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March 12, 2007

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Via Hand Delivery

Anthony Hood, Chairperson
DC Zoning Commission
441 4th Street, NW
Suite 210
Washington, DC 20001

Re: Zoning Commission Case No. 06-41 (Square 653, Lot 111); Post-Hearing Submission

Dear Commissioner Hood and Members of the Commission:

Enclosed herein, please find the Applicant's post-hearing submission. A public hearing was held in the above-referenced matter on February 22, 2007. At the close of the public hearing in the above-referenced case, the Zoning Commission requested additional information regarding the application. Accordingly, the Applicant now files the following documents which address the Commission's questions:

- A revised roof plan that clarifies the heights of the structures located on the rooftop as well as a courtyard plan and section depicting the vents in the courtyard. The roof plan includes the swimming pool, which is no greater than four feet above the parapet wall and is, thus, not considered an additional rooftop structure in need of relief pursuant to 11 DCMR Section 411.17. The vents in the courtyard will not disturb those who are enjoying the courtyard: they are inaccessible and there is dense landscaping surrounding them. (Exhibit A);
- Detailed information regarding the Applicant's commitment to "green" design. (Exhibit B);
- Ground floor elevations of the retail and amenity space. These exhibits show that the ground floor of the building energizes and engages the South Capitol streetscape. (Exhibit C);

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- A revised western façade that respects the residential uses adjacent to the building. (Exhibit D);
- Photographs of buildings that have materials similar to those the Applicant is proposing. These materials are of the highest quality and create a façade that integrates well with the neighboring residential uses as well as the modern design of the baseball stadium across South Capitol Street. (Exhibit E); and
- Revised proposed conditions of approval that clarify that the parking spaces are available to the neighboring property owners on O Street upon completion of the residential building and based upon the availability of parking spaces. (Exhibit F).

Finally, as delineated in previous submissions and in testimony at the public hearing, the Applicant satisfies the standards for the requested special exception and variance relief. Per the Zoning Commission's comments at the hearing, the Applicant now supplements its previous submissions and testimony to demonstrate its satisfaction of the tests for relief.

A. Special Exception

The Applicant is seeking special exception relief pursuant to Sections 1610.7 and 411.11 from 11 DCMR Section 411.3 for 4 roof top structures on the roof of the proposed building, and from Section 411.5 because the roof top structure in the northeast section of the roof does not have a uniform height. In order to obtain relief, the special exception must be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and must not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Maps. 11 DCMR § 3104.1.

1. The Requested Relief is in Harmony with the General Purpose and Intent of the Zoning Regulations and Zoning Maps

The general purpose and intent of the zoning regulations and zoning maps is to promote the public health, safety, morals, convenience, order, prosperity, and general welfare. 11 DCMR § 101.1. Specifically, the requested relief must take into consideration the character of the respective districts as well as the suitability of each district for the uses permitted; and must be designed to encourage the stability of districts

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and of land values. Id. at § 101.2. The relevant sections of the Zoning Regulations provide guidelines, which are described in more detail below, by which to evaluate whether a special exception should be granted.

Number of Enclosures

Pursuant to 11 DCMR section 411.3, “all penthouses and mechanical equipment shall be placed in one (1) enclosure, and shall harmonize with the main structure in architectural character, material and color.” The Zoning Regulations further provide that “[w]here impracticable because of operating difficulties, size of building lot, or other conditions relating to the building or surrounding area that would tend to make full compliance unduly restrictive, prohibitively costly, or unreasonable, the Board of Zoning Adjustment shall be empowered to approve, as a special exception under § 3104, the ... location, design, number, and all other aspects of such structure..., even if such structures do not meet the normal setback requirements...; provided, that the intent and purpose of this chapter and this title shall not be materially impaired by the structure, and the light and air of adjacent buildings shall not be affected adversely.” 11 DCMR § 411.11.

The Applicant is proposing four rooftop structures: two elevator overruns and two stairways.¹ The four structures are located in the northwest, northeast, southwest, and southeast areas of the roof. The Applicant is providing two elevator banks because of the length of the building. At its greatest length, the building is 249 feet long. Given the long and relatively narrow nature of the lot and in order to make access to the residential units convenient, the Applicant must provide elevators for each wing of the building; thus, two elevator cores are necessary.

