

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 19309 of Valor P Street, LLC, pursuant to 11 DCMR § 3103.2, for variances from the lot occupancy requirements under § 772.1, and the rear yard requirements under § 774.1, to renovate an existing structure to create a mixed-use building containing eight dwelling units with a ground-floor restaurant in the DC/C-2-C District at premises 2147-2149 P Street, N.W. (Square 67, Lot 835).

HEARING DATES: July 12, 2016, October 18, 2016, and November 16, 2016
DECISION DATE: December 21, 2016

DECISION AND ORDER

On April 28, 2016, Valor P Street, LLC (the “Applicant”), the owner of the subject premises, submitted a self-certified application (the “Application”) as subsequently amended to reduce the relief requested, requesting variance relief from the rear yard and residential lot occupancy requirements, to renovate an existing structure with a two-story addition to the building to create a mixed-use building containing nine dwelling units with a ground-floor retail in the DC/C-2-C Zone District at 2147-2149 P Street, N.W. (Square 67, Lot 835) (the “Property”).¹ For the reasons explained below, and following public hearings, the Board of Zoning Adjustment (the “Board”) voted to approve the Application.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated May 10, 2016, the Office of Zoning sent notice of the application to the Office of Planning (“OP”); Advisory Neighborhood Commission 2B (“ANC”), the ANC for the area within which the subject property is located; the ANC Single-Member District 2B02; the Office of Advisory Neighborhood Commissions; the District Department of Transportation (“DDOT”); each of the four At-Large Councilmembers; and the Councilmember for Ward Two. (Ex. 12-20.) A public hearing was initially scheduled for July 12, 2016. Pursuant to 11 DCMR § 3112.14, the Office of Zoning

¹ The Application was modified after the initial filing to reduce the amount of lot occupancy and rear yard relief requested. The Applicant reduced the amount of lot occupancy relief requested on the second and third floors from 100% lot occupancy to 97% lot occupancy from the requirement of 80% maximum residential lot occupancy, and the amount of rear yard relief requested 0 feet on all floors to 3 feet on floors 2 through 5 from the 15 foot rear yard requirement.

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mailed notice of the public hearing to the Applicant, the ANC, and the owners of property within 200 feet of the subject property on May 20, 2016. (Ex. 21-23.) Notice of the public hearings was also published in the *DC Register* on May 23, 2016, August 19, 2016, September 30, 2016, and November 4, 2016.

ANC Report. At a specially scheduled and duly noticed meeting held on July 6, 2016, with a quorum present, the ANC, by a vote of 6-0-2, voted to approve a resolution requesting a continuance of the initial hearing scheduled for July 12, 2016. At a subsequent regularly scheduled and duly noticed meeting held on November 15, 2016, the ANC voted to approve a resolution, by a vote of 5-3-1, to not object to the Board's approval of the Project contingent on the condition that the Board revoke the ability of the Property in perpetuity to apply for and receive an alcohol license. For the reasons explained below, the Board did not adopt the ANC's proposed condition. The ANC also raised additional issues and concerns in their resolution that are addressed fully below.

OP Report. By report dated July 5, 2016, OP recommended denial of the Applicant's request for relief from the lot occupancy requirement of 80% maximum for residential use under § 772.1 to allow 100% lot occupancy on the second and third floors and relief from the rear yard requirement of 15 feet under § 774.1 to allow no rear yard. The Applicant submitted revised plans reducing the lot occupancy relief requested from 100% to 97% for the second and third floors from the lot occupancy requirement of 80% maximum for residential use pursuant to § 772.1 and reducing the amount of rear yard relief required under § 774.1 to three feet for floors 2 through 5. Thereafter, OP submitted a second report, dated November 4, 2016, wherein OP recommended approval of both the lot occupancy and rear yard relief requested by the Applicant. At the public hearing on November 16, 2016, OP also recommended approval of the requested areas of relief.

DDOT Report. By report, dated July 6, 2016, DDOT had no objection to the approval of the Applicant's requested variance relief despite minor potential increases in traffic, noting that no parking was required by the Project under § 2120.3 and that the Applicant's plans for loading, trash removal, and long term bicycle storage met requirements of the Zoning Regulations and were sufficient in terms of potential safety and capacity impacts on the traffic networks in the area.

Requests for Party Status. The Applicant and the ANC were automatically parties in this proceeding. The Board reviewed one request for party status in opposition to the Application from Dupont West Condominium (the "Dupont West"). (Ex. 43.) At the hearing on July 12, 2016, the Board granted the Dupont West's request for party status. The Applicant did not object to the party status request.

Public Hearings. The Board conducted a public hearing on July 12, 2016, and at the request of both the ANC and the Applicant, the hearing was continued to October 18, 2016. At the request of the Applicant (Ex. 65), the October 18, 2015 hearing was subsequently postponed to November 16, 2016. At the Board's hearing on November 16, 2016, the Board requested additional filings and information (submitted on the record at Ex. 95-99B.) The Board took a vote during a public

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meeting on December 21, 2016, during which the conditions of approval were discussed and approved by the Board. (12/21/16 Tr. 22-24.)

Party in Opposition. The Dupont West is an association of condominium owners in the property adjacent to the Project, located at 2141 P Street, N.W. (Ex. 43.) A summary of the Party in Opposition's main issues and concerns is: (1) Property does not have extraordinary characteristics, whether taken singly or as a confluence; (2) The Vacant Area (*see* Finding of Fact 14) was part of the Dupont West's property as early as 1894, and because the Lot configuration has existed in that configuration for a "long period of time, through many uses..." (11/16/16 Tr. 87), the subdivision history does not constitute a unique condition; (3) The Property's change in grade also affects the Dupont West, and so is found within the same square. (11/16/16 Tr. 88); (4) The Property's narrow and long length "is what it is" (11/16/16 Tr. 88); (4) The existing, exposed side walls are no different from a "semi-detached house or a property on an alley in a historic district." (11/16/16 Tr. 92-93); (5) The only practical difficulties are "those imposed by the Applicant themselves because of their plans"; (6) The Project will have substantial detriment and negative impacts; including congestion, light and air (on both the Dupont West and the historic Walsh Stables); and (7) construction will also be detrimental.

Persons in Support. The Board received letters and petitions from persons and businesses in support of the application. Persons and businesses in support of the Project generally noted that the Project was appropriate for the surrounding area and that there would be no adverse impact on the neighborhood. Five petitions in support from neighboring residents, signed by a total 11 individuals, and two petitions signed by three businesses were submitted to the record.

Persons in Opposition. The Board also received letters and heard testimony from persons in opposition to the application. The persons in opposition were generally concerned with the impacts on the light, air, and privacy on their residences. Concerns regarding the impact of additional residents to the neighborhood on traffic, parking, noise, and waste management, as well as the change to the historic building streetscape, were also noted. Concerns were also raised regarding a tree on adjacent property in the rear and the Project's mechanical equipment screening. Twenty-six letters of opposition were submitted by individuals, including many of the residents of Dupont West Condominium and the owners of Walsh Stables. In addition, a petition in opposition, signed by 22 individuals (16 of whom were the same individuals who submitted letters in opposition), and copies of two Letters to the Editor of the *Dupont Current* signed by five of the same individuals who submitted letters in opposition, were submitted to the record. Kay Jackson, one of the owners of Walsh Stables, and Farrokh Khatami, John Hammond, and Judith Snyder, residents of Dupont West Condominium, testified at the hearing on November 16, 2016.

Applicant's Case. During the November 16, 2016 public hearing, the Applicant provided evidence and testimony in support of the Application. The Applicant produced expert testimony from Ellen McCarthy, an expert in land use planning and zoning, who asserted that the Property was subject to unique and exceptional conditions and that the Project will not cause substantial detriment to the public good or impair the Zone Plan. The Project architect, Matt Stevison of PGN Architects, spoke in an expert capacity regarding design elements of the Project and the need for the requested

relief as it pertains to the Project's rear yard and lot occupancy specifications. Mr. Stevison also concluded that the strict application of the Zoning Regulations would result in a practical difficulty to the Owner and that the Project will not cause substantial detriment to the public good in terms of reduction in light and air to the Dupont West. Finally, Will Lansing testified on behalf of the developer, responding to questions from the Board.

