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via IZIS

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: Post-Hearing Submission - BZA Application No. 19828- 3423 Holmead Place, NW

Dear Members of the Board:

At the hearing on October 17, 2018, the Board requested that the Applicant file additional information to respond to certain Board requests, with an eye toward securing the Applicant's variance argument. Specifically, among other things, this submission includes additional evidence on both the extraordinary condition of the Subject Property and the practical difficulty resulting therefrom, as well as additional argument regarding the *de minimis* degree of relief being requested, and the context of this request within the general course of variance relief granted by this Board over the years.

There are numerous cases in which this Board has found that a unique situation with a Property prevents a property owner from realizing a zoning benefit to which it would otherwise be entitled, but for the unique condition. Far from being an ambiguous case, the Applicant asserts that this particular case is a "textbook" case for a variance argument. Regarding the provision of financial evidence of a practical difficulty, this Board and the courts have been clear over the years that economic use of a property may properly be considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variance cases (*See* Oakland Condominium v. DC Board of Zoning Adjustment, 22 A.3d 748 (2011); Tyler v. DC Board of Zoning Adjustment, 606 A.2d, 1362 (1992); Gilmartin v. DC Board of Zoning Adjustment, 579 A.2d 1164 (1990)). Further, the Court has held that "at some point, economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure." Oakland Condominium v. DC Board of Zoning Adjustment, 22 A.3d 748 (2011).

In this case, as more fully described herein, the unique condition of the Property creates a practical difficulty for the Applicant as it loses development rights – either the loss of a fourth floor of usable space (if it keeps the structure and does the matter-of-right conversion), or a loss of three (3) units from the matter-of-right number of seven (7), along with additional construction expense (if it opts to raze the building and build two three-story-plus-cellar flats). The loss of these development rights as a result of the unique conditions impacting the property creates a financial loss to the Applicant, which is clearly unnecessarily burdensome to the property owner/applicant.

It is important to note that in most cases when financial pro forma evidence is evaluated as evidence, an applicant is often requesting additional entitlement beyond what would otherwise be permitted. The most common case over the years has been relief from the 900-foot rule, both before and after the "R-4 changes" that were adopted in 2015.[1] In that line of cases, financial evidence was accepted and used as the basis to grant additional units beyond the matter-of-right permitted amount. Contrast that relief with this application, wherein the Applicant is merely asking to retain its current matter-of-right permitted density and number of units, which it could do without practical difficulty if not for the extraordinary conditions present in this situation.

There are a number of other cases in which the Board has granted area variance relief in order to allow a property owner to realize a floor area ratio to which they might otherwise be entitled. Additionally, there is a line of cases in which area relief is granted – for instance, lot width or area – to allow an applicant to develop more lots than they would otherwise be able to do – the relief for which was granted based on an applicant's presumed difficulty in producing and selling residential units which may be out of character with its surrounding neighborhood, and therefore more difficult to develop and sell at a reasonable profit.[2] Again, we would contrast that line with this application in saying that the present case is not asking for additional density or additional units. It is not a case of asking for more, but merely asking for what would otherwise be permitted but for the extremely unique set of circumstances here.

Also critical in the practical difficult analysis in this case is the ***de minimis*** nature of the requested relief. It would appear that everybody agrees that the relief for the additional height – to forty (40) feet – is entirely appropriate here, if not encouraged for design and compatibility sake. This support for the 40-foot height not only highlights the uniqueness of this Property's condition (that the higher height is actually considered a benefit, rather than a burden), but it eliminates any notion that also granting the relief from the number of stories could be a detriment to the public good. Regarding the integrity of the Zoning Regulations, that integrity is firmly protected by the extraordinarily unique nature of this particular situation, as well as the de minimis nature of the request.[3]

Not only does the additional evidence herein show the highly unique situation here – that no other churches in the RF-1 zone come close to matching this situation (with the raised first floor and the adjoining 40+-feet buildings), but the fact that 40 feet in height is so roundly supported as the best design option for

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[1] See BZA Cases 19712, 19517, 19029, 18515, and 17991.
[2] See OP Report for BZA Case No. 19183 ("Although one large lot could be created in conformance with the lot width and area requirements, the size of this one lot would be out of character with the surrounding row house development."); See also Case Nos. 19193, 19100, 19055.
[3] To be clear, the Applicant is not asserting that relief from the 'number of stories' requirement is *de minimis*, by itself. And in almost any other situation we can envision, such relief would be substantial. But in this case, the additional height to 40 feet is supported, and necessary to do the best project, and the "stories" relief has zero impact on the density or appearance of the building, with the 40-foot height relief granted.

this project, is itself a unique aspect of this project not likely to be repeated in a similar BZA request. There is a confluence of exceptional conditions associated with this property, such that it is difficult to imagine that the Board will ever face such a situation, including an originally-built eyesore church building, in the middle of a block with a significant representation of apartment uses, buttressed by two adjoining 40+-feet buildings, with the raised first floor, and a recognition that the relief for the 40 feet in height is undoubtedly a good thing in this case. Every one of these conditions has a nexus to the practical difficulty of compliance with a strict definition of what amounts to just a minor aspect - in this case - of the two portions of the height restrictions in the Zoning Regulations.

