threshold limits for monitoring vibration and plans of action, and doing a careful review of construction processes at the beginning of construction. Mr. Matteo testified that these measures are critical to underpinning and lateral retention of soil during excavation. Tr. 255-56, 260-61 and 287; see also ¶17.c below.

12. In its report, dated June 13, 2014, the Office of Planning ("OP") conditioned its recommended approval of the requested zoning relief on five conditions, the first of which is that "[a] construction management agreement is achieved between the Applicant and St. Mary's Episcopal Church." OP also noted that "proposed building projections protruding into public space are a problematic feature of the project due to their excessive width." Ex. 31 at 1 and 2 and note 4.

13. In its report, dated June 13, 2014, the Department of Transportation ("DDOT") conditioned its approval on Hillel using trash bins rather than large cars or dumpsters at its proposed facility to facilitate quick trash pick-up. DDOT also noted that Hillel's proposed building design includes projections that exceed the maximum widths allowed under the District of Columbia's building code. Importantly, DDOT noted that Hillel would occupy space in its proposed facility that is "roughly comparable to the current Hillel facility." Ex. 24 at 2 and 3.

14. In its report, dated June 19, 2014, ANC 2A conditioned its support, among other things, on Hillel "reaching a construction management agreement with St. Mary's Episcopal Church that will address the legitimate concerns of that institution with respect to the impact that excavation and construction might have on their fragile, historic property." ANC 2A also conditioned its support on Hillel addressing "any specific concerns about any appreciably negative impacts on St. Mary's light and air quality."

ANC 2A also noted that the University's participation in the Project "is necessary to provide Hillel with the financing it needs in order to go forward with the project." Additionally, ANC 2A expressed concern about the impacts of construction on the surrounding community "especially with respect to Church operations." Ex. 36.

ANC 2A submitted a second report, dated October 28, 2015, in which it advised that it had voted to approve resubmitting its previous resolution adopted at its meeting of June 18, 2014. In its October 28, 2015 report, the ANC stated as follows:

The Commission appreciated both organizations' hard work in attempting to finalize a construction management agreement that would safeguard the historic structure of St. Mary's Church during the construction process, as well as GW Hillel's efforts to address St. Mary's Church's concerns regarding light and air quality by reducing the height of the development's south exterior wall as part of the final design plans. However, given the fact that GW Hillel and St. Mary's Church were not able to finalize a construction management agreement that was acceptable to both organizations, the Commission was unable to pass a resolution in support of the application by GW Hillel and The George Washington University before the Zoning Commission considers the matter at its meeting on November 9, 2015.

Ex. __ (letter from Patrick Kennedy to Anthony Hood, dated Oct. 28, 2015).

15. Hillel's proposed "construction management *plan*" is not a "response" to the condition on which OP and the ANC recommended approval of Hillel's Project, but a total repudiation of that condition. Hillel's construction management plan eviscerates the protections the parties have been attempting to negotiate to ensure a strong *agreement* that would protect St. Mary's from damage during Hillel's Project and fully protect it from any damage relating to the Project. As to the Church's concerns about light and air, Hillel's proposed design changes do not change the fundamental fact that its Proposed Building will run along the full length of the northern boundary of the Church's Property, extend upwards for four stories, and block light and air in the Rectory backyard. Although Hillel agreed to set back the southern wall of its Proposed Building by four feet from its original plan, this change does not fundamentally address the Church's design concerns.

17.a. The Church was granted party status in opposition to Hillel's application for zoning relief. The Church submitted evidence and provided testimony on several areas of concern, including Hillel's requested lot occupancy and rear yard variance, the location of the Proposed Building's entrance, the loss of access to the North Gate and Hillel's driveway as a means of ingress and egress, the impact of the Hillel's Proposed Building on light and open sky to the north of the Rectory backyard, proposed building projections, the Church's devastating experience in dealing with the damage to its Property caused by the University's construction of the Health and Wellness Center, and

the risks that Hillel's Project poses to the Church's historic and architecturally significant buildings.

