

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



**Application No. 18375 of Florida Avenue Residential, LLC**, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for area variances from the required standards for rear yard depth (§774), lot occupancy (§772), off-street parking (§2101.1) and loading (§2201), and special exception relief pursuant to § 1906, from the street wall requirements under § 1903.3 and the roof structure requirements under § 770.6 to allow the development of a six-story mixed-use residential building with ground floor retail/service uses in the ARTS/C-2-B District at 710 Florida Avenue, N.W. (Square 416, Lot 31).

**HEARING DATE:** July 10, 2012

**DECISION DATE:** July 24, 2012

**DECISION AND ORDER**

Florida Avenue Residential, LLC (“Applicant”), submitted this self-certified application on March 13, 2012, as the owner and developer of the property at 710 Florida Avenue, N.W., (Square 416, Lot 31) (the “Property”). The Applicant sought area variances from the required standards for rear yard depth (§ 774), lot occupancy (§ 772), off-street parking (§ 2101.1) and loading (§ 2201), and special exception relief pursuant to § 1906, from the street wall requirements under § 1903.3 and the roof structure requirements under § 770.6 to allow the development of a six-story mixed-use residential building with ground floor retail/service uses on a vacant lot in the ARTS/C-2-B District.

The Board of Zoning Adjustment (“BZA” or “Board”) convened a hearing on the application on July 10, 2012. Post-hearing submissions were filed with the record on July 20, 2012. The Board deliberated on the application on July 24, 2012, and voted 5-0-0 to **GRANT** the application.

**PRELIMINARY MATTERS**

*Notice of Application and Notice of Hearing.* By memoranda dated March 14, 2012, the Office of Zoning sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 1B, the ANC within which the subject property is located, Single Member District 1B-01, and the Councilmember for Ward 1. A public hearing was scheduled for July 10, 2012. Pursuant to

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11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the *D.C. Register*, and on April 13, 2012, sent such notice to the Applicant, ANC 1B, and all owners of property within 200 feet of the subject property.

*Request for Party Status.* In addition to the Applicant, ANC 1B was automatically a party to this proceeding. No other requests for party status were received.

*Applicant's Case.* Carolyn Brown and Norman M. Glasgow, Jr., of Holland & Knight LLP, represented the Applicant. The Applicant presented four witnesses in support of the application: Lauren Jezienicki of the JBG Companies on behalf of Florida Avenue Residential, LLC; John Maisto, BKV Architects; Erwin Andres, Gorove/Slade & Associates, transportation consultants; and Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The Board qualified Mr. Maisto as an expert in architecture, Mr. Andres as an expert in traffic and transportation planning, and Mr. Sher as an expert in planning and zoning.

*Government Reports.* OP filed a report with the Board on July 3, 2012, recommending approval of the special exceptions and variances from the parking, loading and rear yard requirements. (See Exhibit 28.) The OP report set forth each of the provisions of 11 DCMR §§ 411.5 and 3104.1 and opined that each was met. OP requested additional information on the rationale for the lot occupancy relief. Based on the Applicant's supplemental information submitted to OP and the record, OP stated at the hearing that the Applicant met its burden of proof for the lot occupancy relief and recommended approval for that area variance, as well. DDOT filed a report with the Board on July 3, 2012, indicating that it had no objection to the requested relief. (See Exhibit 27.) Councilmember Jim Graham, representing Ward 1, also submitted a letter dated May 30, 2012, supporting the project.

*ANC Report.* ANC 1B submitted a report to the Board dated June 26, 2012, strongly recommending approval of the application.

*Persons in Support or Opposition.* Ms. Dana Jackson submitted documents to the record and testified in opposition to the application for herself and other business owners on 9th Street in Square 393, which is located across 8<sup>th</sup> Street to the west of the subject site.

**FINDINGS OF FACT**

**The Property and Surrounding Area**

1. The subject Property is located at Lot 31 in Square 416 and has street frontage along Florida Avenue and 8<sup>th</sup> Street, N.W., Washington, D.C. Lot 31 measures approximately 124.5 feet along Florida Avenue, taking up half of the street frontage of the block, and extends approximately 140.5 feet south along 8<sup>th</sup> Street, with a total land area of 15,596 square feet. The site has been vacant since the construction of the Metrorail Green Line in the 1970s, whose tunnels run beneath the parcel.

