September 21, 2020

Board of Zoning Adjustment for the District of Columbia
441 4th Street, N.W., Suite 200S
Washington, D.C. 20001
Re: BZA Case No 20266 via email to BZASubmissions@dc.gov

Dear Members of the Board,

On behalf of the Party in Opposition (Opposition), I submit a response to the Findings of Fact and Conclusions of Law submitted by the Applicant in support of its parking waiver request.

In its submission, the Applicant admits that its proposed development will create parking and loading impacts on the neighborhood. The Applicant tries to mitigate these impacts by proposing five-single spaced pages of some forty conditions as part of the Special Exception. As demonstrated by the Opposition's case, those conditions do little to ameliorate the substantial problems the project will create for the immediate and nearby residential neighborhood and local businesses. The Applicant's case is dependent on persuading the Board that during its deliberations it should ignore those documented problems in the record and, instead, accept assumptions rather than reviewable facts. The Applicant has not met its full burden of proof to rebut the ample evidence presented by the Opposition that a waiver from the parking requirement in this case would not be in harmony with the zoning regulations and would tend to adversely affect the nearby residents.

The Special Exception Review Standards Are Not Met

1. The BZA is authorized to grant a Special Exception only where the requirements of 11X §901.2 are met. As noted above, in its submission (BZA Ex. 137 and 137A), the Applicant admits that its proposed development will create adverse impacts on neighborhood residents and businesses. The suggested conditions do not limit these adverse impacts, as the Board itself recognized that it does not have full authority to order, implement, or enforce many of them. Essentially, Applicant asks the Board to engage in a legal fiction by pretending these non-enforceable conditions will reduce the proven adverse impacts.

2. Similarly, the Applicant has not met its full burden of proof to show that the project furthers the goals of the NC-3 Zone Regulations. The Applicant cites 11H §500.1(c), which calls for the "retention of existing housing within the Cleveland Park commercial area to help meet the need for affordable housing…." The Applicant reports that OP found the Special Exception for parking in harmony with zoning because the project provides housing**,** including only the absolute minimum of required affordable units. There is much more to the NC-3 Zone regulations than that one provision. Notably absent from both the Applicant's submission and OP's report is any analysis of all of the purposes of NC3 Zone and not a whit of testimony about how businesses would be impacted both by the loss of existing parking supply, and by increased demand without increased supply. They make unsupportable claims about "enhance[ing] pedestrian activity, safety…." and they are deafeningly silent about "consumer support for businesses in the commercial area." The Board cannot ignore these omissions.

3. With no real analysis from OP about harmony with zoning or adverse impacts, the Applicant could only repeat OP's imaginative analysis of 11C §703.2. The Applicant and OP note that only one of the 10 provisions of §703.2 need to be met; they assert that six of them are met and that four are not applicable. A closer look makes it clear that none have been satisfied.

The Applicant's Claim that On-Site Parking is Not Feasible is Specious

4. The crux of the Applicant's case is that it satisfies §703.2(a) because providing on-site parking is not feasible. That is demonstrably wrong, if alone for the simple reason that there are now 14 parking spaces on the site. The Applicant wishes to remove them.

5. A key element in support of its erroneous claim that it would not be feasible to provide on-site parking is the Applicant's assertion that the Zoning Regulations prohibit maintaining the current on-site parking, since a curb cut that is not compliant with 11H §§204.2 and 500.5 must be closed (BZA Ex. 12 at p. 6). This is wrong. The NC zone regulations are silent on curb cuts. Neither OP, DDOT, nor the Applicant provided any evidence that it is DDOT's policy to prohibit curb cuts. As the Board knows, the DDOT Public Space Committee has authority to approve curb cuts, but it is not DDOT's policy to prohibit curb cuts on arterial roadways, such as Connecticut Avenue. Per DDOT testimony, the DDOT Design and Engineering Manual (2019) lists a preference for curb cuts on lower-volume streets *when a use confronts two streets and when this would meet the objective of area planning and historic preservation* [emphasis added] (Tr. at p. 141) — that is a preference and not a prohibition. And the emphasized condition is not met. The Opposition provided the only testimony about the practice of the DDOT Public Space Committee, which has jurisdiction over the approval of curb cuts, and which has, in fact, approved a new curb cut to access parking from an arterial roadway in the neighborhood. The Applicant's oft-repeated claim that there can be no curb cut on Connecticut Avenue, either new or retained, is simply not true. In fact, DDOT itself is adding a new curb cut to Connecticut Avenue (See Para. #8 below).