17.b The Church's witnesses, including its structural engineer, John Matteo and Dr Richard English, a member of St Mary's for 30 years and former Provost and Chief Academic Officer of Howard University, testified about the damage suffered by the Church as a result of the University's construction of the Health and Wellness Center. The Church did not "acknowledge" that it did not suffer damage when the original Hillel building was constructed in the 1980's or when an earthquake hit the area several years ago. John Matteo was the only Church witness who testified on this subject, and he stated that he did not know if these events caused any damage. Tr. 265 and 268.

17.c. The Church's structural engineer, John Matteo, was qualified as an expert in the field of structural engineering. Mr Matteo has approximately 20 years of experience in protecting historic buildings and has advised St. Mary's on structural issues for over 15 years. Mr. Matteo testified on what went wrong during the University's construction of the Health and Wellness Center, its impact on St. Mary's, risk mitigation measures that can reduce, but not eliminate, the risk of construction, including the design of a soil retention system, the sequencing of underpinning, monitoring thresholds, an action plan in place to allow for a quick response to any problems, and a careful review of construction processes, the importance of a very good and strong construction management agreement to mitigate the risks of construction, and the ability of more sophisticated techniques to mitigate the risks of construction . Ex. 10 and Tr. 254-268.

19. Hillel refused to compromise on its design plan to extend the south wall of its Proposed Building so that it would not block light and air in the Rectory backyard. Instead, Hillel agreed to set its Proposed Building four feet back from the Church's Property This change does not address the Church's objections to the loss of light and air and its use of the North Gate. Hillel also agreed to move the entrance of the Proposed Building from 23rd Street to H Street and made several design changes to the south wall of the Proposed Building.

19.g. At its public meeting on April 13, 2015, the Zoning Commission voted 4-0-1 to deny WECA's motion to dismiss and granted the fourth postponement request as well as the ANC's request for additional time Tr. April 13, 2015 at 39

21 The Zoning Commission has not voted to approve Hillel's application and the requested relief.

The Property and Surrounding Context

24. Hillel's Property is located in the R-5-D Zone District.

27 St. Mary's has a Rectory attached to the Sanctuary, Church offices, Parish Hall and Rector's Study. The Rectory is located at 730 23rd Street, N.W. There is a narrow three-foot passageway between the Rectory and Hillel's current building. The Rectory serves as the home of the Priest or Rector at St. Mary's. The Rectory is currently leased to a Department of State employee. Portions of St. Mary's are designated on the D.C. Joint Committee on Historic Landmarks and the U.S. Department of the Interior's National Register of Historic Places. Ex. 46.

The Project

32. The first floor of the Proposed Building will be used as a chapel and a lounge. The lower level will have a dining hall and two kosher kitchens. The second floor will contain staff offices, a student lounge and gathering space, study area and library. The top two floors will be leased to the University for 20 years. The two top floors will contain 9,387 square feet of gross floor area. The University will lease 41.48 percent of the total gross floor area for 20 years. Tr. 50-52; Ex. 72 at Att. "A" and 73 at 4.

33. Hillel failed to present any documentary or other persuasive evidence demonstrating that the spaces in its Proposed Building will be larger than the spaces used for similar purposes in its existing building. Although Rabbi Kaiser-Blueth stated that he thought some of the spaces in the Proposed Building would be larger he testified "I don't have the numbers offhand." Tr. 151.

34. A twenty-year lease is not, as Hillel suggests, "the near term." This is a long-term, twenty-year lease that is intended to provide Hillel with the funds to enable it to construct its Proposed Building. Ex. 72 at Att. "A." Hillel presented no evidence at the Hearing demonstrating that it has any plans much less any need for the top two floors if the University does not renew its lease after its first twenty-year term.