2. The Property falls within the U Street Historic District along its north-easternmost boundary. Small-scale residential buildings are located adjacent to the property to the south and a parking lot is located immediately to the east, which serves the CVS Pharmacy in the southeast corner of the square. Other retail buildings are located along 7th Street and T Streets. Across 8<sup>th</sup> Street to the west is another vacant parcel controlled by the Applicant, which will be developed with a companion residential building with ground floor retail.
3. Mid-rise and some large-scale commercial buildings line Florida Avenue in both directions. The D.C. Housing Finance Agency is located on Florida Avenue at 9th Street. Howard University and its hospital are two blocks to the north across Florida Avenue. The U Street corridor, an established arts and entertainment district, is just two blocks to the west, which also includes several recently constructed condominium and apartment buildings, similar to what is proposed for this site. These include the Ellington (1301 U St NW), the Beauregard (11th and V Streets, N.W.), Union Row (2125 14th Street, N.W.), Langston Lofts (1390 V Street, N.W.), and the Murano (2117 10th Street, N.W.).
4. The property is located in the ARTS/C-2-B District. The C-2-B District is designated to serve high-density residential and mixed uses. The C-2-B Districts are generally compact and located on arterial streets, in uptown centers, and at rapid transit stops. Building use may be entirely residential or a mixture of commercial and residential uses.
5. The Uptown Arts-Mixed Use (ARTS) Overlay is designed to encourage a scale of development, mixture of uses, and "other attributes such as safe and efficient conditions for pedestrian and vehicular movement...." (11 DCMR 1900.2(a).) The ARTS Overlay requires uses that foster pedestrian activity, especially retail, entertainment, and residential uses. Among its many purposes is to expand the area's housing supply and a variety of rent and price ranges. (11 DCMR 1900.2(d).) The ARTS Overlay provides bonus density incentives for owners to attract preferred retail, arts and services uses in this area.
6. The maximum permitted height in the ARTS/C-2-B District is 70 feet, with a maximum lot occupancy of 80% for residential uses. The maximum permitted floor area ratio ("FAR") for this site is 5.0 FAR, based on a combination of bonus density incentives.

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

7. The Applicant proposes to construct a new six-story residential building with ground floor retail on the vacant lot at the southeast corner of 8<sup>th</sup> Street and Florida Avenue, N.W. The main lobby entrance to the residential building will front on 8<sup>th</sup> Street, with retail spaces lining the ground floor along Florida Avenue and 8<sup>th</sup> Street. In order to increase the width of the substandard sidewalk on Florida Avenue, the ground floor has been set back approximately five to 10 feet along that street frontage. Presently, the width of the unobstructed portion of the Florida Avenue sidewalk is approximately seven feet, six inches with a four-foot tree box zone. In contrast, the 8<sup>th</sup> Street sidewalk is 29 feet wide with a four-

foot tree box zone. The additional five to 10-foot setbacks along Florida Avenue will increase that sidewalk width to at least 10 feet clear (and up to 12 feet based on the undulating storefront design) with a four-foot tree box zone. The proposed sidewalk width will thus conform with the standards established under section 31.2.5 of the Design and Engineering Manual ("DEM") published by DDOT and the Public Realm Design Manual jointly issued by DDOT and the Office of Planning (at page 3-4). Parking and loading facilities are accessed from a new curb cut on 8<sup>th</sup> Street at the south property line.

8. The equipment on the roof will be comprised of two stair towers, an elevator penthouse, and communal recreation space. The elevator penthouse will be located in the center of the roof and will open onto the communal recreation space on the west portion of the roof. "Stair D" will be located at the south part of the roof, while "Stair E" is situated at the east end of the Florida Avenue bar of the building. Small mechanical units for each of the individual residential units are also located on the roof and screened by a metal wall. These individual units are less than four feet in height and are not subject to the roof structure requirements. (See 11 DCMR § 411.17.)
9. The Historic Preservation Review Board ("HPRB") reviewed the design of the proposed new building on March 22 and May 31, 2012, and approved the height and scale in concept. In adopting the staff recommendation, HPRB noted that the project fulfills elements of the Uptown Destination District Plan, referred to as the DUKE Plan in honor of Duke Ellington, which was adopted by the D.C. Council in 2005. The plan identified this site, which was owned and cleared by WMATA for staging and construction of the Metrorail Green Line, as a gap in the U Street/Shaw neighborhoods. The plan calls for its redevelopment with high density residential uses and ground floor retail/entertainment uses to create a destination spot for the community and the city.