FINDINGS OF FACT

THE SUBJECT PROPERTY

1. The subject property is a single tax lot with the joint addresses of 2147-2149 P Street, N.W. (Square 67, Lot 835) ("the Property").
2. The Property is improved with two townhouses (the "East Row Dwelling", the "West Row Dwelling", collectively the "Existing Structures"). The Existing Structures were designed by architect, Alfred B. Mullett in 1894. The Existing Structures are approximately 40' in height along P Street, reducing in height towards the rear of the Property. Subsequently, the party wall shared by the structures was removed and the separate row dwellings were combined internally.²
3. The West Row Dwelling has an existing semi-exposed, historic side wall that is 51'-in length (the "West Side Wall"). The East Row Dwelling has an existing, exposed historic side wall that is 34' in length (the "East Side Wall").
4. The Existing Structures are three stories in height. The ground floors of the Existing Structures are built out to the Property's rear yard³ and there is no rear yard on the ground floor. Accordingly, the Existing Structures occupy 100% of the lot.
5. The Property is 40' in width and 100' in depth. The Property's total land area is approximately 4,000 square feet, and it was zoned C-2-C in the Dupont Circle Overlay (C-2-C/DC).
6. The grade changes approximately 13' from the front to the rear of the Property.
7. The Property is located in the Dupont Circle Historic District (the "Historic District"), and the Historic Preservation Review Board ("HPRB") approved concept plan 16-528 on October 27, 2016, which requires the Project's proposed addition to be set back from the building façade by 34' along the east side and 51' along the west side. (Ex. 70C.)

² See Ex. 70C, which states that the interior of the two row dwellings "have had extensive renovations over the last several decades to accommodate different uses as a restaurant and nightclub, resulting in the loss of the original structural system and the construction of additions at the rear bringing it to 100% lot occupancy."

³ The record does not include building permits documenting that the existing rear addition was constructed pursuant to building permits.

8. Only 15% of the lot area along P Street is located in the Historic District.
9. The Property is narrower than other neighboring, developed properties. It is also longer than other, historic properties to the west along P Street.
10. The Property is located in Square 67, which is a large square bounded by P Street, N.W. to the south, 22nd Street, N.W. to the west, Q Street and Massachusetts Avenue N.W. to the north and 21st Street, N.W. to the east. The Square is split-zoned between the C-2-C and R-5-E Zone Districts.
11. The Property is located mid-block, along the busy, commercial, and high-density residential/hotel block of P Street of Dupont Circle. The surrounding area on P Street is commercial in nature. The adjacent property, Dupont West, is a 10-story, mixed-use building with ground floor retail and residential units above. Also to the east are the Hotel Palomar and the Marriott Residence Inn, both 10 stories tall. The taller buildings to the east are not contributing to the Historic District. To the west along P Street are multi-level eateries and shops that are deemed to be contributing buildings to the Historic District.
12. To the north is the Walsh Stables, a historic carriage house.
13. The Dupont West building is separated from the Property by 23'-6", which includes a driveway that provides access to that building's below grade parking spaces, and the Dupont West's separate side yard. The Dupont West includes balconies that are inset into that building, and do not extend into the side yard separation between the Property and the Dupont West building.
14. There is an approximately 22' x 40' deep vacant area between the Property and the Walsh Stables (the "Vacant Area"). A plat from 1796 showed the Vacant Area as being part of the Property. (Ex. 9C, 83A1 [8].) The Property included the Vacant Area as late as 1843. (Ex. 9C showing the 1843 subdivision plat identified the Property as "Lot 6", which had the dimensions of 62' x 120'). Also, a Plat from 1892 included the Vacant Area in the "Lot 6", and in 1892, the Existing Structures could have been constructed all the way back to the 120' limit of Lot 6. (Ex. 53.) On or about 1910, the prior Lot 6 was subdivided into the current Property, and the new Lot 49 was created that became part of the Dupont West. (Ex. 9C, 1910 Plat.) Accordingly, in the 1910 Subdivision, the Vacant Area was removed from the Property lot and became part of the Dupont West. The Vacant Lot was the condition when the Dupont West was constructed in 1980. (11/16/16 Tr. 103.)
15. The Property is well-served by public transportation. The Property is approximately 0.3 miles from the Dupont Circle Metro Station. The Property also has direct access to numerous bus lines, including those that run along P Street, Q Street, 20th Street and Connecticut Avenue. Also, there are a number of Capital Bikeshare stations and ZipCar vehicles very close to the Property. On walkscore.com, the Property receives a walk

score of 97 out of 100, deemed a “walker’s paradise,” and receives a bike score of 91, a “biker’s paradise.”

THE APPLICANT’S PROPOSAL

16. The Applicant will preserve the Existing Structures’ front façades and the historic side walls of the West and East Row Dwellings.
17. The Applicant will construct a two-story addition with approximately 2,653 s.f. of ground floor retail and nine units (the “Project”).
18. The Project will have a total building height of 60 feet plus a mechanical penthouse. The Project initially proposed a three-story addition, but it was reduced. The maximum height in the zone is 90’.
19. The Project will have a total floor-area-ratio (“FAR”) of 6.0. The maximum FAR in the zone is 9.0 FAR.
20. Due to the 13’ change in grade from the front to the rear, the Applicant’s proposed 2,635 s.f. ground floor retail/restaurant space will be at grade level on P Street, but will be below grade at the rear of the Property. The Project’s main residential access will be on its west side, with the retail access near the middle of the frontage and the emergency egress on the east side.
21. The Applicant located the main residential entrance on the Project’s west side, so it would be more than 63’ away from the Dupont West’s property line.
22. The Project requires two means of egress, which both need to egress out the front of the building. In addition, it requires an elevator. Accordingly, the Project’s “Access Core” (the Project’s elevator and stairway core) is approximately 27’ in length, and must provide access to both sides of the 40’-wide Property. (Ex. 70.) If the Access Core were squared off, it would be functionally more than 1,000 s.f., equating to approximately 25% of the Property’s total lot area. (Ex. 70.) The Access Core measures approximately 708 s.f., with a core factor of 18%.
23. To ensure that the Access Core could reach all four stories of units, the Access Core is pushed 51’ into the lot. The “rear” of the Access Core is located 78’ into the lot. (Ex. 70.)
24. The Project’s second and third floors are identical in design and layout. Each floor extends from the front property line to the rear property line, and they propose three units each. The two front units will be long and narrow, and with one small, rectangular unit in the rear. The west side units will only have natural light from the P Street windows because it is bounded by the original, 51-foot West Side Wall that does not have any windows. The east side units will only have windows in the rear, beyond the end of the

34' East Side Wall. The rear units will be one bedroom units that have windows along the rear. (Ex. 70A3.)

25. The Project's two-story addition (for the Project's fourth and fifth floors) will be set back from the building façade by 34' along the east side and 51' along the west side, as approved by HPRB in concept plan 16-528 on October 27, 2016. (Ex. 70A3.) The addition will likely not be visible from P Street. (11/16/16 Tr. 105.)
26. As initially proposed, the upper story addition was proposed to be located only 20' from the façade. (Ex. 9D.) The Applicant moved the addition back to 34' along the east side and 51' along the west side, at the direction of HPRB. (Ex. 70A1- 70A5.)
27. The increased setback resulted in a 26% reduction in the fourth and fifth floors from what was initially proposed. (Ex. 70.)
28. The Project plans (Ex. 70A1- 70A5) illustrate that due to the reduced size of the upper story additions, the Access Core is approximately 523 s.f. on the fourth and fifth floors, resulting in an approximately 23% core factor, which is high for this type of development.
29. As initially designed, the Project had no rear yard. As approved, it has a three-foot rear yard on floors 2 through 5. (Ex. 70A3.)
30. The Project proposes 100% lot occupancy on the ground floor and 97% lot occupancy on the 2nd and 3rd floors. Due to the setbacks, the lot occupancy on the 4th and 5th stories is reduced to below 80%.
31. The Project's proposed materials include painted brick, metal panels and aluminum window frames. These materials were approved by HPRB.
32. As a Historic resource, no parking is required. None is provided, but the Project does provide bike spaces in the cellar.
33. No loading is required. None is provided.

ZONE PLAN/

34. The Property is zoned C-2-C, which permits a maximum height of 90' and a maximum FAR of 6.0. The C-2-C Zone District is identified as one of three community business center zones consistent with the mixed-use character and the presence of a major metro station within three blocks. (11/16/16 Tr. 76.)