Zoning Relief

Exceptional Condition

42.a There is nothing unique about Hillel's Property. Hillel's comparison of its lot size to churches and synagogues in the District of Columbia is meritless since they serve an entirely different function.

42.b. The fact that Hillel's Property is on a corner lot does not make it unique. Otherwise, every corner lot in the District of Columbia would be unique under the zoning rules, which is not the case.

42.c. A lot size of 61 feet does not make the lot unique. There are many lots in the District that have a lot size that is equal to or smaller than 61 feet which are not unique.

43. Hillel's needs as a student organization with a religious purpose has no bearing on whether its Property is unique or relates to the general conditions in the neighborhood.

43 b. Hillel did not put any evidence into the record that there were no commercial properties for sale or residential properties of the required size within Zip Code 20037. It merely asserted this as fact in its Supplemental Statement. Ex. 12 at 9.

43.c. Hillel's existing facility contains approximately 11,437 gross square feet, including one floor that is below grade. Hillel's Proposed Building will have 22,629 square feet of which Hillel will use 13,242 square feet and the University will use 9,387 square feet for twenty years. Thus, in its Proposed Building, Hillel will have only 1,805 additional square feet more than its existing facility and the University will use 41.48 percent of the new space for at least twenty years Ex. 73 at 4.

Hillel's relative size to Hillel's at other educational institutions does not provide a complete picture. In order for this comparison to have any validity, Hillel would have to also compare the numbers of students who participate in functions at Hillel's located elsewhere. Hillel also provided no evidence in the record that it is "unable to accommodate existing demand, much less future planned growth." Hillel's expert in architecture admitted that Hillel's architects were *not* asked to determine if Hillel could meet its programmatic needs by renovating its existing building. Tr. 162-64. And Hillel's Rabbi admitted that Hillel has not done *any* projections of anticipated student participation at Hillel over the next several years, let alone after the University's lease expires in 20 years. Tr. 142 and 144.

- ii Hillel did not provide evidence that the number of students involved in Hillel activities "has significantly increased." Rabbi Kaiser-Blueth testified that Hillel has 250-500 students who are "very involved students . . . in any given week or month" and that Hillel "tracks" 1,600 students. "Very involved students" and "tracking" students are not the same thing. Tr. 143. Rabbi Kaiser-Blueth testified that Hillel has never turned anyone away because of overcrowding at Friday night services. While he stated that students have been turned away once or twice at Shabbat dinner and once at Passover (Tr. 141, 147-52), he did not provide any specific information as to the number of students who were allegedly turned away.

He also admitted that although Hillel used to have Saturday morning services, it has stopped doing so. Tr. 147

- iii. Hillel did not provide any evidence suggesting that Hillel needs to expand its existing facility to accommodate another student organization, “uGeW”, and admitted that another organization, Gather the Jews, meets at Hillel only once a month Tr. 154.

43.d. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.* prohibits a government from imposing a “land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,” except in certain defined circumstances. Hillel has not provided any evidence that the zoning laws of the District of Columbia impose a “substantial burden” on the religious exercise of Jewish students at the University. Accordingly, this statute has no relevance to this zoning dispute. See also ¶46 below.

Practical Difficulty – Lot Occupancy and Rear Yard

44. Hillel has not shown that its existing building will not accommodate its existing needs and has provided no evidence as to its “planned future needs ”

- a. Hillel did not provide any evidence that it needs a larger sanctuary to accommodate worship services or a vestibule to provide transition from the street to the sanctuary. It did not provide any evidence that it needs a dining space “large enough to accommodate regular Shabbat services,” which are held in the sanctuary. It did not provide any evidence that it cannot accommodate two kitchens in its existing facility. In fact, Rabbi Kaiser-Blueth acknowledged that it has two kosher kitchens in its current facility. Tr. 146 and 149. It did not provide any evidence that it cannot use or renovate its current rooftop to accommodate the construction of a sukkah for outdoor religious services during Sukkot. And it did not provide any evidence that its current space is inadequate to for student counseling, ministry, education, informal gathering and socializing.
- b. Hillel has not shown that its “institutional needs” require construction of the Proposed Building. Rabbi Kaiser-Blueth admitted that Hillel’s dining room was not large enough to accommodate students for Friday night dinner on only one or two occasions. Tr. 152

