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February 18, 2016

## VIA IZIS AND HAND DELIVERY

D.C. Board of Zoning Adjustment  
441 4th Street, N.W. - Suite 210  
Washington, DC 20001


**Re: Applicant's Proposed Findings of Fact and Conclusions of Law  
BZA Case No. 19127**

Dear Members of the Board:

On behalf of 2800 Sherman, LLC, the Applicant in the above-referenced case, and pursuant to 11 DCMR § 3125.3, we hereby submit the Applicant's proposed findings of fact and conclusions of law. Should you have any questions, please do not hesitate to have staff contact me.

Sincerely,

HOLLAND & KNIGHT LLP



Christopher H. Collins  
Jessica R. Bloomfield

cc: Joel Lawson, Office of Planning	(Via Email; w/enclosure)
Stephen Gyor, Office of Planning	(Via Email; w/enclosure)
Lewis Booker, DDOT	(Via Email; w/enclosure)
Advisory Neighborhood Commission 1B	(Via US Mail; w/enclosure)
James Turner, ANC 1B09	(Via Email; w/ enclosure)

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**

**Application No. 19127 of 2800 Sherman, LLC**, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for variances from the lot area requirements under § 401.3, the lot occupancy requirements under § 403.2, the rear yard requirements under § 404.1, and the limitation on compact parking space requirements under § 2115.2, and special exception relief from the lot width requirements under § 2604.3, the accessory parking space location requirements under § 2116.5, and the penthouse requirements of § 411.5 to construct 10 flats<sup>1</sup> in the R-4 District at premises 2800 Sherman Avenue, NW (Square 2857, Lot 818).

**HEARING DATES:** December 8, 2015, and February 2 and 9, 2016

**DECISION DATE:** February 23, 2016

**DECISION AND ORDER**

The owner of the subject property, 2800 Sherman, LLC (the “Applicant”), submitted a self-certified application on August 25, 2015, seeking variances from 11 DCMR §§ 401.3 (lot area and lot width), 403.2 (lot occupancy), 404.1 (rear yard), and 2115.2 (compact parking spaces), and special exception relief from 11 DCMR §§ 400.23 (height), 2604.3 (lot width for an Inclusionary Zoning development), and 2116.5 (accessory parking space location), to construct 11 flats on 11 new record lots in the R-4 District at 2800 Sherman Avenue, NW (Square 2857, Lot 818) (the “Site”). Based on subsequent revisions to the site layout and simultaneous changes to the Zoning Regulations, the Applicant eliminated the need for and withdrew its request for the variance from the lot width requirements of 11 DCMR § 401.3 and the special exception relief under the height requirements of 11 DCMR § 400.23. The Applicant also amended its application to add a request for special exception relief under 11 DCMR § 411.5 following the publication of the new penthouse regulations (Z.C. Case No. 14-13) in the *DC Register* on January 8, 2016.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Hearing. By memoranda dated September 1, 2015, the Office of Zoning provided notice of the original application to the Office of Planning (“OP”); the District Department of Transportation (“DDOT”); the Councilmember for Ward 1; Advisory Neighborhood Commission (“ANC”) 1B, the ANC in which the Site is located; and Single Member District/ANC 1B09. Pursuant to 11 DCMR § 3112.14, on September 15, 2015, the Office of Zoning mailed letters providing notice of the hearing to the Applicant, ANC 1B, and the owners of property within 200 ft. of the Site. Notice was published in the *DC Register* on September 25, 2015 (62 DCR 40).

Board of Zoning Adjustment Hearings. The Board convened a hearing on the application on

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<sup>1</sup> The Applicant’s proposal to construct 10 flats on the Site was reduced from its original proposal to construct 11 flats.

December 8, 2016. No party status requests were filed, although four persons testified in opposition at the public hearing. Two of those neighbors, Mr. Scholnick and Mr. Warnecke, live at 1020 Girard Street, NW (Square 2858, Lot 58) (the “Girard Street Neighbors), and two of those neighbors live at 2810 Sherman Avenue, NW (Square 2857, Lot 45) (Mr. Jackson) and 2814 Sherman Avenue (Square 2857, Lots 137 and 820) (Mr. Donaldson), abutting portions of the Site (the “Sherman Avenue Neighbors”). At the close of the December 8, 2015 hearing, the Board asked the Applicant to submit additional information to be reviewed at a limited further hearing on February 2, 2016. The Applicant filed its post-hearing submission on January 26, 2016 (Exhibit [“Ex”] 39). At the limited further hearing, the Applicant and the Sherman Avenue Neighbors testified, as did a resident who lives across Sherman Avenue from the Site, and who testified about his experiences with his neighbor on his side of the street. At the close of the limited hearing, the Board asked the Applicant and the Sherman Avenue Neighbors to schedule a meeting to be moderated by Ms. Tania Jackson, Chief of Staff to the Ward 1 Councilmember, to further discuss the issues of the Sherman Avenue Neighbors. The Board scheduled a second limited hearing for February 9, 2016, wherein the Applicant and Ms. Tania Jackson testified regarding the outcome of the meeting with the Sherman Avenue Neighbors (who did not attend the February 9 hearing). At the February 9, 2015 hearing the Applicant also offered solutions to address the concerns raised by the Sherman Avenue Neighbors. The Board scheduled the application for deliberation on February 23, 2016, and voted \_\_\_\_\_ to approve the application.

Applicant's Case. Christopher Collins and Jessica Bloomfield of Holland & Knight LLP represented the Applicant. The Applicant presented two witnesses in support of the application at the December 8, 2015 hearing: Jerry Zayets of 2800 Sherman, LLC and David Bagnoli of McGraw Bagnoli Architects. The witnesses described the Applicant’s plans to construct the originally-proposed 11 flats at the Site and presented evidence and testimony to demonstrate that the application met all requirements for approval under the Zoning Regulations.