The Building Code requires the Applicant to provide two stairways, which creates additional difficulty in trying to enclose all rooftop structures within one enclosure. The Applicant has located a stairway on each wing to provide, *inter alia*, a means of egress for residents in the event of a fire. Again, the length of the building and its “u-shape” design require the stairways to be located on separate wings of the building in order to be effective as points of egress for all building tenants.

¹ The Commission questioned whether the swimming pool was a fifth rooftop structure. Pursuant to 11 DCMR Section 411.17 it is not considered a rooftop structure because it is less than 4 feet above the parapet wall.

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The four structures are located on opposite corners of the roof; requiring them to be enclosed within one structure would result in a penthouse that would encompass a large portion of the roof and would be unnecessarily large. One of the primary reasons for staggering the height of the building is to diminish the size of the structure as it nears the adjacent rowhouses; establishing such a large roof structure would undermine the Applicant's efforts to reduce any impact its construction may have on neighboring properties.

Uniform Height of Rooftop Structure

Section 411.5 requires enclosing walls for a rooftop structure to be of equal height. The elevator overrun on the northeast portion of the roof has varying heights. The rooftop structure encloses two elevator overruns, as well as mechanical equipment, the elevator machine room, and pool equipment. In an effort to diminish the presence of the rooftop structures wherever possible, the Applicant reduced the height of the portions of the structure that were used as storage or mechanical space. The elevator overruns, however, are required to go to a height of 18 feet in order to provide access for all residents (including disabled residents) to the residential recreation space on the roof. If the elevator overruns are reduced, the Applicant would have to provide a complicated ramping system to allow access for all residents to the roof. In light of this alternative, providing rooftop access via the elevators minimizes the impact of the roof top structures. Moreover, the height of the elevator overruns is within the 18'6" permitted under the Zoning Regulations. Reducing the height of the penthouse, where possible, minimizes the overall impact of the roof structure, further ensuring there will be no adverse impact on adjacent properties.

2. The Requested Relief Will Not Adversely Affect the Use of Neighboring Property

The fact that the penthouses are not set in one structure will not adversely affect the use of neighboring property, but will in fact minimize the impact of the rooftop structures. The penthouses will be no taller than eighteen feet tall, which is within the permissible height of eighteen feet and six inches. The Applicant designed the proposed roof structures to avoid providing structures that are unnecessarily large or tall. The structures that are provided have been minimized as much as possible while maintaining their functionality: the overall massing has been reduced by not trying to enclose them within one structure and the height has been reduced by keeping as much of the structure below 18 feet as possible.

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B. Variance

The Applicant seeks variance relief pursuant to section 1610.7 of the Zoning Regulations from the height requirements of Section 770 and the court requirements of Section 776. Section 770 limits buildings in the C-2-C Zone District to a height of 90 feet; and Section 776 requires the width of a court to be a minimum of four inches per foot of height. In order to satisfy the standards for area variance relief, the Applicant must satisfy a three part test:

- (1) the property must be subject to an extraordinary or exceptional situation or condition;
- (2) a practical difficulty will result if the applicant is required to satisfy the strict application of the Zoning Regulations; and
- (3) no harm to the public or to the zone plan will occur as a result of the approval of the variance application.

See Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164, 1167 (D.C. 1990). As detailed below, the Applicant meets this test.

1. An Extraordinary Or Exceptional Situation Or Condition Is Inherent To The Property

The D.C. Court of Appeals held in Clerics of St. Viator v. D.C. Board of Zoning Adjustment, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the “property”, not just the “land”; and that “...property generally includes the permanent structures existing on the land [footnote omitted].” *Id.* at 293-294. The Court held that the exceptional situation standard of the variance test may be met where the required hardship inheres in the land, or the property (i.e., the building on the land).

Height

The Applicant is seeking variance relief from the height prescribed for the C-2-C Zone District. The CG/C-2-C Zone District imposes a maximum height restriction of 90 feet. The configuration of the Applicant’s property, however, justifies the needs for a

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variance from this requirement to allow a height of 110 feet. Further, the Applicant is proposing a parapet wall that is 3 feet, 6 inches above the rooftop; this is 6 inches greater than what is permitted under the Zoning Regulations.