45. The size of Hillel’s lot and its alleged “institutional needs” do not create a practical difficulty. There is nothing unique about Hillel’s lot and Hillel has not

demonstrated that its institutional needs necessitate the Proposed Building its architects have designed.

a Whether or not Hillel's proposed design "drives requirements" for multiple stairways, corridors, larger than usual plumbing uses, multiple elevators cannot circumvent the fact that Hillel has not demonstrated that it actually needs its proposed design. Because Hillel has not satisfied this fundamental requirement, its assertions regarding "assembly use" and the "exceptionally large building core" are irrelevant.

b. Hillel has also failed to demonstrate that its need for multiple kitchen facilities necessitates its proposed design or that it cannot address this need within its existing facility which already has two kosher kitchens.

46 Hillel has not demonstrated that its "program needs" are incompatible with rear yard and lot occupancy requirements. The design of Hillel's Proposed Building reflects Hillel's wants, not its needs. Hillel's wants do not provide a legal basis for ignoring the zoning rules that pertain to rear yard and lot occupancy requirements. The contention that these zoning rules impose a "substantial burden on Hillel's religious exercise" is meritless, particularly in light of its admission that it has never turned anyone away from attending a Friday night service and does not hold Saturday morning services. Moreover, even if Hillel could demonstrate that it actually needed a larger sanctuary, this would not satisfy the "substantial burden" requirements of the Religious Land Use and Institutionalized Persons Act. *See, e.g., Living Water Church of God v. Charter Twp. Of Meridian*, 258 Fed. Appx. 729, 741 (6th Cir.) (holding that township's refusal to grant a special use permit to allow church to build a larger facility was not a "substantial burden" because the church had failed to demonstrate that "it cannot carry out its church missions and ministries. Instead, Living Water has demonstrated only that it cannot operate its church on the *scale* it desires.") (emphasis in original), cert. denied, 553 U.S. 1093 (2008).

Public Good and Conformance with the Zone Plan – Lot Occupancy/Rear Yard

47. Hillel's assertion that the "Project serves the public good because it will permit Hillel to remain in place on the University campus" is a false choice because it assumes, without a shred of evidence, that Hillel cannot satisfy its actual needs by renovating its existing facility. Further, the record shows that Hillel's actual needs do not include a larger sanctuary since it admitted that it has not turned anyone away from a Friday night service and it no longer holds Saturday morning services. As to a larger dining space, Hillel's has asserted only that its dining room was not large enough to accommodate students for Friday night dinner "one or two nights this year" and once during the previous Passover. And as Hillel admitted, its dining space will increase in size only modestly from 125 seats to 140 seats. Tr 147-48, 150 and 152

48. Hillel's assertion that it would be "unable to remain in place" if zoning relief is not granted is not supported by the evidence. Hillel did not provide any evidence that it would abandon its existing facility if the Zoning Commission denies its application, nor did it provide any evidence that it could not meet its needs by renovating its existing facility.

49. Hillel's Proposed Building will restrict light and air to the Church Property. The fact that Hillel could, as a matter of right, build a much taller building of 90 feet in no way changes that irrefutable fact. Hillel's Proposed Building will result in the loss of light and open sky to the north of the Rectory backyard. The north side of the Rectory backyard will be entirely blocked by a high wall extending four stories upwards and running along the entire length of the Rectory's backyard. This will diminish the quality of life for anyone living in the Rectory and make it less attractive for the Rector to live there. Ex. 50.