On January 26, 2016, the Applicant submitted its post-hearing submission (Ex. 39), which included the following information and materials requested by the Board: (i) updated architectural plans and elevations showing 10 lots (10 flats/20 units) instead of the originally-proposed 11 lots (11 flats/22 units) and a slightly revised site layout (Ex. 39A). The revised layout resulted in the removal of the lot width variance previously requested and the reduction in the extent of relief needed under 11 DCMR §§ 401.3, 2604.3, 403.2, and 404.1; (ii) revised zoning data sheets verifying the new calculations (Ex. 39B); (iii) a description confirming the Applicant’s need for penthouse relief under 11 DCMR § 411.5; and (iv) a detailed response and related documents regarding the issues raised by the Sherman Avenue Neighbors concerning an alleged encroachment on Lots 45, 137 and 820 in Square 2857, and an alleged easement over the Site, benefitting Lots 45, 137, and 820. At the limited public hearing on February 2, 2016, the Board considered the information submitted in the Applicant’s post-hearing submission as well as additional information submitted at that hearing (Ex. 42), showing the methodology the Applicant used to arrive at the proposed 10-lot site plan. The Board scheduled a continued limited hearing on February

9, 2016, to review the results of the Applicant's further discussions with the Sherman Avenue Neighbors.

On February 8, 2016, the Applicant submitted a letter and associated exhibits to the Board describing the results of its meeting with the Sherman Avenue Neighbors (Ex. 44). At the limited hearing on February 9, 2016, the Applicant and Ms. Tania Jackson of the Ward 1 Councilmember's Office discussed the outcome of the meeting with the Sherman Avenue Neighbors, and the Applicant submitted a further revised site plan that specifically included emergency egress gates and a trash storage area for the benefit of the Sherman Avenue Neighbors (Ex. 45). The Applicant also testified on February 9, 2016, that it was committed to working with the Sherman Avenue Neighbors to move forward with the project.

Government Reports. By memorandum dated December 1, 2015 (Ex. 33), OP asserted its general support of the Applicant's intent to increase the District's housing supply on the infill lot with new dwellings fronting Sherman Avenue and Girard Street. However, OP recommended denial of the variance and special exception requests under 11 DCMR §§ 401.3, 2604.3, 403.2, and 404.1, asserting that the application did not adequately explain the unique Site characteristics that create a practical difficulty in developing the Site in a "more conforming matter." OP asserted that there was not a clear practical difficulty related to the shape of the lot that prevented it from being developed into new record lots that are "closer to conformance with the intent of the Zoning Regulations." Nevertheless, OP asserted that it would not oppose the relief requested under 11 DCMR §§ 2115.2 and 2116.5.

Following the public hearing on December 8, 2015, and the Applicant's January 26, 2016 post-hearing submission, OP submitted a supplemental report dated January 27, 2016 (Ex. 41). This report reaffirmed OP's support for the project architecture, stating that it is "generally consistent and compatible with the surrounding community." The report repeated OP's concerns regarding the nexus between the Site's exceptional situation and the practical difficulty of developing the Site. The report also confirmed OP's unwillingness to support the variance from the lot area requirements of 11 DCMR § 401.3. However, OP asserted that if the BZA accepts the non-conforming lot size, then OP would not oppose the remaining relief under 11 DCMR §§ 403.2, 404.1, 411.5, 2115.2, 2116.5, and 2604.3.

By memorandum dated December 1, 2015, DDOT filed a report with the Board, finding that the Applicant's request for variances and special exceptions are appropriate (Ex. 34). DDOT noted that "an appropriate network of pedestrian, bicycle, and transit infrastructure exists in close proximity to the proposed development, and which the Applicant will improve access by improving existing pedestrian facilities adjacent to its proposed development." DDOT also asserted that the provision of "15 vehicular parking spaces and 10 long term bicycle parking spaces is appropriate and meets zoning regulations." Finally, DDOT noted that the Applicant's project would result in the closure of a curb cut on Sherman Avenue.

ANC Report. ANC 1B submitted a resolution to the Board dated November 6, 2015. The resolution noted that at its public meeting of November 5, 2015, at which notice was properly given and a quorum was present, ANC 1B voted 8-0 to support the project (Ex. 28).

Persons in Opposition. The Sherman Avenue Neighbors who testified at the December 8, 2015 public hearing included Mr. Jackson (owner of Lot 45 in Square 2857), and Mr. Donaldson (owner of Lots 137 and 820 in Square 2857). The Girard Street Neighbors who testified at the December 8 public hearing included Mr. Scholnick (resident of Lot 58 in Square 2858), and Mr. Warnecke (also a resident of Lot 58 in Square 2858). Mr. Jackson alleged that the proposed development on the Site would impermissibly encroach on his property (Lot 45). Mr. Donaldson asserted that the development would encroach on his properties (Lots 137 and 820). Mr. Jackson and Mr. Donaldson together asserted that an easement existed for access from their properties across the Site (or the predecessor Lots 800, 808 and 816), to the north-south public alley located to the west of the Site. Mr. Scholnick and Mr. Warnecke expressed more general concerns regarding increased density, construction activities, and the impact of the development on on-street parking availability. Mr. Donaldson and Mr. Jackson submitted documents to the record (Ex. 40A1 and 40A2) and testified a second time at the limited public hearing of February 2, 2016, but were not present at the February 9, 2016 hearing.

## **FINDINGS OF FACT**

### **The Site and the Surrounding Neighborhood**

1. The Site is located at 2800 Sherman Avenue, NW (Square 2857, Lot 818). Square 2857 is bounded by Harvard Street to the north, Sherman Avenue to the east, Girard Street to the south, and 11th Street to the west. Square 2857 has a north-south, 15 ft. wide alley that runs from Harvard Street to Girard Street. The majority of the square is located in the R-4 District, except for the three northern-most lots that are located in the C-2-A District.
2. The Site has a total land area of 13,900 square feet and is located in the R-4 District. The Site is an irregularly-shaped flag lot, and is the largest lot within Square 2857. The Site is located on the southeast corner of the square, with Sherman Avenue to the east, Girard Street to the south, and a north-south public alley to the west. The Site is otherwise bounded by private property, including Lots 45, 137 and 820 and .
3. The Site has had a history of nonconforming commercial/industrial uses, including the headquarters of a taxi company, and was most recently occupied by the headquarters of Foote's Plumbing and Heating. The Site is improved with a two-story commercial building located at the southeast corner of the Site, a one-story garage building abutting the alley on the west side of the Site that spans the entire north-south west portion of the Site along the alley, and surface parking on the remainder of the Site. The Applicant proposes to raze the existing structures in connection with redevelopment of the Site.
4. The Site is located in Columbia Heights, one of the District's most diverse and dense urban neighborhoods, with frontage on Sherman Avenue. Sherman Avenue is a major north-south corridor in the District that is primarily developed with one- and two-family row dwellings, many of which are non-conforming as to lot width and lot area. The majority of the area surrounding the Site is zoned R-4.