6. Although the Applicant, OP and DDOT assert that the existing curb cut is a safety hazard and that pedestrians will be safer if it is removed, there is no evidence in the record to support that claim. There was no evidence that there has ever been an accident or any type of safety violation at this curb cut. Simply saying the curb cut is a safety hazard does not make it so. The Applicant is making a statement with no factual basis and, as such, the Board should give it no weight. The proposed replacement of the curb cut with a truck loading zone on Connecticut Avenue is arguably an activity more dangerous to both pedestrians and motorists than the existing curb cut.

7. The Applicant and OP cite 11H §204.1, which generally prohibits driveways to required parking spaces from designated roadways but does not apply to an existing curb cut. In any event, an approved Special Exception would waive this limitation. It is not dispositive, as the Applicant and OP argue.

8. Further, neither the Applicant nor DDOT mentioned in testimony that there are several other curb cuts within one block of the site, nor did they mention that DDOT's intention to remove 3 or 4 parking spaces on the east side of Connecticut Avenue during the Streetscape Improvement Project are necessitated by its plan to reorient the service road exit from a lower volume street to Connecticut Avenue with a new curb cut (Tr. at p. 143).

9. The conclusion of the Applicant, OP and DDOT that it is not feasible to retain existing or build new parking spaces due to regulations and the physical constraints of the lot was based on incomplete information and flawed assumptions. Neither OP nor DDOT did any independent assessment of the physical features of the lot and the opportunity for developing parking if the existing surface lot were removed.

10. The possibility of new parking on-site was not fully considered. The Applicant presented a single slide in its submission (Ex. 42C, Appendix A at p. 26) that dismissed the feasibility of parking under the proposed townhomes, if accessed from Connecticut Avenue. This conclusion was based on ramp and drive lane limits. Despite the submission including a topographical map, no dimensions or engineering plans were provided to document an analysis of this and other parking options, nor was there any exploration of using the obvious height difference from Newark Street down to the existing surface lot to build parking spaces under the planned townhomes. There are no provisions in historic preservation law that prohibit a curb cut on Newark Street, nor has the grade of the street been put into evidence to be evaluated.

11. Using the same single slide (Ex. 42C, Appendix A at p. 26), the Applicant dismissed the feasibility of building new parking spaces in or under the new apartment building. For example, excavation was summarily dismissed and there was no detailed discussion of parking below the alley level**,** even though the "mezzanine" leve**l** – with easily replaceable amenities (movie room, gym, and library) – is 14 feet below the alley entrance and would itself involve excavation. The possibility of second floor parking, accessed from the alley, or of on-grade parking, accessed from Newark Street, were summarily dismissed on the grounds that they would eliminate profit-generating housing units. Again, it is Applicant who bears the burden of proof on this issue beyond declaring options "difficult" or "infeasible."

12. Next, the Applicant and OP cite C §710.2 to assert that the existing surface parking lot is non-compliant and it cannot remain because §710.2(b)(2) states that surface parking spaces shall not be located within a front yard, which is an open space covering the entire width of the lot. This regulation is not applicable to this case. There is no front yard designation in NC mixed use zones, a fact the Applicant demonstrates by siting the townhomes on the front lot line.

13. The Applicant's contention that the zoning regulations present a physical constraint to the provision of parking is not persuasive. One cannot use one's desire to avoid complying with a requirement as grounds for waiving that requirement, nor can one simply assert that what amounts to a lower return on investment is justification for concluding that parking options are "infeasible."

14. In sum, OP testified that the "most compelling" and relevant provision to the facts of this case is §703.2(a), which states that, due to physical constraints, parking cannot be provided on the lot or within 600 feet of the lot (Tr. at p. 137). As explained above, the Applicant did not examine all the options for providing parking on the lot, nor did it demonstrate that the options it rejected were infeasible. The Applicant admitted its reluctance to excavate, but did not explain why it would do so for amenities (movie room, library, gym, etc.) but not to satisfy a zoning requirement, and it asserted, without providing evidence, that ramps and driveways would not be adequate or efficient. The exploration of the several summarily dismissed options does not lead to a conclusion that there are no options and/or

that parking on the lot is not feasible. Thus, 703.2(a), which OP cites as the best reason for granting the waiver, is in fact no reason at all.