51. The West Gate and easement that the University provided to the Church are not an adequate substitute for the loss of use of the North Gate that would result if Hillel's request for relief is granted. The West Gate may not be accessible to fire trucks and other emergency vehicles since it is often blocked by cars and other vehicles in both the public alley and the University dormitory – Amsterdam Hall. The North Gate has been used over the years as a method for St. Mary's Priest to obtain ingress and egress to the Rectory through Hillel's parking lot on H Street. St. Mary's has an easement to use the North Gate to obtain access to H Street through Hillel's parking lot. Ex. 46 at Exhibit E and Tr. 249.

52. Hillel's revised plan to relocate the entrance to the Project from 23rd Street to H Street will not change the fact that the Project poses a significant risk to the Church – a risk that, based on the Church's prior experience, is likely to result in damage to the Church Property. The Church's structural engineer testified that if Hillel is allowed to construct its Proposed Building, St. Mary's will face the risks of settlement of its buildings, cracking, damage to its buildings and finishes. These risks are the greatest for the Rectory, which is closest to the excavation. The other buildings at St. Mary's are also at risk, including the risks of damage due to vibration and dust. Tr. 259 and Ex. 46.

Practical Difficulty - FAR

54. Hillel's practical difficulty argument regarding FAR fails for the same reason that its practical difficulty argument for variance relief fails – it has failed to show that it needs the design contemplated for its Proposed Building. The best evidence of this failure is the fact that over 40% of its Proposed Building won't be used by Hillel for at least 20 years. Plainly, Hillel does not need that space if it doesn't intend to use it. The large floor plate of Hillel's Proposed Building is not driven by need but by the University's intended use of the two top floors. As Hillel has acknowledged, the area it

will occupy in its Proposed Building (13,242 square feet) represents a small increase in the space it uses in its existing facility (11,437 square feet) – a difference of only 1,805 square feet representing only a 15.78 percent increase. As to Hillel's planned use of the roof for Sukkot services, it provided *no* evidence that it needs the roof area in its Proposed Building to meet its needs. An examination of its roof floor plan shows that most of the roof area will not even be used as a Sukkah. Ex. 73B at A18.

55 Hillel's contention that compliance with FAR requirements would require it to "eliminate an entire floor" and thereby deprive it of "long-term expansion space it needs to accommodate future growth and the short-term revenue it requires to construct the facility" does not show practical difficulty. For one thing, Hillel has not provided any evidence as to its long-term growth needs. In fact, it admitted that it has not any projection of its anticipated needs over the next several years, let alone 20 years from now. Tr 142 and 144. As to Hillel's alleged "short-term revenue" needs, a 20-year lease is surely not "short term" and, further, such financial needs have nothing to do with whether Hillel satisfies the practical difficulty requirement.

Public Good and Conformance with the Zone Plan -- FAR

56. Hillel has acknowledged that compliance with the FAR requirement would mean that it would have to eliminate the fourth floor. Ex. 12 at 16 Thus, contrary to Hillel's contention that the FAR variance "does not impact light and air to the Church property," precisely the opposite is true. Hillel's proposed fourth floor would contribute to the towering effect of Hillel's plan to extend its building along the entire length of the Church Property

CONCLUSIONS OF LAW AND OPINION

Variance Relief

Hillel has failed to meet its burden of proof that it is entitled to variance relief under 11 DCMR § 3103.2. In analyzing whether Hillel has met its burden of proof, the Commission must keep in mind the standard for judicial review of its decisions. This standard is as follows:

As we have said repeatedly: "In reviewing BZA decisions, our inquiry is '(1) whether the [BZA] made a finding of fact on each material contested issue of fact; (2) **whether substantial evidence in the record supports each finding**, and (3) whether the [BZA's] conclusions of law follow rationally from the findings.'" (Emphasis added.)