### **The Applicant's Project**

5. Applicant proposes to remove the existing commercial building and garages on the Site and to subdivide the Site into 10 individual record lots in order to construct 10 two-family row dwellings (flats). Six new lots will have frontage on Girard Street (referred to herein as “Lots A-F”) and four new lots will have frontage on Sherman Avenue (referred to herein as “Lots G-H and J-K”).
6. Fifteen compact surface parking spaces will be provided on the Site, all of which will be accessed from the public alley. Thirteen spaces will be located in the north-south stem portion of the flag lot located along the alley, and two spaces will be located behind Lots C and D. A centralized trash area located on the rear portion of Lots D and E will be provided on the Site.
7. The project is subject to the Inclusionary Zoning (“IZ”) requirements set forth in Chapter 26 of the Zoning Regulations. The Applicant will dedicate the two units in the flat on Lot B to two three-bedroom IZ units, both of which will be dedicated to households earning up to 50% of the area medium income (“AMI”), which is a steeper subsidy than that required by the Zoning Regulations.

### **Variance Relief**

8. Variance relief is required from 11 DCMR §§ 401.3, 403.2, 404.1, and 2115.2. The Applicant meets the variance standards of 11 DCMR § 3202 as set forth below.

### ***Exceptional Situation or Condition Related to the Site***

9. The Site is affected by exceptional narrowness, shallowness, and shape. The Site has approximately 13,900 square feet of land area and is roughly comprised of two rectangles due to the creation of the Site (Lot 818) from three separate lots (Lots 800, 808, and 816). The main portion of the Site is a rectangle (former Lots 800 and 808), oriented east-west, that measures approximately 75 ft. along Sherman Avenue and approximately 120 ft. along Girard Street. Abutting these lots to the west is former Lot 816, which is a long, narrow, rectangular strip of land, oriented north-south, with 35 ft. of frontage on Girard Street and 140 ft. of alley frontage extending north along the alley to the west. These two segments of the Site together create an irregularly-shaped and unusually-sized flag lot with uneven dimensions that significantly impact the ability to create conforming record lots that are consistent with the lot sizes and building sizes in the surrounding neighborhood.
10. In addition, due to the Site’s former use as a gas station, there is significant petroleum contamination on the Site that requires remediation. Based on the Applicant’s drilling and environmental reports, the contamination is up to 16 ft. and 18 ft. deep. This level of contamination will require the Applicant to over-dig by approximately 10 ft. to 12 ft. in some locations and bring in a significant amount of clean fill to obtain approval from DDOE and ensure safe residential development. *See* BZA Transcript of 12/8/2016, pp.

42-43. Moreover, as a result of the contamination and the associated studies and remediation work, the Applicant will spend approximately \$800,000 additional on redevelopment of the Site. *See* BZA Transcript of 12/8/2016, p. 51.

### ***Practical Difficulty in Complying with the Zoning Regulations***

11. The size, shape, and dimensions of the Site present limited options for appropriate development with matter-of-right residential dwellings in accordance with the Zoning Regulations. The Applicant studied a variety of factors and configurations in developing a plan for the Site that fits into, and is consistent with, the fabric of the surrounding R-4 District. The resulting site plan is most logical layout and orientation for the Site. Important factors in developing the site plan included the following:
  - a. Maximizing the orientation of dwellings to face Sherman Avenue, rather than positioning them to face Girard Street, which would result in one long side wall and a large rear yard “gap” located mid-block along Sherman Avenue;
  - b. Minimizing the rear yard “gap” along the Girard Street frontage;
  - c. Maintaining the height, width, design, rhythm, and overall size of the buildings and lots to be consistent with the character of the surrounding residential neighborhood;
  - d. Providing adequate off-street parking and on-site location for trash storage; and
  - e. Eliminating the need for curb cuts and parking spaces along both street frontages.
12. To accommodate the proposed development on the irregularly-shaped Site, up to three variances are required for some of the individual lots. However, the average lot area for the new record lots is only 110 square feet less than the land area permitted by special exception for IZ developments in the R-4 District under 11 DCMR § 2604.3 (1,390 square feet instead of 1,500 square feet). This is less than the size of a compact parking space. An integral feature of the plan is that it locates all parking on the west side of the Site, with no individually-dedicated parking spaces or curb cuts on the individual lots. The average lot occupancy is 49% for the new lots, whereas 60% is required, and the average rear yard depth for the new lots is 29 ft., 3 in., whereas a rear yard depth of 20 ft. is required. A variance is also required for the use of compact parking spaces, since all fifteen of the off-street parking spaces on the Site will be compact in size.

### ***Variances for Lots G, H, J, K (Sherman-fronting Lots)***

13. The lots along Sherman Avenue each require variances from the lot area, lot occupancy, and rear yard requirements of the Zoning Regulations. The original 11-lot plan had five lots fronting on Sherman Avenue, each measuring 15 ft. wide (based on the lot dimension of 75 ft. along Sherman) and 885 sq. ft. of lot area. The plan has been revised to include

four lots fronting on Sherman Avenue, each with a lot width of 18.75 ft. and 994 square feet of lot area where 1,500 square feet is required, plus a lot occupancy of 60% where 70% is required, and a rear yard of 16 ft. where 20 ft. is required.

14. In order to have a lot area of 1,500 square feet, the Sherman-fronting lots would each need to have a depth of 80 ft. However, based on the proposed building depth of 37 ft. for the new flats (excluding projections into public space), which is shallower than the depth of many other row dwellings fronting this section of Sherman Avenue, providing lots with 1,500 square feet would result in a 43 ft. rear yard gap along Girard Street, and a lot occupancy of 46%. To prevent this undesirable configuration, the site plan provides lots that are 53 ft. deep with 994 square feet, a 70% lot occupancy, and appropriately-sized 16 ft. deep rear yards. This layout minimizes the gap along the streetscape and maintains the architectural rhythm of the street. The square footages of the units have remained approximately the same as in the original plan, in order to respond to the market in that area for units of a certain size and a certain cost per square foot.

