

BEFORE THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

**APPLICATION OF
KLINE OPERATIONS LLC**

BZA APPLICATION NO. 19722

**MOTION OF 450K CAP LLC TO STAY BZA DECISION AND ORDER PENDING
JUDICIAL REVIEW BY D.C. COURT OF APPEALS**

450K CAP LLC, by and through undersigned counsel and pursuant to Subtitle Y § 701 of the BZA Rules of Practice and Procedure, hereby moves the District of Columbia Board of Zoning Adjustment (“BZA”) for an order staying the Decision and Order of the BZA dated January 9, 2019 (the “Order”) pending judicial review by the D.C. Court of Appeals in the matter styled *450K CAP LLC v. D.C. Bd. of Zoning Adjustment*, No. 19-AA-0071, which was commenced on February 1, 2019 (the “Appeal”).

In accordance with Subtitle Y § 701 and as further demonstrated below, a stay of the Order pending the D.C. Court of Appeals’ ruling in the Appeal is proper and necessary because (i) irreparable injury will result if the requested stay is denied; (ii) 450K CAP LLC is likely to prevail on the merits in the Appeal; (iii) the opposing party will not be harmed by the stay; and (iv) a stay is in the public interest.

I. Irreparable Injury Will Result If The Requested Stay Is Denied

450K CAP LLC is an immediately adjoining landowner and its property is located within 8.5 feet of the Applicant’s property. If the requested stay is denied and the Applicant proceeds to construct the proposed development project before the D.C. Court of Appeals issues its ruling, 450K CAP LLC will suffer significant irreparable injury, including without limitation (i) severe adverse conditions as a result of a rear yard comprised of merely 1.5 feet—as opposed to more than 20 feet as required under Subtitle I § 205.1—which will permit the Applicant to construct a wall merely ten (10) feet within

and directly facing 450K CAP LLC's residential apartments, thereby greatly diminishing and adversely affecting the light, air, and quality of life of 450K CAP LLC's residents; (ii) substantial increased traffic and congestion in the rear alley as a result of the Applicant's proposed use of a single loading dock and berth, and an 11.5 foot loading entrance, to service an oversized 11-story hotel containing 153 guest rooms, which traffic and congestion will adversely impact 450K CAP LLC's use of its property; and (iii) adverse traffic, parking, noise, and other impacts surrounding the Applicant's property as a result of an oversized development that is excessively large for the legally available area and size of the parcel.

II. 450K CAP LLC Is Likely To Prevail On The Merits In The Appeal

450K CAP LLC is likely to prevail on the merits in the Appeal. In particular, the variances requested by the Applicant were granted in violation, *inter-alia*, of D.C. Code § 6-641.07(g)(3) and Subtitle X § 1000.1, which authorize the BZA to grant a variance only if the subject property contains "exceptional narrowness, shallowness, or shape" or possesses "exceptional topographical conditions or [an]other extraordinary or exceptional situation or condition." D.C. Code § 6-641.07(g)(3) and Subtitle X § 1000.1. The BZA erroneously found that "[t]he Property is irregularly shaped due to the unique 'L-shaped' Lot 833 that fronts on 5th Street N.W. and wraps around the rear of Lots 827, 828, and 829." Order at 4. In fact, the record, including the Applicant's Exs. 6, 8, and 12, establishes that the borders of the Applicant's property clearly and unambiguously form a rectangle, its shape and condition are neither unique nor exceptional, and the subject property is in fact similar in condition and shape to other parcels within the square. The Order also violates, *inter-alia*, Subtitle X-901.2(b) by granting a special exception for the rear yard pursuant to Subtitle I § 205.1 because neither the Order nor the record

establishes that the requested relief “[w]ill not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps,” or that the BZA sufficiently considered the adverse impacts that the Applicant’s proposed oversized construction would cause to 450K CAP LLC and its residents. For these reasons, among others, the Order is arbitrary, capricious, an abuse of discretion, and/or otherwise not in accordance with the D.C. Zoning regulations and D.C. law.

III. The Opposing Party Will Not Be Harmed By The Stay

As demonstrated above, 450K CAP LLC will suffer irreparable injury if the instant motion for a stay is denied. Contrary to this inevitable, irreparable injury, there is no identifiable, legitimate harm that the Applicant will suffer by allowing the appellate court to review this matter. The Applicant’s project has been on hold because of its own decision to seek significant and extensive variances and special exceptions from the zoning regulations, and any delay it may suffer is self-inflicted by the Applicant as a result of its requests for unwarranted special exceptions and variances on a property that is unexceptional and typical of other parcels in the square, and for an oversized development project that would cause significant adverse impacts on 450K CAP LLC and other neighbors. Moreover, 450K CAP LLC notified the Applicant via letter on July 26, 2018 that it intended to appeal the final order of the BZA, and “strongly advised [the Applicant] not to perform any construction activities” before a final order on the Appeal is issued. See Letter from J. Lifschitz dated July 26, 2018, attached hereto as Ex. 1. Accordingly, the Applicant was put on notice of 450K CAP LLC’s intention to appeal the Order more than six (6) months before the Order was issued, and before the Applicant had even in fact purchased the property. The Applicant therefore had more than sufficient

time to make necessary arrangements to avoid incurring any harm that might be caused by the issuance of a stay.

IV. A Stay Is In The Public Interest

A stay is in the public interest due to the substantial likelihood that 450K CAP LLC will prevail on the merits of the Appeal, which is likely to result in a remand by the D.C. Court of Appeals to the BZA for further proceedings. It is in the interest of judicial economy for the BZA to stay the Order pending the Appeal to ensure that the Applicant does not perform construction work that the Applicant will thereafter be obligated to change following further proceedings. This interest is in addition to the unnecessary harm to the immediate neighbors that would be caused by construction activities that would defy the D.C. Court of Appeals' ruling and potentially need to be changed.

WHEREFORE, for the foregoing reasons, 450K CAP LLC respectfully requests that the BZA stay the Order pending the outcome of the Appeal and execute other such immediate interim temporary stay measures within the BZA's power as deemed appropriate. 450K CAP LLC further requests that the BZA issue an expedited decision on this motion.

Dated: February 28, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the foregoing was served on this March

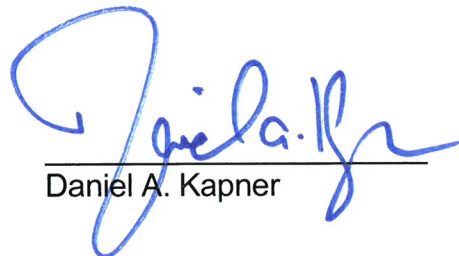
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