### **The Variance Relief**

#### **Nature of Relief Requested**

10. The Applicant seeks relief from the parking requirements for the new development. Based on the proposed 95 residential units, the Applicant must provide 32 spaces (one for every three units). The retail space, at 8,421 square feet of gross floor area, generates a requirement of eight spaces (in excess of 3000 square feet, one space for every 750 square feet). The Applicant proposes to provide a total of 29 parking spaces, all of which will be devoted to residential uses and none of which will be allocated for retail uses.
11. The Applicant also seeks relief from the loading requirements for the project. The residential uses require one 55-foot loading berth, one 200-square-foot platform, and one 20-foot loading space. The retail uses require one 30-foot loading berth and one 100-square-foot platform. The Applicant proposes to not provide the 55-foot residential berth and share the 30-foot berth between the residential and retail uses. Additionally, the Applicant also

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proposes to not provide the 100-square-foot retail platform and share the 200 square-foot platform between the two uses.

12. Relief is also requested from the lot occupancy requirements for the residential portion of the building. Whereas 80% is the maximum permitted lot coverage for residential uses, the Applicant proposes 90% coverage on floors 2, 3 and 4, and 82.5% coverage on floor 5. No relief is required on the 6th floor, which has a lot occupancy of 79.5%.
13. Finally, the Applicant seeks relief from the rear yard depth requirements. Whereas a 15-foot deep rear yard is required, the project will not provide any rear yard.

*Exceptional Conditions*

14. The subject Property is affected by several exceptional and extraordinary conditions. First, the Property is trapezoidal in shape due to the intersection of a diagonal avenue (Florida) with a north-south street (8<sup>th</sup> Street), which affects the layout and configuration of residential units. Second, the sidewalk width along Florida Avenue is only eight feet "clear" and does not comport with the 16-foot standard under DDOT's DEM or the Public Realm Design Manual jointly published by DDOT and OP. Third, and most significantly, the site is encumbered by Metrorail tunnels, related air vents and the Metrorail "zone of influence" that impose severe design and construction constraints on the Property.
15. The Metrorail Green Line tunnels run diagonally underneath the site, approximately 27 feet below the surface. The Washington Metropolitan Transit Authority ("WMATA"), which controls the Metrorail system, has an absolute "no-build" 10-foot easement surrounding the tunnels. This limits the maximum depth of excavation for the project to approximately 17 feet below grade.

*Practical Difficulties*

16. The bottom of the garage slab of the proposed development will, at final completion, sit approximately 14 feet below grade. This depth poses significant difficulties in constructing the support of excavation ("SOE") system. Traditional SOE systems typically require piles to be driven 10 feet below the lowest point of the foundations, which in this case would be a depth of 24 feet. The WMATA "no build" zone makes this traditional SOE system impossible. The SOE system proposed for this project, due to its uniquely proximate location within WMATA zones, is significantly more expensive than any traditional system and carries a premium of 150% over generally accepted SOE systems.
17. In addition to the "no build" zone, the manner in which the WMATA tunnels were constructed exacerbates the construction difficulties of the site and compounds the high cost of the SOE system. Unlike the majority of existing Metrorail tunnels, these particular tunnels are extremely susceptible to changes in soil pressure that occur during the construction process. Constructed with pre-cast sections that were bolted together, the tunnels beneath the

site are among the weakest WMATA allowed to be built. The joints between each pre-cast section allow the tunnels to become very flexible when excavating and constructing above them. If the tunnels are allowed to move too much, they could eventually crack and fail.