SOLAR AND SHADOW STUDIES

35. For purposes of reviewing the Project's solar/shadow studies, it was determined that a "matter of right" project would be one that is 60' in height and includes an addition **with**

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the setbacks required by the HPRB Concept Plan approval (34' on the Project's west side and 51' on the Project's east side), but provides a 15' rear yard. (11/16/16 Tr. 68; 75;162, Ex. 99A.)

36. The Record includes detailed sun/ shadow studies demonstrating that the Project with the requested rear yard and lot occupancy relief would only impact approximately 4.4% of the DuPont West's linear feet of windows over what could be constructed as a matter of right without the relief. (Exs. 70F, 70G, 83A3 [pg. 65]; 95A.)
37. The record details that the Existing Structures, the Walsh Stables and a matter of right design (with the same, HPRB-approved setback, at the same 60'-height, but without the rear yard and lot occupancy relief) do and would impact portions of the Dupont West's west-facing floors first through sixth. This impact would not change with the Project.
38. The Project will have no impact on the Dupont West's west-facing seventh, eighth and ninth stories. (Ex. 70.)
39. Further, the minor impact associated with the rear yard and lot occupancy relief would impact approximately 4.4% additional window linear feet than would a matter of right development without the relief. This results in a minor impact to five additional units (out of 47 of the Dupont West's west-facing units) in addition to the units that would be impacted by a matter of right design and that are already impacted by the Existing Structures and the Walsh Studies. (Exs. 83A3 [pg. 65], 95, 99A.) The Project would only extend over a minor portion of those five units, leaving a large portion of those windows non-impacted. (Exs. 83A3 [pg. 65], 95, 99A.)
40. The Applicant's sun/shadow studies also demonstrate that at most, during the Winter Solstice, an extra 30 minutes of shade, which equates to 5.1% of sunlight, will be impacted on the Dupont West. Further, that impact is limited only to approximately 4.4% of the windows on the East Side of the DuPont West over a matter of right design. (Ex. 70G, Ex. 83A2 [pg. 34].)
41. The Applicant's sun/shadow studies also demonstrate that at most, during the Summer Solstice, an extra 60 minutes of shade, which equates to approximately 6.6% of total day light would be reduced. Such reduction would only apply to approximately 4.4% of the DuPont West's east side's linear feet of windows over a matter of right design. (Ex. 70G, Ex. 83A2 [pg. 35].)

VIABILITY OF ALTERNATIVE MATTER OF RIGHT DESIGNS

42. Due to the required length and location of the Access Core, only 22' of lot length remain on floors 2-5. If the required 15' rear yard had to be accommodated, the maximum width of the rear units would be reduced to seven to eight feet. This width is not sufficient to

provide a functional unit layout with the necessary adjacencies for bathroom, kitchen, and bedroom area. Nor would such a small space accommodate a bed because the standard bed-frame is approximately 6'-8". (Ex. 70D.)⁴

43. The Access Core size and shape is dictated by fire and safety code requirements. This creates an Access Core that has a core factor of approximately 23% on the fourth and fifth stories, which is well above industry standards. (Ex. 70D.) If the rear yard were required, the core factor increases to approximately 30%, creating a condition the Board had previously determined to cause a practical difficulty. *See* BZA Case Nos. 18878, 19223, and 18905.
44. If the rear units are removed to accommodate the rear yard requirement, the resulting layout would be very inefficient. Such a design would require the Access Core be pushed back to be located at the absolute rear of the building. This location would block all rear light into the units. Because there are no windows on the historic East and West Side Walls, such a condition would require that the only sources of light to the second and third floor units would come from the P Street windows. This would result in long and dark, "bowling alley"-type units that are inefficient and awkwardly designed. In regard to the fourth and fifth floors, such a design would also produce awkward and inefficient units. Those units would need to be set back 51' on the west side and 34' on the east side and could not accommodate a new, side window, which will result in insufficient space for additional bedrooms and awkward, dark rooms. (Ex. 70.)
45. Also, "flipping" the Access Core to the east side and pushing it forward to start behind the East Row Dwelling's 34'-historic walls creates significant difficulties with unit layout and square footages. (Ex. 70E.) This alternative impacts all floors of the Project. On the ground floor, this alternative would narrow the usable area in the front of the proposed restaurant, and it would act like a "belt" to effectively divide the restaurant into a small, narrow front room with natural light with a larger, below-grade, dark rear room. This is directly contrary to optimal restaurant design, which seeks to maximize the space in the most visible front portion of the restaurant. On the second and third floors, this would create a blank wall facing the Dupont West, and would limit the size of the east side front unit to 660 s.f. with the only windows along the P Street frontage. Further, on the fourth and fifth floors, this "flipped" alternative reduces the size of the front unit to 288 s.f., which is too small for a functional, habitable space. (Ex. 70E.) Also, it would be impossible to combine the fourth and fifth floor units into a two-story duplex, because a compliant stairway to connect the two floors would take up 140 s.f., leaving insufficient room to locate a bedroom or kitchen. Also, the elevator and fire door location and door swing dimensions would eliminate the possibility of locating an interior connection stair between the fourth and fifth floors without improperly blocking one of the required access areas. This results in the only possible alternative, which would be to eliminate the 288

⁴ Because the Application did not seek a use variance, review of alternative designs was not required. However, the Applicant provided that information into the record, and it is summarized here.

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s.f. unit, thereby increasing the core factor of the fourth and fifth floors to an untenable 54%.

46. Also, compliance with the 80% lot occupancy requirement on the second and third floors would result in a two-foot-wide rear unit, given the required Access Core location. The total square footage of such a unit would be 80, which is not viable. Also, because the 80% lot occupancy is only required on the second and third floors, to be accommodated, the building design would have to be pulled in only on the second and third floors, allowing the fourth and fifth floors to cantilever down to the ground floor.⁵

REQUESTED RELIEF

47. In the DC/C-2-C Zone District, the Zoning Regulations require a 15' rear yard and permit a maximum lot occupancy of 80% for a building with residential use. As finally presented to the Board, the Project will provide a three-foot rear yard on floors 2 through 5, and a lot occupancy of 97% on the second and third floors. (Exs. 70A and 83A.)
48. The Application therefore requests 100% relief pursuant to 11 DCMR § 3103.2 from the requirements for rear yard § 774.1 and residential lot occupancy for the 2nd and 3rd floors (§ 772.1.)

EXCEPTIONAL CONDITIONS

49. The Property is a contributing building to the Dupont Circle Historic District, and only 15% of the lot area on the north side of P Street is located within the Historic District
50. Unlike many of the historic row dwelling type structures within the Square and along the P Street block, both sidewalls of the structure are either totally or almost entirely exposed (east side is totally exposed; west side is exposed above the adjacent one-story structure). (11/16/16 Tr. 61.)
51. Most historic structures are row dwellings and attached, and the walls on either side cannot be seen. (11/16/16 Tr. 61.)
52. The Property was designed and constructed as two distinct buildings by noted architect AB Mullett. (Ex. 92 (building permit history on page 5 of PowerPoint).)
53. The evidence is that the majority of the historic buildings in the Historic District are either relatively modestly scaled row house residential type dwellings, grand mansions like the Anderson house on the north side of the square, or service buildings like the three large

⁵ This design would be absurd even if the rear yard variance were not granted because the lot occupancy requirement would only apply to the second and third floors. Therefore, the ground, fourth, and fifth floors could still extend five feet beyond the second/ third floors and provide a compliant, 15-foot setback.

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stables. But the Property's structures were designed in a more ambitious scale, and "therefore more likely to be desirable for additions." (11/16/16 Tr. 62-63.)