Dorchester Assoc v D C Bd. of Zoning Adj, 976 A.2d 200, 212 (D C. 2009). The D.C. Court of Appeals articulated the "substantial evidence" requirement as follows:

We give deference to the BZA's factual determinations, and "[w]e must uphold the validity of the BZA's findings if they are supported by and in accordance with . . . reliable, probative, and substantial evidence." **We have defined "substantial evidence" as "relevant evidence which a reasonable trier of fact would find adequate to**

support a conclusion. We avoid "second[-]guess[ing]" the BZA's decision or substituting our judgment for that of the Board, and we only reverse a BZA decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (Emphasis added.) (Citations omitted.)

Id. A review of the evidence that Hillel has proffered in support of its application for a variance shows its complete failure to provide "substantial evidence which a reasonable trier of fact would find adequate to support a conclusion."

Exceptional Condition

Hillel's argument that it satisfies the exceptional condition requirement for the variance test hinges on two propositions: First, it argues under the *Gilmartin* test that it faces "unique circumstances peculiar to the applicant's property." *Gilmartin v. D C Bd of Zoning Adj.*, 579 A.2d 1164, 1168 (D.C. 1990) And second, it argues that its application is a matter of "institutional necessity." Hillel fails to proffer "substantial evidence" on either of these assertions

In *Fleischman v. D C Bd of Zoning Adj.*, 27 A.3d 554, 561 (D.C. 2011), the D.C. Court of Appeals discussed the factors that could reasonably lead to the conclusion that a property was unique:

The BZA's Decision and Order demonstrates that it made sufficient factual findings concerning the property's uniqueness, considered as a whole. The BZA concluded that the property is "irregularly shaped and wooded," described in detail its "extreme topography," and discussed the property's "significant grade differential." We have elsewhere affirmed the BZA's determination of uniqueness based upon a "site's irregular shape, steeply sloping grade, the large size and physical configuration . . ." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995). In addition, the BZA found that the property had minimal street frontage in comparison to its perimeter of over 3,000 feet, no public street infrastructure, and is encumbered on its southern boundary by a private parking lot, which provides no benefits to the development but reduces the property's "buildable" area.

Hillel's Property does not have *any* of these characteristics to support a finding of uniqueness. It is not irregularly shaped or wooded. It does not have an "extreme topography." It does not have a "significant grade differential," minimal street frontage, lack of public infrastructure or an encumbering parking lot reducing its buildable area. In short, Hillel has failed to provide and, let alone "substantial evidence" on which a reasonable trier of fact could conclude that Hillel's Property is unique.

Hillel has also failed to provide "substantial evidence" necessary to satisfy the "institutional necessity" test in *Monaco v. District of Columbia Bd of Zoning Adj.*, 407 A.2d

1091, 1099 (D.C. 1979) and *Draude v. D.C. Board of Zoning Adj.*, 527 A.2d 1242, 1256 (D.C. 1987).

The evidence on this issue is as follows:

- Hillel has never had to turn away people at its Friday night services. Tr. 147;
- Hillel has an average of 100 students who come for Friday night dinner. Hillel's dining room space currently accommodates 125 people. Tr. 141 and 150-1,
- Hillel had to turn away people from its Friday night dinner on only one or two Friday nights and once on Passover. Tr. 141, 147-52;
- Hillel has done no projections of its future growth. Tr. 144;
- Hillel is able to construct a Sukkah in its current facility in the driveway. Tr. 145;
- Hillel no longer holds Saturday morning services Tr. 147;
- Hillel did not do an architectural study to see if it could meet its needs by renovating its existing facility. Tr. 162-64;
- Hillel's existing facility has 11,437 square feet whereas it will use 13,242 square feet at its Proposed Building – a modest increase of only 1,805 square feet. The balance of the space -- two full floors – will be leased to the University for 20 years. Ex. 73 at 4;
- Hillel's current facility has six offices whereas its Proposed Building will have four offices and four work spaces. Tr. 150;
- Hillel's Proposed Building will increase dining room space from 125 to 140 students – an increase of only 15 spaces. Tr. 148 and 150-1; and
- Despite Hillel's claim that it is expanding its programming through its partnership with Gather the Jews, a young adult network, that group meets at Hillel only once a month Tr. 154.