18. These construction constraints dramatically increase up-front costs to the project and demand reserve capital to re-engineer and adjust construction if issues arise. In order for the project to remain viable in light of these extraordinary costs, the Applicant needs to maximize the allowable FAR on site. The Applicant cannot achieve the necessary density, however, unless zoning relief is granted from the loading, rear yard, and lot occupancy requirements.
19. With respect to parking, the Applicant has configured the garage as efficiently as possible to maximize the number of parking spaces, accommodate garage ramps and aisles, and provide access stairs, utility rooms, and bike storage. In doing so, only 29 parking spaces are achievable. The only way to achieve the requisite number of spaces would be to excavate another below-grade level or convert ground floor space to parking. The first option is impossible, given the WMATA constraints described above, and the second is impractical. The second option would reduce the amount of retail square footage, which would undermine the purposes of the ARTS Overlay to encourage preferred retail and arts uses and active streetscapes within the ARTS Overlay District. The retail area is also the most valuable space, which is critical to support the costs of the sophisticated engineering and construction techniques required for the site.
20. Similarly, if the Applicant were required to provide both the 55-foot loading berth required for the residential uses and the 30-foot berth required for retail uses, as well as the additional 100-square foot loading platform, the ground floor would become extremely inefficient and further reduce the amount of active retail uses that are envisioned along 8<sup>th</sup> Street. Under DDOT's DEM, curb cuts are not permitted along major arteries such as Florida Avenue and consequently the garage ramp and loading facilities are located off of 8th Street. If the Applicant were required to provide a 55-foot loading berth and second platform, the size of the 8<sup>th</sup> Street retail space would be reduced and have only a depth of approximately 20-25 feet, which severely compromises the type of retailers that could use the space.
21. Further, a 55-foot truck simply could not make the turn into the loading space without eliminating the remainder of the retail space along this southern portion of the building. While there is sufficient room for a 30-foot truck to maneuver into this area, as shown on the truck turning diagram included with the drawings, it would be extremely difficult to accommodate a 55-foot truck and maintain useable retail space along this southern portion of 8<sup>th</sup> Street. Thus, inclusion of a 55-foot loading berth and second platform would create practical difficulties in achieving the purposes of the ARTS Overlay and the necessary income derived from the most valuable retail space to help address the WMATA-related costs.

22. The shallow depth of the WMATA tunnels, as well as the need to use a mat slab foundation versus traditional spread footings, limits the ability to put service elements, including loading facilities, in below grade space. That results in significantly more ground floor space being devoted to building-function areas and less room for the most valuable retail/service uses required or promoted by the ARTS Overlay. The widening of the sidewalk at Florida Avenue, consistent with DDOT's DEM and the Public Realm Design Manual, also reduces the amount of ground floor retail space. The irregularly shaped lot further restricts use of the ground floor. The amount of valuable retail square footage lost is approximately 3,200 square feet. HPRB design constraints have additionally limited the placement of square footage on the site.
23. The Applicant proposes to recapture this lost FAR by eliminating the rear yard and increasing the lot occupancy on some of the residential floors. This results in an increase of approximately 4,500 square feet of residential space, which is less valuable and only helps make up for a portion of the lost revenue. Retail space in this neighborhood is expected to command rental rates of approximately \$4.00/sf per month, while residential rates generate approximately \$2.24/sf per month. That represents a net loss of approximately \$2,700/month, even with the increase in lot occupancy. The rate of return for residential units would be even lower if the Applicant were required to comply with the 80% lot occupancy limit, because the unit mix and layout would likely command lower rents.
24. If the Applicant were required to meet the 80% lot occupancy requirement, it would result in inefficient layouts and a reduced unit count. In order to maintain a continuous building wall along the street frontages consistent with the ARTS Overlay requirements, the only place to accommodate open areas on the lot is at the rear of the building. However, by narrowing the 8<sup>th</sup> Street bar portion of the building, eight of the one-bedroom units on a typical floor would need to be converted to studio apartments, and the overall number of units would need to be reduced. In order to minimize the number of lost units to only five, the project would require a 90% increase in studios (from 20 to 38); a 27% decrease in one-bedroom units (from 59 to 43); and a 58% decrease in two-bedroom units (from 12 to five). The ability to house families, as well as individuals, would be dramatically reduced. Additionally, the elevator core would need to be shifted to the west, which would negatively affect the garage layout and result in inefficient and wasted retail space on the ground floor.
25. Moreover, because of the site's dual street frontages along Florida Avenue and 8<sup>th</sup> Street, the provision of a rear yard would result in a gap in the streetscape. With 8<sup>th</sup> Street as the front of the building, the rear yard would need to span the full width of the lot, from Florida Avenue to the south property line. This would result in a gap along the prominent Florida Avenue street frontage of more than 15 feet. Because of the angle of Florida Avenue, the gap along the street frontage could be as much as 25 feet. This runs directly counter to the purposes and goals of the ARTS Overlay. Changing the front of the building to Florida Avenue would have the same effect along 8<sup>th</sup> Street. A gap would be created between the