*Variances for Lots D, E, F (Girard-fronting Lots)*

15. Lots D, E, and F each have a lot area of 1,275 square feet and thus require a variance from the lot area requirements. Due to the Site's irregular shape, the three western-most lots fronting on Girard Street (Lots A, B, and C) are all irregular in shape and size, but all comply with (and exceed) the minimum required lot dimensions for a project with IZ units in the R-4 District. Lots D, E, and F match Lots A, B, and C in the permitted lot width, but because of the shallow north-south depth of 75 ft. for this portion of the Site, Lots D, E, and F require variances from the lot area requirements.
16. Lots D, E, and F would need to be 93.75 ft. deep in order to provide the minimum required lot area of 1,500 square feet and the minimum required lot width of 16 ft. Providing lots at 93.75 ft. deep would result in an encroachment on the adjacent property to the north (Lot 45) by approximately 19 ft., which is not possible.
17. Alternatively, Lots D, E, and F would need to be 20 ft. wide in order to provide the minimum required lot area of 1,500 square feet and still fit within the Site's lot lines. Providing 20 ft. wide lots would be inconsistent with the widths of Lots A, B, and C and with the existing residential development in the neighborhood. Moreover, adding a combined total of 12 ft. in width along Girard Street for a 20 ft. wide configuration for Lots D, E, and F would significantly encroach on the rear yards of Lots G, H, J, and K fronting Sherman Avenue, which are already non-conforming. Lots of 20 ft. wide along Girard would result in essentially square building footprints, which are inefficient from an interior layout perspective.

*Variance from the Compact Parking Space Requirements*

18. A variance is also required for the use of compact parking spaces, as set forth in 11 DCMR § 2115.2. Fifteen surface parking spaces will be located on the north-south stem of the Site along the alley and behind Lots C and D. All of the parking spaces will be



compact in size in order to (i) provide sufficient drive aisle widths; (ii) accommodate the on-site trash area; (iii) prevent the need for any new curb cuts onto the Site; and (iv) eliminate the need for a variance from the number of required parking spaces set forth in 11 DCMR § 2101.1. Since the required number of full-sized parking spaces could not fit in the same area on the Site, a variance is required to provide compact spaces.

***No Substantial Detriment to the Public Good or Zone Plan***

19. The proposed development plan is a logical layout given the Site’s physical constraints, and is consistent with the dimensions and character of the surrounding community, and will allow the Applicant to provide units which are consistent with the market demand, and a price that is consistent with the market in the neighborhood. Although up to three variances are required for some of the proposed new record lots, many of the variance requests are *de minimis*, consisting of several feet at most for the lot width, rear yard depth, and parking dimensions.
20. The project is consistent with the surrounding residential neighborhood. The proposed lot dimensions, lot occupancies, and rear yards are consistent with (and often more conforming than) those of other residential dwellings in the surrounding area. Each record lot will provide substantial open space, light, and air to its residents, and each flat is designed to maximize space to comfortably accommodate families.
21. Moreover, the project is consistent with the Comprehensive Plan for the National Capital (the “Comprehensive Plan”), which encourages infill development on underutilized land within the city, particularly in areas where there are unimproved lots that create gaps in the urban fabric, as is the case here. The project complements the existing community character while converting the underutilized Site into a productive housing use.

**Special Exception Relief**

22. Special exception relief is required pursuant to 11 DCMR §§ 2604.3, 2116.5, 411.5, and 3104.1. The Applicant meets the special exception standards set forth in those sections of the Zoning Regulations as follows.

**Lot Width**

23. Lots A, D, E, and F are all 17 ft. wide and Lot C is 17 ft., 1 in. wide, which widths are permitted by special exception pursuant to 11 DCMR § 2604.3 for IZ developments in the R-4 District. The average lot width in the surrounding area is 17.1 ft. (a range of 12.5 ft. to 26 ft.). Accordingly, the proposed 17 ft. and 17 ft., 1 in. lot widths are consistent with lot widths found in the surrounding neighborhood and therefore will not create any adverse affects on the use of neighboring properties. Moreover, the proposed lot widths will allow for an appropriate interior layout for the flats, which are designed to accommodate families.

Parking Other Than on the Lot Where the Principal Use is Located

24. Section 2116.5 of the Zoning Regulations permits off-site parking for flats by special exception. Given the size, shape, and dimensions of the Site, and the layout of the proposed development, all of the parking for the project is located on the western portion of the Site adjacent to the alley, rather than on the individual lots upon which the parking spaces are intended to serve. Two of the new record lots will have more than one parking space, two others will have a portion of a parking space, and the remainder will have no parking spaces. Cross-easements will be recorded to allow access and use of the parking by the residents of the project.
25. The proposed parking layout is the most efficient use of the Site, and complies with 11 DCMR § 2116.6 through 2116.8 as follows:
- a. Section 2116.6 – It is not practical to locate the spaces in accordance with § 2116.2 for the following reasons: (a) unusual shape, size, and dimensions of the lot; (b) the lack of appropriate ingress or egress through existing alleys or streets; and (c) the location of required parking spaces elsewhere on the same lot or on another lot will result in more efficient use of land, better design and landscaping, safer ingress and egress, and less adverse impact on neighboring properties. The location of the parking spaces grouped on the western portion of the Site is the most efficient use of the Site's irregular shape, creates a better design, provides safe ingress and egress to the street, and results in minimal impact on neighboring properties.
  - b. Section 2116.7 –The parking on adjacent lots, as shown on the Applicant's plan, is preferred. All ingress and egress will occur from the public alley. This type of access will result in the closure of an existing curb cut on Sherman Avenue and will permit the Applicant to eliminate all vehicle entrances and curb cuts onto the Site from the surrounding streets. Minimizing curb cuts will limit pedestrian-vehicle conflicts and associated traffic hazards.
  - c. Section 2116.8 – The accessory parking spaces will be located so as to furnish reasonable and convenient parking facilities for the occupants or guests of the building or structures that they are designed to serve. The location of the parking spaces on the Site is conveniently accessed by occupants of the proposed development, since cross-easements will be recorded to allow direct access for residents from their flat to their vehicle.

Penthouses

26. Section 411.5 of the new penthouse regulations prohibits a penthouse, other than screening for rooftop mechanical equipment or a guard rail for a roof deck required by the Building Code, from being located on the roof of a flat, except that the Board may approve a penthouse as a special exception under 11 DCMR § 3104, provided the penthouse (a) is no more than 10 ft. in height and contains no more than one story, and

(b) contains only stair or elevator access to the roof and a maximum of 30 square feet of storage space ancillary to a rooftop deck.