The Property is long and narrow. As noted above, the property is approximately 250 feet long with a depth of as little of 135 feet. In addition to this condition, the Property is subject to two opposing setback requirements which serve to squeeze the building into the middle of the Property: a 15 foot setback from South Capitol Street in the front and a 15 foot setback from the rear lot line, which effectively create a lot with a depth of only 105 feet. Both of these setbacks are required along the Property's greatest length, limiting the footprint of the building and condensing construction in the center of the Property.

Similarly, the configuration of the lot has created challenges for the Applicant in the placement of its HVAC units. Fortunately, the Applicant is able to place every HVAC unit on the roof; however, the sheer number of units requires that nearly half of the rooftop be used to accommodate them. Though placing them on the roof reduces noise at the ground level for adjacent properties, it creates unsightly views for neighboring properties. Thus, the Applicant is proposing a parapet that is six inches greater than what is permitted under the regulations pursuant to the definition of building height in Section 199 of the Zoning Regulations. The additional height will mask the HVAC units from views from neighboring properties. The alternative would be to provide a railing along the perimeter of the building, which would not have the same aesthetic appeal as the parapet.

Inclusionary Zoning

Though the inclusionary zoning regulations are still pending and are not a requirement for the Applicant at this time, the Applicant would like to opt into the program. The configuration of this lot compounded with the setbacks required by the Capital Gateway Overlay and rear yard requirements make it extremely difficult to accommodate the full affordable housing requirement particularly because it is nearly impossible to capture bonus density to offset the cost of the requirement.

As described above, the lot is particularly long and narrow, which makes for a long and narrow building. The building's context also presents challenges because it is located between a residential community and a major thoroughfare that the District is proposing to make a "monumental boulevard." In order to reconcile the amount of

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density needed to create a feasible project and to provide affordable housing within a limited amount of space, the Applicant considered several alternatives. It proposed reducing ceiling heights on each floor, which allowed the addition of another floor within the 90 feet height requirement. Reducing ceiling heights, however, made the residential units less attractive and made the potential retail space nearly unmarketable because portions were below-grade. The Applicant also proposed designs requiring greater lot occupancy, which resulted in deep units, and compromised the available light and air of existing and future adjacent buildings as well as for the tenants of the proposed residential project.² These conditions diminish any flexibility the Applicant had in establishing a footprint for the building. The Applicant is forced to accommodate the competing uses that surround it and above all, it must create an attractive residential building on the wide and narrow lot.

The Office of Planning (“OP”) corroborates the difficulty residential projects in the CG/C-2-C Zone District face in order to capture bonus density. OP’s report regarding inclusionary zoning dated September 25, 2006, noted “consideration is needed for permitting additional height instead of greater lot occupancy for the C-2-C and SP-2 zones.” (OP Report dated September 25, 2006, p. 3.) OP went even further and found that those sites in the CG/C-2-C Overlay “receive[s] no bonus from CG, but would require a 15 foot setback along South Capitol Street. This, combined with rear yard requirements, would make it difficult to use the IZ bonus density, so *OP recommends a height of 110 feet be permitted*. All CG/C-2-C property fronts onto South Capitol Street, where a consistent 110-130 foot height is anticipated, so this height is in character with plans for the area.” (*Id* at p. 67, emphasis in the original).

The proposed additional height is helpful to offset the cost of the providing affordable housing to some degree. The Applicant; however, is not proposing a uniform height of 110 feet, but is stepping the building down in the rear to accommodate adjacent residential uses. Thus, it still is unable to capture more than half of the eligible bonus density: the Applicant can only capture 22,500 square feet of the 49,223 square foot bonus density the IZ regulations provide. Accordingly, the Applicant is proposing a proportionate amount of affordable housing – half of the bonus density, or 11,250 square feet, will be reserved for affordable units. To require the Applicant to provide at least 8%

² The Applicant studied the possibility of reducing the height of the building even further along its western elevation. Because of the site constraints cited previously, the Applicant would not be able to reduce the height further and create a financially viable project.

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of its matter-of-right density for affordable housing would unfairly demand reserving 19,689 square feet of the development for affordable housing, leaving only 2,811 square feet of bonus density for market-rate residential, which is not sufficient to offset the cost of the affordable housing.

The Applicant will locate those affordable units it does provide on the second, third, fourth, and fifth floors of the building and will not cluster the units in any one area. This is consistent with statements the Office of Planning made in Zoning Commission Case No. 06-35, where the Office of Planning stated, "And to be fair to developers OP has tried to recognize that a lot of the higher market rate units are on the top floors and that it does serve to kind of cross subsidize the affordable units. So, we've not pushed for those affordable units to be placed in the higher half or third of the building. As long as they are evenly distributed within the bulk of the building." (Transcript for November 13, 2006 Public Meeting, p. 35.)