To summarize, the Applicant has a confluence of extraordinary conditions, readily apparent and discussed in detail throughout this case, which directly causes a practical difficulty which can be summed up as not being able to realize the zoning entitlements which it would otherwise accrue if this unique set of circumstances were not present. There is not much dispute that granting relief will not be a substantial detriment to the public good, and regarding integrity of the Zoning Regulations, the integrity is assured by the overwhelming uniqueness of the property.

BURDEN OF PROOF

Exceptional Situation

At the hearing, the Applicant argued that the situation was truly unique because the building was purposefully built as a non-residential church building and has a lower level that was purposefully built above-grade and therefore counted as a story. The uniqueness is compounded by the fact that the adjacent buildings are significantly taller than the existing and proposed structure. While each one of these situations may not reach the first part of the variance test on its own, the combination of these three factors creates a highly unique situation, not likely to be repeated again. The Board has determined numerous times that a unique situation may be the result of a confluence of factors. The Court has held that the exceptional situation standard of the variance test may be met where the required hardship is inherent in the improvements on the land (*i.e.*, the building or structure) and not just the land itself. Furthermore, the Court of Appeals held in *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition of the property. Rather, it may arise from a "confluence of factors."

At the hearing, the Board asked for more evidence of the unique nature of this situation. We did a photo survey of all RF-1 churches in this area. As demonstrated by the photographs includes as **Exhibit A**, no other RF-1 church is similar to the present case, with a raised first floor, buttressed by two very tall buildings on both side lot lines. Only one of the churches was even close to this situation, and that church's first floor was well below the five-foot distance to have the lower level counted as a story.

Practical Difficulty

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. In reviewing the standard for practical difficulty, the Court of Appeals stated in Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C. App. 1972), that "[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. 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.2w 1362, 1365 (D.C. 1992) (citing Gilmartin v. Bd. of Zoning Adjustment, 579 A.2d 1164, 1167 (D.C. 1990).

The Board also requested the Applicant to provide financial information regarding the practical difficulty.

To demonstrate how a strict application of the regulations would impact financial aspects of the project, consider four scenarios:

A. Financial Projections: Application is Approved

Currently, the Applicant is requesting relief to construct seven (7), three-bedroom units spread across four floors. While one of the units is a bit larger, the average unit size is approximately 1,637 square feet. The Applicant expects to sell the units for approximately $777,000 each. Considering the purchase price of the building, the cost of construction, and other associated costs, detailed in the Pro Forma included as **Exhibit B**, the Applicant would make approximately $292,000 from this scenario. As noted in the real estate report, included as **Exhibit C**, this scenario is the most marketable use of the building, as issues with light getting into the units' interior rooms will be resolved by the proposed courts. The units would likely be able to sell within 30-45 days, as opposed to the other scenarios which would require the Applicant to hold on to the property for longer, thereby increasing related costs.

B. Financial Projections: "Alternative A"- Three Floors

If the Application is not approved, the Applicant will be forced to explore other options. One option is to shrink the units and spread them across three floors instead of two.[4] As demonstrated by the additional floor plans included as **Exhibit D**, this would result in a loss of 2,800 square feet of living space. The result would be four (4), three-bedroom units, measuring approximately 1,500 square feet that could sell at approximately $699,000; and three (3), one-bedroom units, measuring approximately 980 square feet, that could sell for $468,000. Even though the overall cost of construction would be slightly lower, the total profit will be only $187,884, significantly lower than the proposal. Further, the Real Estate Report details how

[4] The proposed size of the units was one of the elements of the Application favored by ANC 1A.

difficult it would be to market these units as the building would suffer somewhat from the canyon effect of the two overbearing buildings flanking it. Further, this scenario itself is not a matter-of-right option, as it would require relief for the removal of the spire, the courts, and the front setback. It would result in a loss of over $100,000 in potential profit and still require special exception relief as the Applicant is removing a spire and variance relief for the front setback.

C. Financial Projections: "Alternative B"- Alternative at Time of Purchase

At the time of purchase, ZC Case No. 17-18 had not yet been voted on or been made effective. Once effective, it eliminated the Applicant's ability to lower the floor plate of the first floor so that the lowest level would no longer count as a story. While that would have been a costly alternative to variance relief, it was still a viable option at the time of purchase. The Applicant acknowledges a change in the Zoning Regulations is not, on its own, a justification for variance relief. However, the fact that four stories was permitted as a matter-of-right (via lowering the floor plate) was a justification for the purchase price and the fact that the option is no longer available impacts the Applicant's ability to resell the property as-is for a similar price.