27. The proposed flats will each have a penthouse that provides roof access to the residents, thus requiring a special exception under 11 DCMR § 411.5. The penthouses meet the requirements of 11 DCMR § 411.5, since the penthouses will not exceed 10 ft. and one story in height and will contain only stair access to the roofs. The penthouses will also meet the standards of 11 DCMR § 3104.1 since they will be setback at least 1:1 and will therefore not adversely affect the use of neighboring property.

### **Issues Raised by the Neighbors in Opposition and Applicant's Response**

28. During the December 8 and February 2 public hearings, the Sherman Avenue Neighbors (Mr. Jackson, who owns Lot 45, and Mr. Donaldson, who owns Lots 137 and 820) testified in opposition to the project regarding two main issues: (1) that the proposed development would impermissibly encroach on Lots 45, 137 and 820; and (2) that an easement exists for access from Lots 45, 137, and 820, across the Site, to the north-south public alley to the west of the Site. The Neighbors in Opposition raised a general concern with emergency egress out of their properties that they believed would be hampered by the proposed development of the Site.
29. The Applicant responded to the issues raised by the Sherman Avenue Neighbors in its post-hearing submission (Ex. 39), as described below.

### ***Encroachment Issue***

30. The Applicant commissioned a Survey to Mark to confirm the actual recorded boundaries of the Site (Ex. 39A, Sheet 4). The Survey to Mark is stamped and sealed by the District of Columbia Office of the Surveyor, and by Daniel Caywood of Maddox Engineers and Surveyors, who has been a Registered Land Surveyor in the District of Columbia for 20 years. The Survey to Mark indicates that the Site extends for a width of 35 ft. east of the north-south alley that abuts the west side of the Site. The Survey to Mark also shows the existence of a one-story brick and block garage building on the Site, spanning the entire north-south portion of the west side of the Site, along the public alley, entirely on the Applicant's property.
31. The Baist Atlas Plat (Ex. 39A, Sheet 2) shows the Site and surrounding properties as they existed in the 1960s. At that time, the Site was known as Lots 800, 808 and 816. The Baist Atlas Plat shows a small landlocked public alley (the "Small Public Alley") to the east of former Lot 816 and to the west of Lots 136, 137 (Mr. Donaldson's lot) and 138, and abutting Lot 45 (Mr. Jackson's lot). The Small Public Alley also abutted Lot 815, which is directly to the north of the Site.
32. Lots 136, 137, and 138, and the Small Public Alley, were established by a subdivision recorded in the Office of the Surveyor in 1915 (*see* Ex. 39C, Subdivision Plat for Lots 136-138). That plat shows that the three lots extended for a depth of 105 ft. west of

Sherman Avenue, and that the public alley was another 15 ft. in width. Lot 45 was established by a subdivision recorded in the Office of the Surveyor in 1902 (*see* Ex. 39D, Subdivision Plat for Lot 45). That plat shows that Lot 45 extended for a depth of 120 ft. west of Sherman Avenue.

33. The Survey to Mark shows that the distance from Sherman Avenue west to the north-south public alley measures 155 ft.. The depth of Lot 45 (120 ft.), and the depths of Lots 136, 137, and 138 (105 ft.) (together with the 15 ft. width of the Small Public Alley), when combined with the width of the portion of the Site that abuts that property (35 ft.), adds up to 155 ft.. There is no other intervening land between Sherman Avenue and the north-south public alley at this point.
34. The Small Public Alley was closed by action of the Council of the District of Columbia in DC Law 14-263, dated March 27, 2003. The Alley Closing Plat was recorded on August 1, 2003. The application for the alley closing (known as Application No. SO 02-1463) was filed in 2002 on behalf of the record owners of Lots 136, 137, and 138. The ownership of the closed alley reverted to the record owners of Lots 136, 137, and 138 upon recordation of the alley closing plat in 2003 (*see* Ex. 39E, Alley Closing Plat, and Ex. 39F, Alley Closing Legislation).
35. The Office of Tax and Revenue ("OTR") assigned tax lot numbers to those three reversionary properties on May 18, 2004 (*see* Ex. 39G, Assessment and Taxation Plat 3812-S). The lots that reverted to the owners of Lots 136, 137, and 138 became known, respectively, as Lots 819, 820, and 821.
36. In 2006, the owner of Lots 138 and 821 combined the two lots into one lot, now identified as Lot 822 (*see* Ex. 39H, Assessment and Taxation Plat 3827-K). The other two owners (including Mr. Donaldson) have not yet combined their lots, according to the records of OTR, and therefore those two owners each receive two separate tax bills for their two properties. Thus, Lots 136 and 819 are owned by the same person (Ms. Theresa Banks), and Lots 137 and 820 are owned by the same person (Mr. Donaldson) (*see* Ex. 39I, Property Ownership List from OTR website).
37. Based on the above information, the residential development proposed for the Site is entirely within the Site's lot lines and will not encroach onto Lot 45, Lot 137, or Lot 820.

### ***Easement Issue***

38. The Applicant commissioned its title company to research the records of the DC Recorder of Deeds, to see if there exists any record of a recorded easement granted to Mr. Jackson and/or Mr. Donaldson for access from their properties, across the Site or the predecessor Lots 800, 808 and 816, to the north-south public alley. Ex. 39J of the record is an abstract of the recorded documents on file with the DC Recorder of Deeds. There is no record of any recorded easements affecting either the Site or the Jackson or Donaldson properties. The formal report prepared by the Applicant's title company was submitted

with the Applicant's February 8, 2016 post-hearing submission (Ex. 44) and indicated that there are no easements of record across the Site.

39. The Sherman Avenue Neighbors submitted several document in Ex. 40A1 and 40A2. Included in Ex. 40A1 is a title report for the Site commissioned by Mr. Jackson. That report also shows that there is no record of an easement across the Site.
40. The survey (Ex. 39A, Sheet 3) shows the existence of a long brick and block garage building extending for the full length of the western part of the Site, from Girard Street northward, extending onto and including Lot 815 to the north of the Site. This physical barrier between the Site and the properties owned by Mr. Jackson and Mr. Donaldson has existed for many years, long before the Applicant purchased the Site. The presence of this structure along the entirety of the Site abutting the alley physically precludes access to the alley from Mr. Jackson and Mr. Donaldson's properties.
41. Based on the foregoing, the Board finds that there is no recorded easement for the benefit of either Mr. Jackson or Mr. Donaldson across any part of the Site, to allow them to occupy any portion of the Site, or to provide access across the Site to the north-south public alley.