Court

Pursuant to the Zoning Regulations, the court along the northern edge of the Property would be required to be 36'8" wide; the Applicant is providing a courtyard that is 31'7" wide. Though the lot is long, it abuts another lot directly to its north. Because the lot is immediately adjacent to another lot to the north, the Applicant established a courtyard to provide green space and to remove some of the residential units from the lot line in order to create attractive residential units along the northern edge of the Property. The regulations mandating that the building be set back from the front and rear lot lines reduces the Applicant's flexibility in developing a design with green spaces that are in compliance with the Zoning Regulations. Development has been relegated to the center of the lot which competes with the area needed for additional green space. Unfortunately, because of the circumstances of this case, as described in greater detail above, the Applicant is not able to narrow the building to increase the width of the northern courtyard. Similarly, the Applicant cannot simply shift the northern arm of the building to the south to create two conforming courts because given the length of the building, the D.C. Building Code would require an additional staircase to accommodate the building core along South Capitol Street; this would increase costs and further diminish the number of residential units in the building.

The Applicant also must consider the position of the rowhouses to the west of the Property. To lessen the impact on the adjacent rowhouses, the Applicant is proposing to align the courtyards with the rowhouses. This way, the rowhouses are adjacent to

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additional green space and the area where the rowhouses abut the proposed building are minimized. This further lessens the impact the building has on the adjacent property.

2. A Practical Difficulty Exists in Satisfying The Strict Application Of The Requirements Of The Zoning Regulations

The DC Court of Appeals defined "practical difficulty" in Palmer v. D.C. Bd. of Zoning Adjustment, 287 A. 2d 535, 542 (D.C. 1972) as the following: "[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. [Footnote omitted.] The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case." In area variances, applicants are not required to show "undue hardship" but must satisfy only "the lower 'practical difficulty' standards." Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2d 1362, 1365 (D.C. 1992), citing Gilmartin v. D.C. Bd. of Zoning Adjustment, 579 A.2d 1164, 1170 (D.C. 1990). Finally, it is well settled that the BZA may consider "... a wide range of factors in determining whether there is an 'unnecessary burden' or 'practical difficulty'". Gilmartin, 579 A.2d at 1171, citing Barbour v. D.C. Bd. of Zoning Adjustment, 358 A. 2d 326, 327 (D.C. 1976). See also, Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2d 1362, 1367 (D.C. 1992). Thus, to demonstrate practical difficulty, the Applicant must show that strict compliance with the regulations is burdensome, not impossible. The Applicant, as demonstrated below, meets this standard.

Height

Constructing a building with a uniform 90 foot height would require the Applicant to make internal changes to the building that would render the potential retail and residential space undesirable as described above. The building would require an additional floor to make the project financially viable; however, the additional floor would create a particularly dense building with unappealing floor to floor heights that would neither be practicable nor marketable. Squeezing an additional floor into a 90 foot building would also result in an awkward configuration of some of the units and limit some unit's access to light. If the Applicant expanded the footprint of the building to capture additional square footage, the units would be deep and have little access to natural light.

Limiting the height of the building would create a sub-par structure that would be difficult to market and would detract from the monumental nature of South Capitol Street. Permitting a building height of up to 110 feet along South Capitol Street creates

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flexibility for the Applicant in designing the project and allows the Applicant to create attractive and marketable units, while stepping down to adjacent properties.

Similarly, the Office of Planning acknowledged in its report regarding inclusionary zoning that competing setbacks create difficulty for lots in the C-2-C/CG Zone District to capture bonus density. Permitting the height variance will afford the Applicant an opportunity to capture this density.

With regard to permitting an expanded height for the parapet, the neighboring property owners would have views of the mechanical equipment located on the rooftop. Though this is not necessarily a hardship for the Applicant, it is an unnecessary burden for adjacent property owners that could be avoided by permitting an additional 6" of height along the rooftop.