54. Topographical change is 13 feet between the elevation in the front to the rear of the Property.
55. The Vacant Area had originally been a part of the Property from the 1700s through 1892. But in a 1910 Subdivision, the Vacant Area was removed from the Property lot and became part of the Dupont West's Lot 49.
56. HPRB approved concept plan 16-528. In approving the concept plan, HPRB required the Project's proposed addition to be set back from the building façade by 34' along the east side and 51' along the west side. This locates the Property's required elevator/stairway access core (the "Access Core") 51' behind the Property's façade. (Ex. 70C.)
57. At 40' in width, the Property is uniquely narrow compared to neighboring developed properties. The Dupont West property has a width of 84 feet, and the Hotel Palomar property is 5.8 times as wide as the Property, with an approximate width of 232 feet. Therefore, the Property is more than 53% narrower than the Dupont West and 83% narrower than the Hotel Palomar site.
58. The Property is uniquely longer than the four historically-designated properties to the west on P Street. The comparison is reflected in the chart below:

Address	Lot No.	Lot Length
2147-2149 P Street N.W. (the subject Property)	835	100'
2153-2155 P Street N.W.	62	50'
2157 P Street N.W.	46	50'
2159 P Street N.W.	47	50'
2161 P Street N.W.	48	50'

59. The combination of the exceptional conditions (part of the 15% of the north side of P Street determined to be contributing to the Historic District, unique subdivision history, uniquely narrow, uniquely long, grade change, HPRB approval, dual-row dwelling condition, uniquely exposed, historic side walls) makes the Property unique in the neighborhood. There is no other Property in the neighborhood and within the Square that shares the same confluence of exceptional characteristics with the Property.

PRACTICAL DIFFICULTIES

Rear yard

60. The Applicant would face a practical difficulty with strict compliance of the rear yard for the reasons stated in Findings of Fact 61 through 66.
61. The evidence demonstrates that provision of the full 15-foot rear yard would reduce the rear unit to 7'-8' in width, which is too small for a functional unit. (Ex. 70D.)
62. The HPRB concept plan approval required the 51'-west side setback in conjunction with the Property's other exceptional conditions and the location of the main residential entrance on the west side, and required the Project's approximately 523 s.f. Access Core (which is required to include two separate stairways and an elevator shaft to satisfy life-safety code) to be pushed back to 51' feet behind the Property's façade. (Ex. 70D.)
63. Therefore, only 22 feet of lot length remain on floors 2-5 based on the access core's size (523 s.f.) and its location on the west side of the building.
64. This would also result in extremely high core factors, ranging from 20% to 40%.
65. The evidence documented that without the rear yard relief, the resulting unit layout is inefficient, dark and narrow even without the rear units. (Ex. 70.)
66. The evidence also demonstrated that "Flipping the access core" to the east side is also inefficient, because it creates an unfeasible layout for ground floor retail and results in 4th and 5th floor units that are 288 s.f. in size, which is far too small for functional habitable space. (Ex. 70E.)

Lot Occupancy

67. For the reasons stated in Findings of Fact 68 through 70, It is practically difficult for the Applicant to provide the 80% residential lot occupancy on floors 2 – 3 due to the Access Core location (51' behind the façade).
68. Limiting residential lot occupancy to 80% would limit the rear unit sizes to two feet in width (total of 80 feet). This tiny unit is not feasible.
69. The change in grade also impacts the second and third floor units because with the lower grade at the rear, the second floor units are effectively "at grade". Therefore, those units are functionally "ground floor" units.
70. Requiring the 80% lot occupancy, would result in having the second and third floors pulled in 20', with the fourth and fifth floors extended further. This would be a cantilever condition that would not be feasible. (See Ex. No. 70, 11/16/16 Tr. 107.)

NO SUBSTANTIAL DETRIMENT TO PUBLIC GOOD OR ZONE PLAN

71. The Project furthers the intent and goals of the DC/C-2-C Zone, which permits heights of 90' and density of 6.0 FAR, by redeveloping the Property with a mixed-use development with an emphasis on residential density. The ground floor retail will provide an active, pedestrian-oriented experience with an "emphasis on fostering economic and housing opportunities." (11/16/16 Tr. 78.)
72. The Project would cause no substantial detriment to the public good, including the Dupont West or the Walsh Stables. The Project will be separated from the Dupont West by 23'-6", and from the Walsh Stables by 25'.
73. Also, the Applicant's "window study" and a "sun study," demonstrate minimal impact on the Dupont West. Specifically, those studies establish that only approximately four percent of the Dupont West's linear feet of windows would be impacted over and above a matter of right project. (11/16/16 Tr. 69.)

CONCLUSIONS OF LAW AND OPINION

Pursuant to 11 DCMR § 3103.2, the Applicant seeks area variances from the requirements for rear yard (§ 774.1) and residential lot occupancy for the second and third floors (C § 772.1) in order to provide no rear yard on the ground floor and a three-foot rear yard on floors 2 through 5 and 97% lot occupancy on the 2nd and 3rd floors. The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that 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. (See 11 DCMR § 3103.2.)

Based on the findings of fact, the Board concludes that this application satisfies the requirements for variance relief in accordance with § 3103.2.

Extraordinary or exceptional situation.

For purposes of variance relief, the "extraordinary or exceptional situation" need not inhere in the land itself. *Clerics of St. Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). Rather, the extraordinary or exceptional conditions that justify a finding of uniqueness can be caused by subsequent events extraneous to the land at issue, provided that the condition uniquely affects a single property. *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987); *DeAzcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978) (the extraordinary or

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exceptional condition that is the basis for a use variance need not be inherent in the land but can be caused by subsequent events extraneous to the land itself... [The] term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases...); *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979) (for purposes of approval of variance relief, “extraordinary circumstances” need not be limited to physical aspects of the land).

The extraordinary or exceptional conditions affecting a property can arise from a confluence of factors; the critical requirement is that the extraordinary condition must affect a single property. *Metropole Condominium Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082-1083 (D.C. 2016), citing *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (confluence of location of existing structure and easements created uniqueness); see also *Monaco v. District of Columbia Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979) (for purposes of approval of variance relief, “extraordinary circumstances” need not be limited to physical aspects of the land and finding uniqueness based on confluence of restrictive covenants, position of adjacent building and common ownership of contiguous properties); *Downtown Cluster of Congregations v. District of Columbia Bd. of Zoning Adjustment*, 675 A.2d 484, 491 (D.C. 1996) (confluence of small footprint of building, limited vertical access, and proximity to public transportation created uniqueness). Further, a property’s uniqueness should be different from other properties in the neighborhood. *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211 (D.C. 2016).

The Court has clearly determined that identification as a “contributing building” to a Historic District “in and of itself” cannot create an “exceptional condition”. See *Dupont Circle Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, No. 16-AA-932 (D.C. April 12, 2018) (holding that the “presence of a contributing structure is not sufficient to constitute an exceptional condition” and vacating and remanding Board decision concluding that “the contributing nature of the [property in that case] would in and of itself represent an exceptional condition”); *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 942 (D.C. 1987) (reversing the decision of the Board after finding that the subject property was no different in size or other conditions to other, nearby properties and that the property in that case was not unique because “the inclusion of intervenor’s property in the Capitol Hill Historic District is not a condition which uniquely affects the lot at issue”); See also *Myrick v. District of Columbia Bd. of Zoning Adjustment*, 577 A.2d 757, 760-61 (D.C. 1990) (reversing the Board’s granting of a variance when the subject property was indistinguishable from neighboring properties in size and explaining “the fact that a piece of property or a structure is located in a historic district cannot satisfy an applicant’s burden of proving that the hardship is peculiar to that property or structure”).

The Court, however, has not determined that being a contributing structure to a historic district *cannot* be one of the “confluence” of factors. Indeed, the testimony in this case establishes that the Office of Planning understands that a property’s historic nature “may be considered a contributing factor” (See 11/16/16 Tr. 112.) This Board has found on numerous occasions that being identified as a contributing building in a historic district constitutes a portion of the confluence of factors that establish an “exceptional condition”. See *Application No. 18905 of*

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Jemal's 9th Street Gang of 3, LLC (identifying multiple frontages and topography as exceptional conditions in addition to the property's historic nature); *Application No. 14247 of 1606 New Hampshire Ltd., Partnership* (identifying building's non-conforming nature as an exceptional condition in addition to the property's historic nature); *Application No. 18201 of Ingomar Associates Inc.* (finding the "relatively small building" and the scenic, open space and façade easement created by a prior owner in addition to the property's historic nature create an exceptional condition).

In this proceeding, the Applicant asserted that the subject property has an exceptional situation or condition due to several factors, including: the historic status of the building and HPRB's approval of the Concept Plan 16-528 in which HPRB required the addition to be set back from the building façade by 34' along the east side and 51' along the west side; only 15% of the lot area on the north side of P Street is located within the historic district; the sidewalls of the structure are either totally or almost entirely exposed, which is unique in the square; the Property is formerly two distinct buildings that were designed by noted architect AB Mullett and as designed the structures are more ambitious in scale than other row dwellings; a 13-foot change in grade between the front and rear; the existence of a 22' x 40' Vacant Area between the Property and the Walsh Stables to the rear that had initially been part of the Property but was transferred to the adjacent property via a prior subdivision circa 1910; the Property is uniquely narrow compared to neighboring developed properties (it is more than 53% narrower than the Dupont West and 83% narrower than the Hotel Palomar); and the Property is more than twice as long in depth than historic properties. The evidence in the record regarding exceptional conditions was substantiated by the Applicant's expert in land use. (*See* Testimony of Ellen McCarthy, 11/16/16 Tr. 60-65.) This evidence is persuasive that a confluence of factors exists here that do not impact other properties in the neighborhood or Square.