Applicant Relies on Flawed and Incomplete OP and DDOT Reports

15. The Applicant, along with OP and DDOT, emphasized in the §703.2(b) and (c) discussion and elsewhere, that there are a Metrorail station and two bus lines in proximity to the project and that that on its face should be enough to lead to a full parking waiver. The Applicant and both government agencies fail to mention that the project already received a 50% waiver on that basis. Further, it is the Opposition's contention that much more is required for a Special Exception beyond citing the existence of public transit. If the physical presence of a Metro station and a bus line were all that was required and no further analysis of their functionality and positive effect on the zone designation purposes was intended (such as providing "consumer support for businesses in the commercial area" by reducing parking demand), the zoning regulations would provide a 100% exemption rather than 50%. The Applicant and the government agencies have provided the Board with no facts in the record to suggest that this particular station and these particular bus lines are a positive influence on the parking situation. In fact, the opposite is true; the Opposition has explained and provided documentation that the public transit available is primarily commuter transit and has not relieved local businesses from the negative effect of lack of parking supply, as was found by the Deputy Mayor for Planning and Economic Development. In other words, the requirements of §703,2 (b) and (c) are not met.

16. OP, DDOT and the Applicant, responding to §703.2(d), all claim that the project will not generate any traffic congestion, but once again that is just a bare statement and does not take into account the reality of adding 35 additional housing units and 2,700 square feet of additional retail space. There will be customers driving to patronize those new stores and there will be an influx of ride share vehicles, taxis, food and merchandise delivery, and there will be both new parking demands and the traffic generated by more than 50 residents, their visitors and overnight guests. The Applicant, who bears the burden of proof, fails to clear the hurdle set by §703.2(d).

17. The Applicant and OP acknowledge that §§703.2 (e), (f), and (g) — less demand, affordable housing, existing available parking – are not applicable

18. §703.2(h), premised on the property having no access to an open public alley, is one of the provisions that the Applicant cites as meeting the requirements for a Special Exception. This does not apply to this case because this property clearly does have alley access. If the property only had access from a public street the provision might apply, but only if DDOT had refused a curb cut, which it has not, or if driveway access from a street to the property would violate a zoning regulation. This refers to11H §204.1, which could be waived. However, this provision does not apply, so it is irrelevant to consider it.

19. The provisions of §703.2(j) are not met; historic preservation does not prohibit or make "infeasible" the provision of on-site parking.

20. In sum, since none of the provisions of §703.2 are met, Applicant does not meet the requirements for a Special Exception from minimum parking requirements.

21. In addition to the several specific problems mentioned above, it is important to note that neither OP nor DDOT did any analysis of their own, but simply relied on the material provided by the Applicant. In other words, the argument is circular: The agencies base their reports on information submitted by the Applicant, and the Applicant then cites those reports in support of its request.

22. In relying on the OP and DDOT reports, the Applicant cites the expertise of each in analyzing planning impacts of proposed uses and development. We do not challenge that they have expertise, but each agency is still expected to provide its reasoning so that it might be evaluated. Neither agency applied the level of analysis of the issues required in this case**.** In fact, DDOT acknowledges that its conclusions are "based on the information [that the Applicant] provided," and that is clearly the case with OP as well. They simply went through the motions and provided an almost pro forma report filled with assumptions, and then recommended that the Board require lots of conditions to mitigate the impacts both agencies said do not exist.