D. Financial Projections: "Alternative C"- Two Flats

As a matter-of-right, the Applicant could subdivide the lot into two, 25 ft. wide lots each measuring 3,175 square feet of land area. Each lot would be permitted to have 2-units (flat) as a matter-of-right. The units would be extremely large, approximately 3,491 square feet. Creating such large units would result in diminishing returns, as the Applicant's construction costs would be much higher than with any other option due to the demolition of the existing building and the construction of two, new buildings. As the real estate report mentioned, units such as these tend to sit on the market for 180+ days. Due to the large size of the units, it would be extremely difficult to sell the units within a reasonable timeframe, adding more cost to the project and resulting in a net loss of $162,384. Such a loss is clearly a practical difficulty for the Applicant.

Supportive Case Law:

In Case No. 17571, the Board came to a similar conclusion to the present case regarding the degree of relief and whether the relief would have an external effect on the project. In that case, the applicant requested variance relief from the FAR, lot occupancy, open space, and rear yard requirements, in order to construct a three-story addition to an existing residential building at 1124 9th Street, NW. In that case, the Office of Planning recommended approval, stating that the variances are minimal, will not have detrimental impact on nearby buildings or on the neighborhood, and will meet the intent of the Zoning Regulations. The applicant argued that the property was impacted by a confluence of factors, including the fact that it was already at 100% lot occupancy, that the property was very narrow, and that HPRB had certain design requirements that were required to be met. HPRB required a large setback which forced the applicant to enclose two parking spaces which would have otherwise not contributed to FAR. Without relief, the applicant would have been

forced to eliminate FAR from another portion of the building, resulting in a loss of FAR that it was otherwise entitled to.

The Board also found that "The requested variance relief can be granted without substantial detriment to the public good or substantial impairment of the Zone Plan . . . the project will cause no impairment of the Zone Plan. The FAR variance is minimal and results in a minimally more dense building than permitted. Such a *de minimus* variance request requires a lesser showing of practical difficulties than a more substantial variance request. See, *Gilmartin*, supra, at 1171, fn. 6. (The "BZA may consider whether the variance is *de minimus* in nature and whether for that reason a correspondingly lesser burden of proof rests on the" applicant.)" The residential lot occupancy variance has no real external effect because the existing building is already at 100% lot occupancy, and any effect of the rear yard variance is ameliorated by the 30-foot alley abutting the rear of the property." Furthermore, the Board considered HPRB's design requirements as part of the variance test.

The current case is very similar to Case No. 17571, as the property is impacted by a confluence of factors and relief is necessary to realize a height and number of stories that the Applicant would otherwise be entitled to but for that confluence of factors. The applicant in that case was dealing with HPRB design considerations, a narrow lot, and a building that was already at 100% lot occupancy. In the current case, the Applicant similarly had certain design considerations that were based on the surrounding properties and an existing unique non-residential purpose-built church that already had its lowest level above grade. Such a *de minimus* variance request requires a lesser showing of practical difficulties than a more substantial variance request. The Applicant is not asserting that relief from the limited number of stories is *de minimis* relief, in and of itself, but rather than where greater actual height is approved, and in fact encouraged to realize a higher-quality project (specifically *because* of the unique circumstances of this case), the relief from the stories requirement is negligible, i.e., it is, effectively, of no degree at all, let alone *de minimus* degree. The building, as viewed from the street, could hypothetically look the same whether or not the relief from the number of stories was granted, it is just the internal floor plate configuration that would change. And whether or not we are permitted to internally have three extremely large stories for a total of forty feet (40 ft.) or four normal stories at forty feet (40 ft.) will impact the number of and configuration of the units which the Applicant is entitled to as a matter-of-right based on the land area of the property. Considering the fact that the relief will have no external effect on potential building from the street but the denial will dramatically impact the internal configuration, the financial impact the Applicant faces certainly rises to the level of a practical difficulty. [5]

No Harm to the Zoning Regulations or Zone Plan

[5] BZA Order No. 18169, p. 8 ("In concluding that the Applicant has satisfied the exceptional circumstances and practical difficulty criteria for variance relief, the Board notes the relatively small degree of variance relief requested by the Applicant.")

In its report, the Office of Planning stated: "The proposed fourth floor would provide an appearance of a more intense and dense zone, which contradicts this intent." However, the proposed fourth story will have no external effect since the special exception for the height is supported by OP. The only impact will be the internal position of the floor plates. The lowest level is approximately six feet (6 ft.) above grade, and while it would be impractical to do so, if the Applicant is granted all but the relief for the number for stories, then hypothetically it could construct two stories above and each story would measure seventeen feet (17 ft.) in height. These two giant stories would look the same from the outside as what the Applicant is currently requesting. Furthermore, the situation is so unique that no other church in the RF-1 Zone is faced with this same situation. Accordingly, this will not set a precedent.

Sincerely,

Martin P Sullivan

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Martin P. Sullivan, Esq.
Sullivan & Barros, LLP
Date: November 1, 2018

Cc: Brandice Elliott, Office of Planning
ANC 1A