The Dupont West agreed that certain elements of the Applicant's reasons for uniqueness have merit: the Vacant Area is owned by the Dupont West and it will not be developed; and that the Property is uniquely "long and narrow". (*See* 11/16/16 Tr. 88 (Bob Oaks' testimony regarding the Property's unique length and narrowness concluded that "it is what it is.")) However, the Dupont West argued that on the whole, the Property did not satisfy the "exceptional condition" test because being a contributing building to the Dupont Circle Historic District in itself did not create an "exceptional condition" and that "being part of the historic district [the Applicant] should have realized that the they would need to accommodate themselves with the current buildings that they had" (11/16/16 Tr. 121); the Property was a "garden variety rectangular parcel"; and the historic records did not appear to show that the Vacant Area had been part of the Property. The Dupont West also stated that the 13'- change in topography also affects its property, but provided no evidence to support that statement.⁶ The Dupont West also argued that the previous subdivision

⁶ The Board finds persuasive the testimony of William Adair and Kay Jackson, the owners of the Walsh Stables to the rear (who testified in opposition to the application), of the existence of the topographic change, stating "due to a slight incline" the 2005 addition to the structure "did not severely impact us". *See* BZA Ex. 48. Notably, the owners of the Walsh Stables did not argue that the Property lacked exceptional conditions.

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history (that the Property and the Vacant Lot had been the only lot as recently at 1896) did not make the Property unique. Further, the Dupont West representative stated that “everything that the developer took on when they bought the building just over a year ago, has been in place for over a century”.⁷ The ANC also identified that the Property was “rectangular” in shape, making it “quite ordinary”, and that “compliance with historic preservation is not an extraordinary condition”. (Ex. 90.)

Because a property’s identification as a contributing building to a historic district, “in and of itself,” is not an “exceptional condition”, *Dupont Circle Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, No. 16-AA-932 (D.C. April 12, 2018), the Board concurs with the Dupont West and the ANC that the fact the Property is a contributing building to the Dupont Circle Historic District alone would not make the Property unique.

However, the Board rejects both the ANC’s and Dupont West’s contention that the Property is not faced with exceptional conditions. In particular, the Board dismisses the Dupont West’s assertions that “the Applicant ‘should have known’ about this historic nature of the Property. (11/16/16 Tr. 130.) Instead, the Board finds persuasive OP’s agreement with Commissioner Turnbull’s comment that in “in this particular case, though, with the setbacks that they’ve imposed, there’s no way for an owner of a historic property to know that anybody would impose such a restriction like that. So, it does become a critical factor in the analysis of how you develop your property.” (11/16/16 Tr. 131.) Especially in light of, as OP identified, the required amount of setback “changed over time [and] increased quite significantly as the process drew on.” (11/16/16 Tr. 131.) Also, the information presented by the Dupont West to counter the Applicant’s evidence that the Property is faced with a unique subdivision history was not persuasive, because the Dupont West’s information showed the Property within “Lot 6” - including the Vacant Area – as late as 1892. (See Ex. 92.)

Further, based on the substantial evidence in the record, the Board concludes that the subject property is faced with a confluence of factors that apply uniquely and exceptionally to the Property, *in addition to the Property’s Historic Nature*, that create an exceptional situation and condition on the Property. In so doing, the Board agrees with the Applicant and its land use expert that these factors include that the Property is formerly two distinct buildings that were designed by architect AB Mullett and are more ambitious in scale than other row dwellings; the Property’s sidewalls are

⁷ The Board notes that much of the Dupont West’s argument regarding lack of “exceptional conditions” was actually more of a “self-created” hardship argument. To that end, the Board also finds that the Dupont West’s suggestion of self-created hardship is not germane to the Applicant’s requests for area variance relief. See, e.g., *Ass’n for the Preservation of 1700 Block of N Street v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978) (grant of a parking variance was upheld even though the property owner, a YMCA, had “full knowledge” of all problems with the shape of the land, zoning, and costs of putting in parking before buying the property; the YMCA had no feasible alternative method to provide both a pool and all required parking spaces, and its self-created hardship was not a factor to be considered in an application for an area variance, as that factor applies only to a use variance.); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1169 (D.C. 1990) (Prior knowledge or constructive knowledge or that the difficulty is self-imposed is not a bar to an area variance.); *A.L.W. v. District of Columbia Bd. of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975) (prior knowledge of area restrictions or self-imposition of a practical difficulty did not bar the grant of an area variance).

largely exposed resulting in the HPRB's directive to set back the addition on the west side by 51' and on the east side by 34' to preserve those walls, which were identified by OP as applying "some pretty significant restrictions on the building area"; and that the prior subdivision history created a situation in which the Vacant Area was once part of the Property, but is now owned by the adjacent Dupont West, instead of being part of the Property. The Board also finds that the Property's uniquely long length compared to the other historically-designated parcels and its uniquely narrow width compared to the developable parcels on the square are included in the confluence of factors that make the Property unique compared to other lots in the neighborhood. In particular, the fact that the Property is twice as deep as the other historically-designated properties and that it is narrower than other developable parcels combine to make the Property unique within the square and along P Street, compared to other lots. The Board also acknowledges the Dupont West agreed that the Property's unique length and width constituted exceptional conditions, and the Board notes that upon cross-examination questioning by the Dupont West's counsel, OP did not state that it "disagree[d] with the four new factors, the topography, the narrowness depth and the fact these are two buildings joined as one."⁸

The Board also finds persuasive the facts in the record that the combination of the exceptional conditions (part of the 15% of the north side of P Street determined to be contributing to the Historic District, unique subdivision history, uniquely narrow, uniquely long, grade change, HPRB approval, dual-row dwelling condition, uniquely exposed, historic side walls) makes the Property unique in the neighborhood. There is no other Property in the neighborhood and within the Square that shares the same confluence of exceptional characteristics with the Property. Accordingly, the finding of exception condition would be distinguishable from the Court's direction in *Ait-Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211 (D.C. 2016)(reversing the BZA's decision in part because "But, we cannot say – without additional findings regarding, among other things, whether the 9th Street Property [the subject property in that case]'s shape is distinctively irregular or exceptionally narrow among properties in the neighborhood – that these two factors alone form a "confluence of factors" sufficient to justify the Board's conclusion that the 9th Street property is affected by an exceptional condition").

For purposes of the Applicant's request for area variances from the zoning requirements pertaining to lot occupancy and rear yard, the Board rejects the claims of the Dupont West and the ANC that the Property lacks exceptional qualities. Instead, the Board finds that the subject property is faced with an exceptional situation and condition as the result of the designation of the Property as a contributing property to the Historic District and the HPRB's approval of the Concept Plan 16-528 in which HPRB required the addition to be set back from the building façade by 34' along the east side wall and 51' along the west side wall, in conjunction with the confluence of the numerous factors discussed above that combine to make the Property unique within the Square and the block.

⁸ During OP's presentation, it had said that "I wouldn't say that OP is entirely in agreement with everything that's been presented" (11/16/16 Tr. At 106), but on cross-examination, OP clarified her remarks, stating, "Those are not factors that we considered strongly in our analysis." (11/16/16 Tr. 111.)

Practical difficulties.

An applicant for area variance relief is required to show that the strict application of the zoning regulations would result in “practical difficulties.” *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). A showing of practical difficulty requires “[t]he applicant [to] demonstrate that ... compliance with the area restriction would be unnecessarily burdensome....” *Metropole Condominium Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1084 (D.C. 2016), quoting *Fleishman v. District of Columbia Bd. of Zoning Adjustment*, 27 A.3d 554, 561-62 (D.C. 2011). In assessing a claim of practical difficulty, proper factors for the Board’s consideration include the added expense and inconvenience to the applicant inherent in alternatives that would not require the requested variance relief. *Barbour v. District of Columbia Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976).