***Applicant's Follow-Up Actions In Response to Concerns Raised by Neighbors in Opposition***

42. Following the limited public hearing on February 2, 2016, and as requested by the Board, the Applicant met with Mr. Jackson and Mr. Donaldson in a meeting facilitated by Ms. Tania Jackson, Chief of Staff to the Councilmember for Ward 1. The Applicant submitted relevant information and documents to the Board regarding this meeting (Ex. 44 and 45), as follows:
  - a. The Applicant submitted a Neighbor Emergency Egress Plan (Ex. 45, Sheet 1) showing proposed emergency exit gates for egress from Mr. Jackson's property (Lot 45), Mr. Donaldson's property (Lots 137 and 820), and the intervening Lot 822, onto the Site. The Applicant offered to install the emergency exit gates shown on Ex. 44 if accepted by the neighbors. Egress from these gates to the alley would be through a pedestrian gate located behind the flat on Lot A. This would be for emergency egress only.
  - b. The Applicant provided a Neighbor Trash Removal and Emergency Egress Plan (Ex. 45, Sheet 2) showing a proposed access way from the neighboring properties to the public alley, across Lot 813, for use by the neighbors to store their trans cans so that they can have trash pickup from the alley, rather than from the front of their properties. The Applicant offered to provide this access if and when the Applicant is successful in completing the purchase of Lot 813 in a tax sale, and if the neighbors agree that they want it.
  - c. The Applicant submitted a compilation of documents (Ex. 44) showing the history of the Site and the surrounding lots, including (a) the creation of Lot 45 in 1902;

(b) the creation of the north-south public alley in Square 2857 in 1912; (c) the creation of Lots 136, 137, and 138, and an abutting Small Public Alley in 1915; (d) the closing of the Small Public Alley behind Lots 136, 137, and 138 in 2003 and the reversion of that land to the abutting owners of Lots 136, 137, and 138; (e) the conversion in 2004 of the land from the closed Small Public Alley to Tax Lots 819, 820, and 821; (f) the conversion of former Lots 138 and 821 to Lot 822 in 2006; (g) the Survey to Mark for the Site, certified by a registered DC Land Surveyor in 2015 and recorded in the Office of the DC Surveyor; (h) the Zoning Map for the Site from the Office of Zoning website, showing the location of the Site and Lots 45, 137, and 820, among others; (i) the existing condition survey of the Site showing the outline of the garage structure spanning the north-south portion of the Site; (j) the February 1, 2016 letter from the Applicant's title company to the Board, with a worksheet from Red Rock Title included, showing that there are no easements of record across the Site; (k) the report to Mr. Jackson from his own title company showing that there are no easements of record across the Site; and (l) the current records from the OTR website, showing the tax information for Mr. Donaldson's Lots 137 and 820 and for Mr. Jackson's Lot 45. The land areas shown for these three lots correspond to the land areas of those lots when they were originally created.

## CONCLUSIONS OF LAW

### Variance Relief

#### *Standard of Review*

The Board is authorized under § 8 of the Zoning Act (D.C. Code § 6- 641.07(g)(3) (2012 Repl.) to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property . . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of the Zoning Regulations would "result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property . . . ." D.C. Official Code § 6-641.07(g)(3) (2012 Repl.), 11 DCMR § 3103.2. The Board must find that three conditions exist: "(1) the property is unique because, *inter alia*, of its size, shape or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; and (3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan." *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). *See, also, Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

Based on the above findings of fact, the Board finds that the Applicant has satisfied the burden of proof under 11 DCMR § 3103.2 and concludes that the application should be granted.

### ***Exceptional Situation or Condition Related to the Site***

The Board concludes that the Site is affected by a confluence of several exceptional and extraordinary conditions. The Site is exceptionally narrow and shallow in certain locations and has an unusual flag shape. The Site has approximately 13,900 square feet of land area and is roughly comprised of two rectangles due to the creation of Lot 818 from three separate lots (Lots 800, 808, and 816). The main portion of the Site (former Lots 800 and 808) measures approximately 75 ft. along Sherman Avenue and approximately 120 ft. along Girard Street. Abutting these lots to the west is former Lot 816, which is a long, narrow, rectangular strip of land with only 35 ft. of frontage on Girard Street and 140 ft. of frontage extending north along the alley to the west. These two segments of the Site together create an irregularly-shaped and sized flag lot with unusual dimensions that significantly impact the ability to create matter-of-right development on the Site.

In addition, there is significant petroleum contamination on the Site that further results in an exceptional situation and condition. The Applicant has undertaken drilling activities on the Site that indicate the existence of contamination up to 16 ft. and 18 ft. deep. This level of contamination will require the Applicant to over-dig by approximately 10 ft. to 12 ft. in some locations and bring in a significant amount of clean fill to obtain approval from DDOE and develop the Site in a safe manner. The necessary environmental testing and remediation work on the Site will result in an additional \$800,000 in fees. Thus, when taken as a whole, the Board concludes that the irregularly-shaped and sized lot, plus the existence of extensive environmental contamination, together create exceptional and extraordinary conditions.

### ***Practical Difficulty in Complying with the Zoning Regulations***

The Board concludes that the Site's exceptional and extraordinary conditions create practical difficulties in complying with the Zoning Regulations. The size, shape, and dimensions of the Site present limited options for appropriate development with matter-of-right lot sizes, residential dwellings, and parking layouts. The project architects studied multiple site configurations, resulting in a final design that fits into and is consistent with the fabric of the surrounding R-4 District. Important factors in developing the final site plan included orienting the flats to face Sherman Avenue, minimizing the rear yard gap along Girard Street, maintaining the height, width, design, rhythm, and size of the flats to be consistent with the surrounding residential neighborhood, providing adequate off-street parking and trash storage, and eliminating curb cuts.

### ***Variances for Lots G, H, J, K (Sherman-fronting Lots)***

The Board finds that it is practically difficult to provide zoning-compliant lot areas, rear yards, and lot occupancies for Lots G, H, J, and K. Each lot fronting Sherman Avenue will have a lot width of 18.75 ft. where 16 ft. is permitted for IZ developments by special exception; a lot area of 994 square feet where 1,500 square feet is required, a lot occupancy of 60% where 70% is allowed, and a rear yard of 16 ft. where 20 ft. is required.