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proposed development and the rowhouses, which also disrupts the rhythm and character of the historic district.

*No Harm to Public Good or Zone Plan*

26. The requested relief can be granted without harm to the public good and without threat to the integrity of the zone plan. With respect to the public good, the replacement of a vacant lot with a new residential building in the Florida Avenue corridor, in conformance with the DUKE Plan, will provide a significant contribution to the community. Other public benefits provided by the project include affordable housing, vast streetscape improvements on Florida Avenue and 8<sup>th</sup> Street, and neighborhood serving retail shops and restaurants.
27. With respect to parking and loading, the zone plan will not be compromised because the project will include sufficient parking and loading facilities that are adequate to serve the needs of the prospective residents and tenants of the new building. The site is within two blocks of two Metrorail Stations, U Street-Cardoza and the Shaw-Howard University stations, which provides alternative means of transportation. Further, the Property is well served by several bus lines and located in an area that is conducive to riding bicycles. Fourteen car-share vehicles are also within walking distance of the site.
28. To ensure safe vehicular and pedestrian circulation, the Applicant has agreed to implement several transportation demand mitigation ("TDM") measures, as set forth in Exhibit 25 to the record. As to the adequacy of the loading facilities, loading, the loading dock will be managed by the residential property management company so that deliveries are scheduled appropriately.
29. With respect to rear yard and lot occupancy, the closed court at the rear of the property will provide adequate light and air to surrounding properties. The relief is consistent with other zone districts that allow 5.0 FAR as a matter of right for residential uses and which also provide a means of spreading the density across the site through 100% lot occupancy and the provision of a court in lieu of a rear yard.

**The Special Exception Relief**

30. Housing for mechanical equipment or a stairway or elevator penthouse on the roof of a building or structure must be placed in one enclosure and the enclosing walls from the roof level must be of equal height. (11 DCMR §§ 411.4 and 411.5.) Additionally, the roof structures must be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located. (11 DCMR § 770.6.) Here, in order to minimize the size and visibility of the roof structures, the Applicant proposes to house the stairway enclosures separately from the elevator penthouse and communal recreation space on the roof. The Applicant also seeks relief from the setback requirements for Stair D, which is located approximately eight feet from the closest exterior wall where a distance of 10 feet is required.