Assertions of “self-created” hardships do not apply to area variance cases. *See, e.g., Ass’n for the Preservation of 1700 Block of N Street v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978); etc. Further, it is well-settled that prior knowledge of a property’s exceptional conditions does not negate a claim of practical difficulty. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). Accordingly, the Dupont West’s claims that the Applicant’s “practical difficulties” are “self-created” lack legal merit, and are dismissed by the Board.

The Applicant asserted that strict application of the Zoning Regulations with respect to rear yard and lot occupancy would result in a practical difficulty to the Applicant due to the confluence of the exceptional conditions discussed above. The Board agrees.

As a general matter, the Board finds persuasive the testimony of the Applicant’s land use expert that the Property’s unique status as the deepest historically-designated property on the block creates a practical difficulty due to the fact that the shorter lots “would not be able to even contemplate an addition because they are generally half or less than half of the depth of [the] Property.” (11/16/16 Tr. 64-65.) Accordingly, the Board agrees that the Property’s unique depth creates a practical difficulty, because but for that depth, the Property would not likely be a candidate for development in the first place.

Further, the Board also agrees that the subdivision history that created the Vacant Area behind the structure contributes to the practical difficulties the Applicant would face through strict application of the Zoning Regulations. Indeed, the subdivision that created the Vacant Area truncated the size of the Property, thereby eliminating the possibility of effectively providing a rear yard. Further, the Board acknowledges that because the existing structure is effectively built to the rear lot line on the ground floor, due to the existence of the Vacant Area there will always continue to be a separation of at least 25’ from the rear of the Project to the Walsh Stables behind it.

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With that, the Board will address the conclusions of law regarding the practical difficulties associated with the rear yard and lot occupancy relief separately below:

Rear Yard:

The C-2-C Zone requires a 15-foot rear yard, pursuant to 11 DCMR § 774.1 of ZR-58. The approved plans include a rear yard of three feet on floors 2-5, while the ground floor is built to the rear lot line as existing.⁹

Based on the confluence of factors created by the unique elements of the Property discussed above, it is the Board's conclusion that mandating a compliant, 15-foot rear yard would result in a practical difficulty and that compliance would be unnecessarily burdensome. In sum, the existing, dual row dwelling condition, combined with the historic designation of the Existing Structures and subsequent HPRB approval, as well as the Property's narrowness mandates significant front setbacks for the Addition. In turn, this requires the Project's Access Core to be pushed back to 51' feet causing significant layout constraints and inefficiencies. In particular, the evidence in the record documents that providing a rear yard would create a significant practical difficulty, as the resulting rear unit would be only seven to eight feet in width and the resulting core factors, ranging from 25% to 40% would be infeasible. Moreover, although the Applicant was not required to do so in an area variance cases, a review of potential design alternatives (Exs. 70D, 70E and 83A-1 through 83A-2)¹⁰ also directs the Board to conclude that compliance with the zone's rear yard requirement would be unnecessarily burdensome and would not result in a feasible development.

In particular, the evidence in the record establishes, in order to limit the impact of the Project on the Dupont West, the Applicant placed the main residential entrance on the Project's west side, more than 63' from the Dupont West's property line. This decision directs that the Project's access core, the stairway and access area, be located on the Property's west side, which due to the Property's dual row dwelling and exposed wall condition, the HPRB has mandated the 51'-west side setback for the proposed addition. In order to satisfy the Building Code requirements, the access core area must include two stairways and an elevator – resulting in an access core of approximately 523 s.f. in size. Due to this size of the access core, only 22 feet of lot length remain on floors 2-5 based on the access core's size (523 s.f.) and its location on the west side of the building, set back, as required, 51' from the front façade. Accordingly, if a 15-foot rear yard were required, the maximum width of a rear unit would be seven to eight feet. (Exs. 70, 70D.) As the Applicant's architectural expert testified, "What you end up with is a unit in the rear that's about seven feet wide, which is really not viable as any sort of a unit." (Testimony of Matt Stevison,

⁹ Initially, the Applicant had requested 100% rear yard relief. However, throughout the process, the Project was revised to provide a three-foot rear yard, reducing the amount of relief by 20%.

¹⁰ Exhibit 70D demonstrated that providing a rear yard would result in an approximately seven-foot wide rear unit and inefficient core factors in the Addition, and Exhibit 70E demonstrated that that moving the Access Core forward would result in awkward ground floor retail; as well as a 288 s.f. unit in the Addition that could not be used or accessed, resulting in increasing the core factor in the Addition to 54%.

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11/16/16 Tr. 67.) Further, the record established that such a narrow width is not sufficient to provide a functional layout with the standard adjacencies for bathroom, kitchen, and bedroom area.¹¹ The Board was also convinced through substantial evidence presented by the Applicant that provision of a 15-foot rear yard would cause a practical difficulty because the resulting layout would be incredibly inefficient even without rear units because the units would be too dark and narrow (Exs. 70, 70D) and that “flipping” the Access Core to the east side and locating it forward would also result in practical difficulties through the creation of a practically inefficient retail space on the ground floor and reducing the sizes of the fourth and fifth floor units in a manner that would result in a 288 s.f. unit that would be far too small to be functionally habitable space. (Exs. 70, 70D.)

The Board also gives great weight to the Office of Planning, whose representative testified that, an “appropriate efficiency for a core” is “usually ... around 18 to 20 percent [and] [i]n terms of the rear yard, I think that the applicant did a pretty good job of explaining how the placement of the core affects the floor – the layout of each floor And I think that what they’ve presented, again, does a pretty good job of demonstrating what some of those difficulties are in trying to provide a core that is functional for all floors.” (See 11/16/16 Tr. 107.) As to the rear yard requirement, Ms. Elliott confirmed that “if a rear setback is provided on the fourth and fifth floors, I believe that the core factor actually goes up to around 40 percent ... which is really inefficient; very costly and creates a ... really awkward floorplan layout.” (See 11/16/16 Tr. 108.)

The Board rejects the claims of the Dupont West and the ANC that the Applicant’s “practical difficulties” are self-created. That concept does not apply to area variance requests. Further, the Board credits the testimony of OP referenced above that the required historic setback changed over time and “there’s no way for” the Applicant to have known the depth of the setback until the HPRB provided its approval. (11/16/16 Tr. 131.)

Lot Occupancy:

While there is no lot occupancy restriction for retail uses in the C-2-C, a residential use may not exceed 80% lot occupancy. (11 DCMR § 772.1.)¹² As the second and third floors of the Project are entirely devoted to residential units, those floors will have a lot occupancy of 97%, requiring relief. No lot occupancy relief is required for the fourth and fifth floors.¹³

¹¹ The Board finds persuasive the Applicant’s argument that the rear units would hardly be wide enough to locate a bed along the side wall, much less necessary space for other furniture, bathroom area, or kitchen appliances. Due to the Property’s exceptional conditions, requiring a rear yard would result in non-functional rear units creating a clear practical difficulty for the Applicant.

¹² The Application was reviewed and approved under ZR-58. However, the Board identifies that under ZR-16 there is no lot occupancy requirement for residential uses in the applicable MU-19 Zone District. See ZR-16, 11 DCMR Subtitle G § 604.1.

¹³ The floors of the Addition have a lot occupancy of approximately 56%. When averaged across the Project, the total lot occupancy is 70%.

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It is this Board's conclusion that the Property's dual row dwelling condition, historic designation, narrowness and change in topography create significant practical difficulties associated with complying with the zone's lot occupancy requirement. Similar to the rear yard discussed above, the lot occupancy relief is also driven by the required location of the Access Core, which, due to the Property's confluence of exceptional conditions, only has one reasonable location – 51 feet behind the façade on the Property's west side. The record establishes that without the lot occupancy relief, the length of the second and third floor units would be reduced to an unreasonable two feet. This is due to the narrow depth of the lot, which means that an 80% lot occupancy would mandate a 20-foot reduction in building length. As such, without the requested lot occupancy relief, the rear units on the second and third floors would be only two feet in width, and a total of 80 s.f. in size. Such a tiny unit is clearly not viable and creates a practical difficulty. The Board was also convinced that the Property's topographical change of 13 feet from the front to the rear creates a practical difficulty. This change in grade creates a situation in which the existing ground floor is effectively below grade from the middle of the Property to the rear. This results in a situation where the rear of the second floor units will be functionally at grade, making those units more akin to ground floor units than to second floor units.