To provide 1,500 square foot lots, each lot would need to be 80 ft. deep, instead of 53 ft. deep as proposed. The flats are each proposed to be 37 ft. deep. Thus, creating 80 ft. deep lots would result in a 43 ft. rear yard gap along Girard Street, which is inappropriate urban planning, creates a dead space along the street and a potential safety hazard for the neighborhood, and is generally an inefficient use of the Site. The only practical way to layout four lots along Sherman Avenue with the building square footages as proposed is to provide slightly non-compliant lot areas, which results in slightly non-compliant rear yards. This proposed lot area and layout is consistent with what is found in the surrounding neighborhood. Providing compliant rear yards would result in removing square footage from each flat, thus hindering the creation of appropriately-sized and designed three-bedroom units for families. The proposed site plan minimizes the gap along Girard Street and maintains the architectural rhythm of the street. Providing lots along Sherman Avenue that meet the lot area, lot occupancy, and rear yard requirements is therefore practically difficult.

*Variances for Lots D, E, F (Girard-fronting Lots)*

The Board also finds that it is practically difficult to provide zoning-compliant lot areas for Lots D, E, and F. These lots will each have a lot area of 1,275 square feet where 1,500 square feet is required. Due to the Site's irregular shape, the three western-most lots fronting Girard Street (Lots A, B, and C) are all irregular in shape and size, but all comply with and exceed the minimum required lot dimensions for a project with IZ units in the R-4 District. Lots D, E, and F match Lots A, B, and C in lot width, but because of the shallow north-south dimension of 75 ft. on this portion of the Site, Lots D, E, and F require variances from the lot area requirements.

As previously described, Lots D, E, and F would each need to be 93.75 ft. deep to provide a 1,500 square foot lot, while still maintaining a minimum lot width of 16 ft. Making Lots D, E, and F 93.75 ft. deep would result in an encroachment on the adjacent property to the north (Lot 45) by approximately 19 ft., and is therefore practically difficult. Alternatively, Lots D, E, and F would each need to be 20 ft. wide to provide a 1,500 square foot lot area while still fitting within the Site's lot lines. Providing 20 ft. wide lots would be inconsistent with the widths of adjacent Lots A, B, and C and with other residential lots in the surrounding neighborhood. Moreover, providing 20 ft. lot widths for Lots D, E, and F would add 12 ft. to the Girard Street frontage, thus significantly encroaching on the rear yards of Lots G, H, J, and K, which are already non-conforming. Thus, the Board concludes that it is practically difficult to provide 1,500 square foot lot areas for Lots D, E, and F.

*Variance from the Compact Parking Space Requirements*

The Board finds that it is practically difficult to provide full size parking spaces on the Site. Fifteen surface parking spaces will be located on the north-south stem of the Site along the alley and behind Lots C and D. All of the parking spaces will be compact in size. If the parking spaces were standard-sized, there would not be enough room on the Site to provide the total number of required parking spaces and the required space for drive aisles. Full-sized parking spaces would eliminate space devoted to the on-site trash area, which is centrally located to permit convenient access by all residents. Furthermore, providing full-size parking spaces could potentially result in the creation of new curb cuts onto the Site, which DDOT is unlikely to



permit. Thus, the Board concludes that providing full-sized, on-site parking spaces would result in a practical difficulty to the Applicant.

### ***No Substantial Detriment to the Public Good or Zone Plan***

The Board concludes that the requested variances can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. The proposed development plan is a logical layout given the Site's physical constraints, and is consistent with the dimensions and character of the surrounding neighborhood. Although up to three variances are required for some of the proposed new record lots, many of the variance requests are *de minimis*, consisting of several feet at most. Each new lot will have adequate open space to provide light and air to its occupants, and each flat will provide a logical three-bedroom layout for its residents.

With respect to the zone plan, the Board finds that the project fits within the character of the neighborhood, particularly since the proposed lot dimensions, lot occupancies, and rear yards are consistent with (and in some cases more conforming than) those of other residential dwellings in the surrounding area. Furthermore, the Board finds that the project is consistent with the Comprehensive Plan, which encourages infill development on underutilized land within the city, particularly in areas where there are unimproved lots that create gaps in the urban fabric, as is the case here. The proposed development complements the established character of the area while turning a mostly vacant lot into a productive housing use, which is desperately needed in the District. Thus, the Board concludes that the public good will be well-served by the proposed high-quality, infill residential development in this area of the city.

### **Special Exception Relief**

#### ***Standard of Review***

Under D.C. Code § 6-641.07(g)(2) and 11 DCMR § 3104.1, the Board is authorized to grant a special exception where it finds that the special exception will be in harmony with the general purpose and intent of the zone plan and will not tend to adversely affect the use of neighboring property, subject in each case to the special conditions specified. Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the requested relief are met. In reviewing an application for special exception relief, "[t]he Board's discretion... is limited to a determination of whether the exception sought meets the requirements of the regulation." *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 695, 706 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

The Applicant seeks special exception approval under the lot with requirements of 11 DCMR § 2604.3, the parking space location requirements of § 2116.5, and the penthouse requirements of § 411.5.

### Lot Width

Lots A, D, E, and F are each 17 ft. wide and Lot C is 17 ft., 1 in. wide. These widths are permitted by special exception pursuant to 11 DCMR § 2604.3 for IZ developments in the R-4 District. The average lot width in the surrounding area is 17.1 ft. (a range of 12.5 ft. to 26 ft.). Thus, the Board finds that the proposed lot widths of 17 ft. and 17 ft., 1 in. for Lots A, C, D, E, and F are consistent with, and proportionate to, the lot widths found in the surrounding neighborhood. Moreover, the proposed lot widths will allow for appropriately scaled and sized interior layouts designed to accommodate families in three bedrooms. Therefore, the Board concludes that the grant of this special exception is in harmony with the general purpose and intent of the Zoning Regulations and will not tend to adversely affect the use of neighboring property.