ANC 3C Resolution Recommends Denial If RPP Restriction Is Not Reliable

23. The Applicant speaks to the RPP/VPP restriction condition from the ANC 3C resolution and correctly states that it, OP and DDOT agree with this condition. There is clear testimony that DDOT has never implemented this condition, which appears in numerous BZA zoning orders, but is "scoping out" a research project to evaluate RPP and how it is enforced. In fact, that is not in the record, and if it were, it would provide no assurance that DDOT plans to move expeditiously to correct what can only be described as willful rejection of actions the Board decried were essential to its decisions. The testimony in the record is that DDOT has no process to implement an RPP restriction and that it must await direction from the Mayor about how to proceed. Neither residents nor businesses nor the ANC nor the Board can rely on DDOT implementing RPP conditions. The ANC made it clear, despite the Applicant's description of a friendly, collaborative process, that there are serious parking issues in the neighborhood that affect residents and businesses, and that without every one of its long list of conditions the ANC would not support this application. As such, given the testimony at the hearing, the ANC does not support – it opposes – the waiver.

COVID-19 Should Not Be Ignored, Nor Should Government Actions to Reduce the Parking Supply

24. It is startling that the Applicant characterizes the effects of the pandemic, including unprecedented actions taken by Mayor Bowser, as temporary, hypothetical, and irrelevant to the Board's deliberations. It is common knowledge that businesses have suspended normal operations, that unemployment is at historic high levels, that children cannot safely attend school or families safely gather together, and that no one who has a choice is using public transit. Life has been upended in unfathomable ways and the reach into normalcy is limitless. The Applicant seems to believe the effects of the pandemic on Cleveland Park and the District are beyond the Board's authority to consider in a case that involves adverse impacts, and that it should proceed as if the District is in a bubble permanently fixed in 2019. According to the Applicant, the indefinite loss of 28 parking spaces in the Connecticut Avenue service road apparently will not affect local businesses; this is unquestionably not accurate**.** But the Applicant makes a different argument when it seeks to also remove from the Board's deliberations consideration of the loss of parking spaces due to the DDOT Streetscape Improvement project. In that case, the Applicant says those are being removed for safety reasons and that fact alone means the Board cannot

consider the impact of this action on this case. Once again, Applicant makes an argument supported by neither the evidence nor the zoning law.

25. There is nothing in the record about the spaces being removed for safety; in fact, they were removed because DDOT intends to open a new curb cut onto Connecticut Avenue from the service road (arguably a less safe option), and the curb cut is in the location of parking spaces. Significantly, both of these government actions to reduce the parking supply had nothing to do with an assessment of supply and demand. On the contrary, the Mayor's decision was an emergency action in response to a public health emergency, and the DDOT action was a function of optional streetscape redesign. Notably, both actions were omitted from the Applicant's parking study as well as from both government agencies' reports. If included, they would have reinforced the conclusion that no parking spaces are available during peak and non-peak use times. These actions resulting in reduced parking supply are clearly relevant to this case and must be part of the Board's consideration.

Conclusion

26. The Opposition provided detailed information that this application was not in harmony with the zoning regulations, especially the purpose of the NC-3 zone designation to promote pedestrian activity, safety, and consumer support for businesses. The Applicant did not refute the evidence provided by the Opposition and only asserted that new housing was all that was needed to be in harmony with zoning. The Opposition also provided detailed information that the approval of the requested parking waiver would create and worsen adverse impacts on the nearby properties, including both residents and businesses. The Applicant dismissed these concerns as "inconveniences," never addressed the effect on businesses of the imbalance of supply and demand for parking, omitted key information about the parking supply in the neighborhood, and relied on proximity to a Metrorail station as enough to offset the abundance of evidence from residents, the ANC, and the findings of a formal Deputy Mayor for Planning and Economic Development (DMPED) study of Cleveland Park businesses, all of which concluded that parking is a critical problem.

27. The crux of the Applicant's case is that it satisfies the requirements of C §703.2 because the provision of on-site parking is infeasible, which it clearly is not. The Opposition has shown that there may, indeed, be feasible options. Beyond the fact that there is an existing 14-space lot, any number of parking options were rejected with statements that they were "not desired" or "difficult" or "infeasible" without provision of engineering studies and full analyses. The Opposition notes that other options were not even presented and are seemingly rejected-by-omission.

28. The burden is on the Applicant to prove it understands its obligations and that it has tried assiduously to satisfy the zoning requirements — and that it does not impose hardships on the surrounding residents and businesses — in order to fulfill its ambitious development plan without providing the required on-site parking. The Opposition has convincingly demonstrated the Applicant has fallen well short of meeting its full burden and that the Board is legally obligated to deny this application.