Further, the Board was convinced that a compliant project would be impractically designed because to comply with the 80% lot occupancy limitation, the only option would be to design the rear of the second and third floors to be pulled in 20 feet from the rear property line, would create an absurd building in which the ground floor extends to the rear property line, the second and third floors are pulled in by 20 feet (resulting in a two foot rear unit as discussed above), and then the fourth and fifth floors extend toward the rear property line. In light of this evidence, the Board credits OP, which stated, "the issue with lot occupancy on the second and third floors is a little tricky because the core needs to be provided at the rear – but if the lot occupancy is reduced to 80 percent, then you end up with an unusual building form ... the second and third [floors] are reduced, essentially providing a rear setback. But then the fourth and fifth and [sic] sort of cantilevered over those floors, if that makes sense, to provide the lot occupancy. We do think that that would be a practical difficulty in this case." (See 11/16/16 Tr. 106 - 107.)

The Board rejects the Dupont West and the ANC's claims of no practical difficulty for the reasons discussed above.

For these reasons, the Board finds that due to the confluence of all exceptional condition factors, and in particular the dual row dwelling condition, the HPRB's concept plan approval, and the Property's narrowness as well as the Vacant Area (which truncates the Property's length creating the need for rear yard relief in the first place) and topographical change, strict application of the Zoning Regulations to provide a 15' rear yard or 80% lot occupancy for the second and third floors create a practical difficulty that would be unnecessarily burdensome for the Applicant. The Board notes that the Dupont West did not contest the existence of these practical difficulties, but instead argued that they should be disregarded because they were "self-created". As stated above, the tenet of "self-created" hardships do not apply in this case, which requested area variances. Further,

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the Board has found that high core factor and inefficient unit layouts have constituted practical difficulties in other cases. *See e.g.* BZA Case No. 18905.¹⁴

No Substantial Detriment to Public Good or Zone Plan.

The Board finds that approval of the requested variance relief will not result in substantial detriment to the public good or cause any impairment to the zone plan.

First, as to the Zone Plan, as previously discussed, the Applicant proposes to construct a pedestrian-engaging mixed-use development in a medium-density, mixed-use zone that *prioritizes* development of residential uses and fostering economic and housing opportunities. Further, the Project's maximum height is 60 feet, and its maximum density is 3.59 FAR. Both are below the zone's maximum height of 90 feet and 6.0 FAR. Accordingly, the Board credits the testimony of Ms. McCarthy as well as OP that the Project fulfills the intent and purpose of the DC/C-2-C Zone. (1/16/16 Hearing Tr. 78-80, 109; Ex. 71.)

Both the Dupont West and the ANC claimed that the Project would have a substantial impact on zone plans. The Board disagrees with the Dupont West and the ANC. Instead, the Board credits the testimony of the Applicant's land use expert that the Project is consistent with (and indeed shorter and smaller than) the matter of right standards of the DC/C-2-C Zone. Further, the Board found it persuasive that as Vice-Chair Butani-D'Souza asked the Dupont West representative, "when the Dupont West came in, essentially your building imposed the same impact on [the Property], on some level. I mean both buildings have the right to build up." (11/16/16 Tr. 122.)

Moreover, the Applicant offered evidence that the Project would cause no substantial detriment to the public good, including the Dupont West. When evaluating adverse effects on neighboring property, the D.C. Court of Appeals has approved the Board's use of comparing the proposed structure to a by-right structure. *See Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1253 (DC 1987). In *Draude*, the Court found that the comparison of a proposed project to a matter-of-right project was a reasonable standard when seeking to determine whether an addition to a property was "objectionable." *See id.* The Board has followed this direction when evaluating solar studies in other cases. *See* BZA Case No. 16536 (order reflects Board consideration of shadow study comparison between proposed project and matter-of-right project); *see also* BZA Case Nos. 18886, 19230.

In this case, the "Matter of Right" design was established on October 27 when the HPRB approved Concept Plan 16-528 that permitted a two-story addition to the existing structure, creating a building that is 60 feet in height. Ex. 95 shows that a Matter of Right project, including the existing building and the Walsh Stables, on the Property will impact 30 units along the Dupont West's west façade. (Ex. 99A.)

¹⁴ The Walsh Stables representatives also did not contest the existence of practical difficulties resulting from the exceptional conditions.

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To that end, the Board credits the Applicant's sun study demonstrating that the Project will have a minimal impact on light and air in comparison to by-right construction at the Property as approved by HPRB, which would impact 30 units. (Ex. 95.) Specifically, the Project, with the proposed rear yard and lot occupancy relief would only minimally impact portions of five additional units. (Ex. 95, 99A.)

The Board credits the Applicant's proffered "window study" and "sun study" in demonstrating the Project's minimal impact on the Dupont West over a matter of right design. (Ex. 70G and 83A2 [pg. 34-35].)

The Board also credits Mr. Stevison's following testimony:

We studied a couple different schemes, both the existing conditions, what a matter of right scheme would be, and then what the proposed scheme would be. P Street, which is this street here, is an east-west street. We know the sun, because we're in the northern hemisphere, comes up in the south. So, we've got the West Park Building, which is a 10-story building, directly across P Street. So, most of the shadows that you see on all of these studies, are actually being cast on both our building and the DuPont West by the West Park Building. We have determined, based on this study and another graphic that we'll show you in a minute, that throughout the course of the day, we did it at two times during the year, but we'll do January first, that the additional sun that will be hitting areas of DuPont West will happen for 30 minutes of the day. And that 30 minutes only -- is only 5.1 percent of the daily sunlight, and so 5.1 percent of the daily sunlight will be -- will affect 4.4 percent of the windows of the DuPont West.

(11/16/16 Tr. 68-69.)

Additionally, the Board also finds Mr. Stevison's testimony that the Project's impact on the DuPont West, if any, would be minimized due to the 23-foot separation between the buildings to be credible. (See 11/16/16 Tr. 136.) The Dupont West did not provide any expert testimony to the contrary.

The Board also credits the Office of Planning, who testified that "while we do sympathize with the residents of Dupont West, and we just find that in general, based on what's provided, it's not a significant impact on those neighbors." (See 11/16/16 Tr. 108.) Further, the Board finds OP's follow up response to questions from Vice-Chair Butani-D'Souza persuasive, when OP states, "[OP has] requirements that we have to weigh and consider, so we're not trying to downplay the concerns of the residents by any means, but we feel that the actual relief that's being requested in this case does minimally -- it creates a minimal impact on those neighbors, and it's not something that we would -- so we, in our analysis we indicated that there was no substantial detriment to those neighbors." (11/16/16 Tr. 118.)

The Dupont West and the ANC had claimed that the Project, as designed "building to the lot line on to sides and nearly to the lot line in the rear" detrimentally impacts their building due to loss of

views, loss of light, addition of sounds and odors, and what they perceive to be impacts on the historic view from the intersection of P and 22nd Streets.¹⁵ Furthermore, as acknowledged by the Dupont West at the Hearing (11/16/16 Tr. 105 Lines 7-10), it is well settled that an adjacent property owner is not entitled to views or access to light and air across another person's property without an express easement. *See Hefazi v. Stiglitz*, 862 A.2d 901, 911 (2004). This precedent has been adopted by the Board as well as the Zoning Commission. *See BZA Cases 18787; see also Zoning Commission Case 12-02*. Additionally, issues of noise, odor, and construction have been determined to be beyond the scope of BZA review. *See BZA Case 18201*.

Finally, the issue of the perceived impact on the historic views was conclusively determined at the HPRB Hearing, when the HPRB approved the concept plan for the Project and adopted the Historic Preservation Office's staff report in the record at BZA Exhibit 70C. The Board credits the HPRB's decisions and defers to that body in determinations regarding perceived impact on the Historic District. In so doing, the Board credits the HPRB's determination that the Project is consistent with the Historic District and the District's preservation act. Also, the Board credits the HPRB's determination that the Project offers a "transition" from the high-rise buildings to the west of the Project to the shorter buildings to the east along P Street, as noted by HPRB Chairperson Pfaehler. Further, the Board found it persuasive in the "gateway views" along P Street, the Project would only be 20' taller than the Existing Structures. (11/16/16 Tr. 129.)