No "reasonable trier of fact" could conclude that the foregoing facts constitute "substantial evidence" that Hillel's Proposed Building is an "institutional necessity." What the evidence does show is something entirely different: that Hillel rejected the idea of renovating its existing facility because it would not be cost effective, and that the design of the Proposed

Building is intended to provide Hillel with a state-of-the-art facility that will be largely financed through the University's 20-year lease of the two top floors. Ex. 72 at Attachment "A."

Practical Difficulty

Hillel also fails to meet its evidentiary burden with respect to the practical difficulty test. It makes two arguments. First, that compliance with the zoning regulations would result in an inefficient and uneconomical building. Second, it argues that it satisfies the two prongs of the *Draude* design test for practical difficulty.

First, there is no support for the proposition that an applicant has a right to a variance because compliance with existing zoning rules would be "inefficient and uneconomical." This is not the test, nor even a factor that forms part of a test. If this were the law, the zoning rules would give way any time a property owner proposed a more economical or efficient use of his property. Further, Hillel's reliance on *Palmer v. D.C. Bd. of Zoning Adj.*, 287 A.2d 535 (D.C. 1972) in support of its efficiency argument is entirely misplaced. The court's holding is exactly *opposite* to the proposition asserted by Hillel. Here is the court's holding.

The authorities widely recognize, as petitioners contend, that the hardship envisioned by the statute must be great. A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations. **An inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.** It must be shown that the regulations "preclude the use of the property in question for *any* purpose for which it is reasonably adapted, i.e., can the premises be put to *any* conforming use with a fair and reasonable return arising out of the ownership thereof?" (Emphasis added.)

Thus, economic or efficiency consideration do *not* provide the basis for a variance – a legal principle that further weakens Hillel's case.

Second, Hillel totally fails to satisfy the institutional necessity test for showing practical difficulty. In *Draude*, the D.C. Court of Appeals has applied the practical difficulty test to nonprofit organizations as follows:

The need to expand does not, however, automatically exempt a public service organization from all zoning requirements. Where a public service organization applies for an area variance in accordance with *Monaco*, it must show (1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought. Thus, in the present case, GWU must prove to the BZA that it requires a design that cannot conform to the open court requirement.

Draude, 527 A.2d at 1256. Hillel fails to satisfy the first prong of this test because it has not demonstrated that the "specific design it wants to build is an institutional necessity." Hillel has

not shown that it needs a sanctuary containing 140 seats, a dining room space of 140 students, or for that matter, any of the other design features of its Proposed Building. Hillel also fails to satisfy the second prong of the test – that the “needed design features require the specific variance sought.” Even if we assume, *arguendo*, that Hillel needs a larger sanctuary and dining room space, its Proposed Building also includes two floors that it does not need and will not use for at least 20 years. Hillel has made no attempt to show that if the University use were not included in its plans, it would still require variance relief. Nor for that matter has it made any attempt to show that it cannot accommodate its alleged needs by renovating its existing facility. Since Hillel has not addressed either of these options, it has failed to show that it “require[s] the specific variance sought.” *Id*

In sum, Hillel has not satisfied its burden of demonstrating that its institutional needs cannot be accommodated within existing zoning laws.

Public Good and Integrity of the Zoning Plan

Hillel’s application, if granted, would pose a substantial detriment to the public good because of the significant risks to St. Mary’s Church. Hillel’s Project poses a serious risk to an historic and architecturally significant property. As a historically-designated building, damage to St. Mary’s would be a “substantial detriment” to the public good. St. Mary’s fears are not speculative; they are based on the hardships it endured when the University constructed the Health and Wellness Center and the expert testimony of its structural engineer, John Matteo. As Mr. Matteo testified, while these risks can be mitigated, they cannot be eliminated.