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31. In order to comply with the requirement for one enclosure, the Applicant could build a continuous wall around all the equipment. However, such a wall would increase the massing and visibility of the penthouse, which would undermine the purpose of the regulations, which is to exercise a degree of architectural control over roof structures. (11 DCMR § 411.) Instead, the separate enclosures for the stair towers and elevators will help minimize the appearance of the roof structures and protect the visual quality of the U Street Historic District. The surrounding walls will be of quality material to integrate them into the overall design of the building.
32. If the Applicant were required to set back Stair D an additional two feet, it would result in awkward interior unit layouts on the upper two floors, which have a smaller floor plate than floors 2, 3, and 4, as a result of the HPRB design review process. These upper floors were stepped back from the smaller historic structures along 8<sup>th</sup> Street to allow a better transition between the new construction and existing historic buildings. Significantly, Stair D is set back more than 18 feet from the exterior walls of floors 2, 3 and 4 and the south property line.
33. Pursuant to § 1903.3 of the Arts Overlay District, each new building on Florida Avenue between 7th and 9th Streets must be designed so that not less than 75% of the street wall is built to the property line. Here, the Applicant proposes to set back the street wall at the ground floor level approximately five to 10 feet, in an undulating fashion to mimic the rhythm of the historic row fronts of the neighborhood and to ensure that the public sidewalk's width complies with applicable streetscape standards of DDOT's DEM. The DEM and the Public Realm Design Manual issued in 2011 require a minimum pedestrian clearance of 10 feet. Further, under the DUKE Plan, the ground floor of the new building on this site is to be developed with retail and entertainment uses that actively enhance the public realm and optimize pedestrian access to and among the neighborhood attractions.
34. The expansion of the sidewalk will not adversely affect neighboring properties or be detrimental to the health, safety, convenience, or general welfare of the public. Rather, it will greatly enhance the health, safety, convenience and welfare of the public by increasing the sidewalk width along Florida Avenue, which presently is extremely narrow at only approximately seven feet six inches "clear," with a four-foot tree box zone. This existing exceptional circumstance of the nonconforming sidewalk width warrants a deviation from the street wall requirements. The resulting architectural treatment of the ground floor retail area will be greatly enhanced with the setback.

## **CONCLUSIONS OF LAW**

### **Variance Relief**

#### **Standard of Review**

The Applicant seeks area variances from the required standards for rear yard depth (§774), lot occupancy (§772), off-street parking (§2101.1) and loading (§2201) in order to allow construction of new residential development with ground floor retail at 710 Florida Avenue, N.W. (Square 416, Lot 31). Under § 8 of the Zoning Act (D.C. Code § 6-641.07(g)(3) (2008 Repl.), the Board is authorized to grant an area variance where it finds that three conditions exist: “(1) the property is unique because, *inter alia*, of its size, shape or topography; (2) the owner would encounter practical difficulties if the zoning regulations were strictly applied; and (3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zoning plan.” *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995), quoting *Roumel v. District of Columbia Bd. of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980). See, also, *Capitol Hill Restoration Society, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). Applicants for an area variance need to demonstrate that they will encounter “practical difficulties” in the development of the property if the variance is not granted. See *Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(noting that “area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden”). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be “unnecessarily burdensome.” See *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

As discussed below, the Board concludes that the Applicant has met its burden of proof for the requested variances.

#### **Exceptional and Extraordinary Conditions**

The Board concludes that the subject property is affected by a confluence of several exceptional and extraordinary conditions. See *Clerics of St. Viator v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974); *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990) (an exceptional or extraordinary situation or condition may arise from a “confluence of factors”). First, the property is constrained by Metrorail tunnels that run beneath the surface and a WMATA “zone of influence” that restricts the depth to which the site can be excavated. Second, the particular type of construction used for the Metrorail tunnels is very susceptible to changes in soil pressure, further complicating excavation and construction on the site. Third, the property is irregularly shaped and has frontage on two streets. Fourth, the width of the sidewalk on Florida Avenue is less than the DDOT standard.

*Practical Difficulties*

The confluence of these exceptional and extraordinary conditions creates practical difficulties for the Applicant in complying with the parking, loading, rear yard and lot occupancy provisions of the Zoning Regulations. The WMATA tunnels and the "no build" zone prevent the Applicant from excavating more than one level below grade, thereby limiting the amount of parking, loading, and other building service space that can be provided in an underground garage. The maximum number of parking spaces that can fit on one level is 29 spaces. Because the ARTS Overlay requires that a minimum of 50% of the ground floor level be devoted to retail uses, parking is effectively precluded on that level. Further, the reduction in the amount of retail space to accommodate parking and loading facilities would create significantly inefficient tenant layouts and reduce the most valuable income stream for the property, which is critical to offsetting the increased structural costs to build around and over the Metrorail tunnels.

Without the increase in lot occupancy and reduction of the rear yard depth, the Applicant would not be able to achieve the bonus density permitted under the Inclusionary Zoning regulations, which is designed to off-set the developer's cost of constructing affordable housing. Increasing the residential square footage is also critical to help offset some of the extraordinary costs and unanticipated additional construction premiums associated with the WMATA constraints.