### Parking Other Than on the Lot Where the Principal Use is Located

Section 2116.5 of the Zoning Regulations permits off-site parking for flats by special exception. Given the size, shape, and dimensions of the Site, and the layout of the proposed development, all of the parking for the project is located on the western portion of the Site adjacent to the alley, rather than on the lot upon which the flat the parking spaces are intended to serve is located. The Board finds that the proposed parking layout is the most efficient use of land and complies with the standards of 11 DCMR §§ 2116.5 through 2116.9.

The location of the parking spaces clustered on the western portion of the Site creates the most efficient layout for each new lot, results in safe ingress and egress to the street, minimizes pedestrian-vehicle conflicts, and results in no negative impacts to neighboring properties. All ingress and egress to the Site will occur from the public alley, thus resulting in the closure of the existing curb cut on Sherman Avenue and eliminating vehicular access from the surrounding streets. The Board finds that providing this type of site access will improve pedestrian safety and limit potential traffic hazards surrounding the Site. Moreover, the Board finds that the location of the parking spaces is conveniently located for occupants of the proposed development, since cross-easements will be recorded to allow direct access from all flats. Accordingly, the Board concludes that the grant of this special exception is in harmony with the general purpose and intent of the Zoning Regulations and meets the test for special exception relief under 11 DCMR § 2116.5.

### Penthouses

Pursuant to 11 DCMR §§ 3104 and 411.5, the Board may approve as a special exception a penthouse on the roof of a flat, provided that the penthouse (a) is no more than 10 ft. in height and contains no more than one story, and (b) contains only stair or elevator access to the roof and a maximum of 30 square feet of storage space ancillary to a rooftop deck.

In this case, the flats will have penthouses to provide roof access for their residents. The Board finds that the penthouses meet the requirements of 11 DCMR § 411.5, since (a) the penthouses will not exceed 10 ft. and one story in height, and (b) the penthouses will contain only stair access to the roofs. Moreover, the penthouses will meet or exceed the 1:1 setback requirements

set forth in the penthouse regulations, such that they will not have any perceived impact on surrounding properties. Thus, the Board concludes that the proposed penthouses also meet the requirements of 11 DCMR § 3104 as being in harmony with the general purpose and intent of the zone plan and will not tend to adversely affect the use of neighboring property.

### **Great Weight**

The Board is required under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)) to give “great weight” to the issues and concerns raised in the written report of the affected ANC, which in this case is ANC 1B. In this case, ANC 1B recommended approval of the requested relief. The Board accords the ANC recommendation the great weight to which it is entitled and concurs in its recommendation.

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Code § 6-623.04) to give great weight to OP recommendations. In this case, OP submitted a supplemental report (Ex. 41) affirming its general support for the project and asserting that the project is “generally consistent and compatible with the surrounding community.” The report also expressed OP’s concerns regarding the nexus between the Site’s exceptional situation and the practical difficulty of development. OP did not support the requested variance from the lot area requirements of 11 DCMR § 401.3 for the revised 10-lot plan, but OP did assert that if the Board accepts the non-conforming lot area variance, then OP would not oppose the remaining areas of zoning relief.

The Board in this case does accept the non-conforming lot area variance, since the inability to create zoning-compliant lot areas is a direct result of the Site’s exceptionally narrow dimensions and unusual shape. For this reason and the other substantive findings and conclusions made in this order, the Board accepts the nonconforming lot areas in the Applicant’s 10-lot plan as appropriate under the limited circumstances of this case, and therefore finds OP’s objection to the lot area variance unpersuasive.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for area variances under §§ 401.3, 403.2, 404.1, and 2115.2, that there exists an exceptional or extraordinary situation or condition related to the Site that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

The Board also concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1, 2604.3, 2116.5, and 411.5, and that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

## **Encroachment and Easement Issues**

The Board has carefully reviewed the testimony and materials submitted by the Applicant and the Sherman Avenue Neighbors regarding the claim of encroachment of the project onto Lots 45, 137 and 820, and the claim of the existence of an easement across the Site from Lots 45, 137, and 820. Based on the findings set forth in this order and the exhibits referenced herein, the Board concludes that the project will not encroach on Lots 45, 137 and 820, and that a recorded easement does not exist over the Site for the benefit of Lots 45, 137, and 820. The Board has also carefully reviewed the Applicant's proffer of emergency gates and egress ways for the Sherman Avenue Neighbors to address their concerns about access from their properties, across the Applicant's property, to the public alley to the west (*see* Ex. 45, Sheets 1 and 2). The Board believes that the Applicant has attempted to address these issues in good faith, but also notes that the Applicant's proposal requires in one instance that the Applicant obtain title to the neighboring Lot 813 in a tax sale, and also requires in both instances the assent of the Sherman Avenue Neighbors, who did not appear at the February 9, 2016 public hearing to indicate their acceptance of the Applicant's proffers. The Board also notes that it cannot impose the gates and access ways shown in the site plans in Ex. 45, Sheets 1 and 2, as conditions to the Order, because there is no nexus between the zoning relief being requested in this application and the conditions sought to be imposed. *See* BZA Application No. 18778 of KJ Florida Avenue Property, LLC (June 18, 2014); *see also* BZA Application No. 17165-A of Public Storage, Inc. (August 4, 2004). However, the Board encourages the Applicant to continue a dialogue with the Sherman Avenue Neighbors, and will condition this order to allow the appropriate flexibility, should the Applicant succeed in acquiring the additional property and should the Sherman Avenue Neighbors agree to accept the Applicant's offers.

It is therefore ORDERED that the application is hereby GRANTED, subject to the site plan submitted as Ex. 42, Sheet 8, and the Architectural Drawings at Ex. 39A, Sheets 8 through 18, and subject to the following conditions:

1. The Applicant is given flexibility to modify the site plan in accordance with Ex. 45, Sheet 1, if the Sherman Avenue Neighbors agree to the installation of emergency access gates as shown on that Exhibit.
2. The Applicant is given flexibility to modify the site plan in accordance with Ex. 45, Sheet 2, to include the improvements shown on the adjacent Lot 813, if the Applicant is able to acquire Lot 813, and if the Sherman Avenue Neighbors agree, and are able to get the other affected neighbors along Sherman Avenue to agree, to establish the mutual access way across the rear of their properties as shown on that Exhibit.

**VOTE:** \_\_\_\_\_

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT  
A majority of the Board members approved the issuance of this order.

ATTESTED BY:

\_\_\_\_\_  
**SARA A. BARDIN**  
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** \_\_\_\_\_

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 *ET SEQ.* (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR

PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.