While the Board sympathizes with the Dupont West, it found it particularly persuasive that when asked how the Dupont West owners "did not know that it was a possibility that the building next to them could be built up" given the zoning and the surrounding, tall buildings, the Dupont West representative stated, "I think we have an educated, sophisticated set of residents and owners, and so that was a possibility, but being in a historic district, we thought that gave us a lot of leverage... They expected [the status quo] to be preserved." (11/16/16 Tr. 123-124.) As stated above, the HPRB, not the Board reviews projects for their consistency with the historic district. In this case, the HPRB did that, and determined that the Project as proposed, with the addition setback as proposed, could be approved as a concept plan by the HPRB. Accordingly, the Dupont West's concerns about historic consistency are not within the jurisdiction of this Board, and this Board is not authorized to reverse decisions of the HPRB.

The Board notes that the ANC and other nearby residents had raised concerns about the previous tavern tenants of the Property, indicating that those uses had "caused adverse impacts on the peace, order, and quiet of the neighborhood due to their nightlife orientation." (Ex. 90.) However, this is an area variance, and the Board's concern is limited to the impact of the relief granted. Even if a use permission were sought, the asserted bad acts of prior tenants would not preclude the approval of future use and prior good behavior would not save an application that failed to show the absence

¹⁵ Other than assertions, it must be noted that the Dupont West offers no evidence that the Project creates a substantial detriment to the public good. It neither provided a sun/shadow study (11/16/16 Tr. 84 –testimony of Dupont West representative "I don't have a shadow study for you ..."), nor did it provide studies in any of the other areas of alleged substantial detriment. Further, issues relating to construction, sounds and odors are beyond the scope of the Board's jurisdiction.

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of future adverse impacts. For this same reason, the Board declined to include a condition precluding tenants from seeking license to serve alcohol.

Therefore, the substantial evidence in the record establishes compliance with the third prong of the variance test, which permits the Applicant to obtain relief from the rear yard and lot occupancy requirements.

Great Weight

The Board is required to give “great weight” to the recommendations made by OP. (D.C. Official Code § 6-623.04.) For the reasons discussed above, the Board concurs with OP’s recommendation that the application, including the requested variance relief, should be approved.

The Board is also required to give “great weight” to the issues and concerns raised by the affected ANC. (D.C. Official Code §§ 1-309.10(d)(3)(A).) Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.¹⁶

On November 15, 2016, ANC 2B voted by a vote of 5-3-1 to “not object to the Project, contingent on a condition of approval by the Board of Zoning Adjustment that revokes the ability of the property in perpetuity to apply for and receive an alcohol license.” The ANC also raised the following issues and concerns:

- “ANC 2B would like to note that the project is on a rectangular lot, which is a quite ordinary condition”;
- “ANC 2B notes that compliance with historic preservation is not an extraordinary condition—it is a quite ordinary condition in Dupont Circle and the 40% of the District of Columbia built environment which is located within a historic district”
- “ANC 2B is concerned with the proposed impacts on the zone plan and the surrounding property views, light, and air quality”;

¹⁶ The D.C. Court of Appeals has interpreted “great weight” regulatory requirement to mean that the BZA must acknowledge the ANC’s concerns and articulate reasons why those concerns and issues were rejected and the relief requested from the zoning regulations was granted. See *Metropole Condo Assoc. V. Bd. of Zoning Adjust.* citing *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977) (“We conclude that ‘great weight’ ... means ... that an agency must elaborate, with precision, its response to the ANC issues and concerns.”); see also *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (“[T]he [Board] is required ... to give issues and concerns raised by the ANC ‘great weight’ [through] ‘the written rationale for the government decision taken.’”). However, the Court is clear that the Board is only required to give great weight to those issues and concerns that are “legally relevant” to the relief requested. *Bakers Local 118 v. D.C. Bd. of Zoning Adjustment*, 437 A.2d 176, 179 (D.C. 1981).

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- “ANC 2B is concerned with the project building to the lot line on two sides and nearly to the lot line in the rear, relying on the property and continued air rights of other owners, and”;
- “the tavern tenants of 2147-2149 P Street N.W. have caused adverse impacts on the peace, order, and quiet of the neighborhood due to their nightlife orientation.”

First, the Board has addressed the issues and concerns raised by the ANC in this order and was not persuaded that they warrant disapproval of any of the zoning relief requested in this application.

Next, as to the ANC’s “no liquor license” condition, after hearing the testimony from both the Applicant and the Dupont West that “all of [the ANC’s] conversations before have actually been exactly as Meridith says, to the higher level of tavern license,” the Board did request that the Applicant reach out to the ANC to determine if the ANC intended the condition to completely prohibit any liquor license, or if it was intended to only limit the ability to obtain a “tavern” license, the higher type of ABRA license. (11/16/16 Tr. 135; 158.)

The Applicant emailed the ANC twice to request clarification, but did not receive a response. (Ex. 99A.) The Applicant did proffer to limit the ability to obtain a tavern license. (Ex. 97.)

Ultimately, after reviewing the case and giving great weight to the statements of the ANC, the Board chose not to adopt the “liquor license” condition, finding that it was not directly related to zoning. (12/21/16 Tr. 18.) The Board’s decision is consistent with D.C. Court of Appeals case law that restricts the Board from adopting “personal conditions” on an applicant that “impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful per se.” *See National Black Child Dev. Institute, Inc. v. D.C. Bd. Of Zoning Adjustment*, 483 A.2d 687, 691 (1984). The Board concluded that the ANC’s ABRA Condition would constitute such a “personal condition” that would be prohibited by this Court of Appeals precedent. (12/21/16 Tr. 17.) Furthermore, this decision was consistent with the Board’s previous holdings that conditions on the use of a property are only permissible if they relate to the relief requested and are supported by sufficient evidence in the Record. *See* BZA Case No. 18005-A (examining the record and determining that a condition on the use of a property was supported by the evidence in the record for that case.)

In this case, the Board found that the ANC’s ABRA Condition did not relate to the requested rear yard or residential lot occupancy relief. (12/21/16 Tr. 17.) Rather, the Board found “I think we should leave [the liquor license] to our colleagues on ABRA to decide.” (12/21/16 Tr. 17, 20-21.) This was also found to apply to the Applicant’s “no tavern” license, which the Board also chose not to adopt. (12/21/16 21-22.)

Based on the findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for variances from 11 DCMR § 774.1 for variance relief for a 15-foot rear yard on the ground floor and a 12-foot rear yard on floors 2-5 and

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11 DCMR § 772.1 for 97% residential lot occupancy on the 2nd and 3rd Floors for the premises at 2147-2149 5th Street N.W. (Square 67, Lot 835).

Accordingly, it is **ORDERED** that the application is **GRANTED for variance relief under 11 DCMR § 774.1 for a 12-foot rear yard, and under 11 DCMR § 772.1 for 97% residential lot occupancy on the 2nd and 3rd Floors for premises at 2147-2149 5th Street, N.W., AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 70A1 through 70A5, WITH ONE OF THE MECHANICAL SCREENING OPTIONS SHOWN IN EXHIBIT 96, AND WITH THE FOLLOWING CONDITIONS:**¹⁷


1. Interior partition locations, the number, size, and location of units, stairs and elevators are preliminary and shown for illustrative purposes only. Final layouts, design and interior plans may vary to the extent that such variations do not require additional relief from the Zoning Regulations.
2. The Applicant shall have minor flexibility to vary the final selection of exterior materials within the color ranges and general material types proposed, pursuant to Historic Preservation Review Board approval and based on the availability at the time of construction, without reducing the quality of materials or intent of the original design.
3. The Applicant shall have minor flexibility to make minor refinements to exterior details and dimensions, including belt courses, sills, bases, cornices, railings, trim, and window location, sizes, and shapes to comply with Historic Preservation Review Board approval or that are otherwise necessary to obtain a final building permit to the extent that such changes do not require additional relief from the Zoning Regulations.

VOTE: 4-0-1 (Frederick L. Hill, Carlton E. Hart¹⁸, Anita Butani D'Souza, and Michael G. Turnbull (by absentee vote) to Approve; one Board seat vacant).

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

¹⁷ Conditions were discussed by the Board during deliberation at the Decision meeting. (12/21/16 Tr. 22-24.)

¹⁸ Board Member Hart read the record in the case to participate in the decision.

FINAL DATE OF ORDER: December 24, 2018

PURSUANT TO 11 DCMR SUBTITLE Y § 604.11, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBTITLE Y § 604.7.

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, 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 SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, 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 SUBTITLE A § 303, 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

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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.