Additionally, the south wall of Hillel’s Proposed Building will block light and air along the entire length of the Rectory’s backyard. The D.C. Court of Appeals has held that “adverse effect on light and air to neighboring properties can constitute a reason for denying a variance under the zoning regulations.” *Draude* at 1252.

Further, if Hillel’s application is approved, St. Mary’s will lose the use of the North Gate and be deprived of access through the Hillel parking lot to H Street. The construction of the massive south wall and the loss of the North Gate will significantly impair the quality of life for anyone living in the Rectory and make it difficult for St. Mary’s to find a Rector who will agree to live in the Rectory and thereby be able to engage with the congregation and the larger Foggy Bottom community.

Hillel’s argument that the District’s regulation governing protection of adjacent property (DCMR § 3307) and Hillel’s four-page “construction management plan” mitigate against the risk to the public good has no merit. The only right that DCMR § 3307 confers on adjacent property owners relates solely to structural support and even then, the right is only to object to proposed underpinning plans.² But the risks imposed by Hillel’s Project go far beyond underpinning. Hillel’s proposed construction management “plan” does not address those risks.

² 12A DCMR § 3307.2 is the provision that confers rights on an adjacent property owner and it states as follows:

These risks include the need for a site utilization plan that minimizes impacts on the Church, reimbursing the Church for the substantial expenses it has incurred in meeting and negotiating with Hillel, the risks of a crane that will swing over the Church Property, best practices for construction in close proximity to historic buildings having architectural significance, the appropriate standards for repairing any of the Church's historic buildings that could be damaged or replacing the Church's priceless religious artifacts, the Church's loss of income from the rental of the Rectory, canceled functions such as weddings and funerals and potential loss of use of parking spaces as a result of construction, the need for an air quality expert to insure that construction dust and debris do not damage the interior of the Church, a mechanism for resolving disputes that may arise, and a right to be indemnified if the Church is sued as a result of damage caused during the Project.

The underpinning regulations and Hillel's construction management plan also do not address concerns about Hillel's financial condition and its ability to complete the Project or fully reimburse the Church for any damage it may suffer during excavation and construction. Hillel's insurance policy (which has not been provided to the Church) may not necessarily provide for full reimbursement to the Church or provide for replacement of Church Property that is damaged during excavation or construction.

Great Weight

The Commission is required to give "great weight" to the issues and concerns raised by the affected ANC and the Office of Planning D.C. Code § 1-309.10(d)(3)(A) and § 6-623.04, respectively. Both the ANC and the Office of Planning have expressly conditioned their approval of Hillel's application on the parties reaching agreement on a construction management agreement. Ex 31 and 36 and letter from P. Kennedy to A. Hood, dated October 28, 2015. Ex. ___ Although the Church and St Mary's have held extensive negotiations over the terms of a construction management agreement, Hillel is either unable or unwilling to resolve several fundamental concerns that have been raised by St. Mary's. The Commission should not grant Hillel's request for zoning relief. At a bare minimum, the Commission should require a strong construction management agreement that protects the Church

3307.2 Notification. Without limiting the protection requirement specified in Section 3307.1, where an owner (or the owner's authorized agent) seeks to undertake work on its premises that involves (a) the need to install structural support of an adjoining building or structure, including underpinning or (b) the need to support an adjacent premises (not including a public way), where excavation is to take place on the owner's premises, the owner seeking to undertake the work shall provide written notice to the owners of adjoining premises in accordance with this Section 3307.2.1 advising each owner of an adjacent premises of the proposed work and the need for specific measures to be undertaken to protect the adjoining premises, and, if applicable, requesting access to the adjoining premises to install structural support or to provide support for the excavation on the requesting owner's premises (Emphasis added)

DECISION

For the reasons stated above, it is hereby **ORDERED** that Hillel's application is hereby **DENIED**.

VOTE:

BY ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.

ATTESTED BY: _____

FINAL DATE OF ORDER: _____