Inclusionary Zoning

Similar challenges present themselves in trying to capture more bonus density in order to provide more affordable housing. For the same reasons listed above, the Applicant simply cannot accommodate more bonus density at this site; thus additional affordable housing would have to be subsidized by the matter-of-right residential units that the Applicant is proposing. The financial analysis that the Applicant submitted into the record on February 21, 2007, indicates that it takes nine market-rate units to offset the cost of providing one affordable unit. The cost of providing additional affordable units is too great to make this a viable project if such a burden is imposed.

Court

To require a wider court would necessitate shifting the northern arm of the building further south, which would diminish the size of the central court. The Applicant is not able to narrow the northern arm because that would create sub-par units in that portion of the building, and as has been explained above, the Applicant is in a position of trying to recoup all available square footage for this project in order to make it financially feasible. Instead, the entire arm would have to shift southward and the attractiveness of the central open space would be compromised. Keeping the width of the central court is important to the Applicant because it does not want to create a situation where residents feel that they are intruding on the privacy of other residents, which may occur with a more narrow court. The Applicant also wants to be sure that it retains the attractiveness of the central court to ensure that it will be a space that can be used by residents in light

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of the fact that it is simultaneously requesting relief from the residential recreation space requirements.

Shifting the arm of the building southward would also increase the amount of the building directly east of the adjacent rowhouses. Per the suggestion of the Office of Planning, the Applicant has tried to stagger the building design in conjunction with the neighboring rowhouses, the idea being to minimize the area where both structures extend closer to the property line (it should be noted that both structures maintain a setback from the rear lot line). The northern building arm was designed to balance the need for an attractive courtyard along the northern portion of the property and the need to avoid adverse impacts on the adjacent property owners. If the arm were to shift southward to enlarge the northern courtyard, the arm of the building would no longer be staggered with the adjacent property and both buildings would extend to the rear set back line directly adjacent to each other. The court the Applicant is proposing in fact minimizes the impact of the building on adjacent property owners.

Moreover, shifting the arm southward would create a need for an additional staircase along the South Capitol Street corridor pursuant to the Building Code. This would require the Applicant to eliminate additional units to accommodate the stair case and request additional rooftop structure relief.

3. No Harm To The Public Good Or To The Zoning Plan Will Occur As A Result Of The Approval Of The Variance Application

Relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the Zone Plan. The proposed building height will benefit the neighboring properties as the varied height relates to the immediately adjacent uses. The adjacent rowhouses will not be overwhelmed with a 90 foot structure that is flush with the rear setback line and the front of the building will be consistent with the long term goals and future development for South Capitol Street. The varied heights also break up the massing of the building and diminish the "box-like" appearance that pervades many of the District's buildings. Similarly, the increased height of the parapet will shield neighboring properties from viewing the HVAC units located on the building's roof.

The public good or the zoning plan will not be harmed by approving the Applicant's request to provide 50% of the bonus density it can capture to affordable

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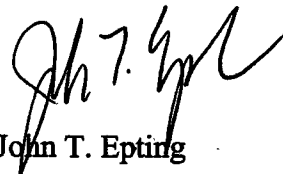
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housing. The Applicant is following a basic tenet of the inclusionary zoning regulations: those who cannot capture bonus density should not be burdened with the affordable housing requirement. The Applicant is simply proposing to provide an amount of affordable housing that is commensurate with the amount of bonus density it can absorb. To require more would render the project financially infeasible, thus eliminating all affordable housing at this site.

Finally, permitting a reduced courtyard width along the northern edge of the property does not compromise the open space that is available to tenants, as described above. The courtyard, as provided, will be 31'7" wide, falling approximately 5 feet short of the regulatory requirement. It is important to note that the northernmost court will be over 78 feet long, while the central court will be over 84 feet long. Though the northernmost court may not meet the width requirements, it is a substantial area given that it runs over half the length of the entire width of the building. This is significant since side yards are not required in the C-2-C Zone District, yet more than half of the units along the northern edge of the property will be set back from the property line over thirty feet.

The Applicant believes that the record is replete with evidence of its satisfaction of the special exception and variance standards. Thus, the Applicant respectfully requests that the Commission approve this application as presented.

Sincerely,



John T. Epting

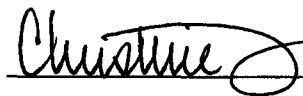


Christine A. Roddy

Attachments

Certificate of Service

I certify that on March 12, 2007, I delivered a copy of the foregoing document via hand delivery or first class mail to the addresses listed below.

A handwritten signature in cursive script, reading "Christine", followed by a horizontal line.

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