Similar difficulties exist in meeting the rear yard and lot occupancy requirements. Because the site confronts two streets at an acute angle, provision of a rear yard would result in undesirable gaps along either street, regardless of which façade is treated as the building frontage. Such gaps are discouraged under the ARTS Overlay and would be incompatible with the historic district. If the Applicant were forced to comply with the lot occupancy requirements, the number of units would be reduced by at least five, and the number of family size units would drop dramatically. If the number of one- and two-bedroom units were maintained, the overall unit count would decrease even further. Similarly, a rear yard would take a 15 foot swath across the southern end of the property and reduce the footprint of the site where apartment units could be located.

*No Harm to Public Good or Zone Plan*

The requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The transportation needs of the building's tenants and residents will be well served. The number of loading spaces is anticipated to sufficiently support the demand of the building and the loading dock will be managed by the residential property management company so that deliveries are scheduled appropriately. Further, the parking demand can be adequately served through the 29 spaces proposed for project and further offset by the transportation demand management measures to be implemented by the applicant. Given the high transit accessibility at the site, including two Metrorail Stations within two blocks of the project, the demand for parking will be greatly reduced. The elimination of the required rear yard prevents gaps in the street walls. Sufficient light and air will be provided to the residential units from the two street frontages and the closed court at the rear of the building.

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The provision of residential units with ground floor retail at the Property is consistent with the goals of the ARTS Overlay and existing planning policies. The Board notes that in other zone districts where residential density may be up to 5.0 FAR without using any bonus density, the regulations allow a flexibility to satisfy the rear yard requirements for corner properties by alternative means. For example, in the SP-1 and SP-2 Districts, a corner lot site may meet the rear yard requirement with a court, similar to the one provided with this development. (11 DCMR §§ 524.1 and 536.1.) Additionally, the C-3-B District, which permits the same maximum residential density of 5.0 FAR (§771.2) and a height of 70 feet (§770.1) that is being developed here through bonus density, eliminates the need for a rear yard and allows 100% lot occupancy. (11 DCMR § 774.9(c) and 772.1.) Thus, the requested lot occupancy and rear yard relief is consistent with other zone districts that permit 5.0 FAR residential density and provide a means to accommodate it on site by allowing 100% lot occupancy and courts in lieu of a rear yard.

The C-2-B District and the Inclusionary Zoning provisions "incentivize" residential uses and the increase in lot occupancy is consistent with that objective. The relief will ensure an appropriate mix of studio, one-bedroom, and two-bedroom units that will support a variety of household sizes rather than an overconcentration of one-person studio units.

**Special Exception**

Pursuant to § 3104 of the Zoning Regulations, the Board is authorized to grant special exceptions where, in its judgment, the relief will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. Additionally, certain special exceptions must meet the conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of § 3104, the Applicant also had to meet the requirements of §§ 411 and 1906.

Relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the relief requested are met. In reviewing an application for special exception relief, the Board's discretion is limited to determining whether the proposed exception satisfies the requirements of the regulations and "if the applicant meets its burden, the Board ordinarily must grant the application." *First Washington Baptist Church v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 695, 701 (D.C. 1981) (quoting *Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)).

Here, the Applicant's proposal to provide two separate stair enclosures advances the goals of minimizing the visibility of roof structures and reducing the impacts on the light and air of other buildings. While Stair D, which is 10 feet in height, is only set back eight feet from the exterior wall to the south, it is set back more than 18 feet from the south property line and the closest abutting building. The roof structures also meet the setback requirements along all the street frontages, and are mostly not visible from public spaces. Based on the foregoing, the Board

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concludes that the Applicant has met its burden of proof in demonstrating that the roof structures are in harmony with the purposes and intent of the Zoning Regulations.

The Board further concludes that relief from the street wall provisions of the ARTS Overlay District will substantially advance the purposes of the overlay and will not adversely affect neighboring property or be detrimental to the health, safety, convenience or general welfare of persons living, working or visiting the area. The exceptionally narrow sidewalk width along Florida Avenue, coupled with the WMATA constraints and the DEM standards, make it difficult to comply with the requirement to bring the building façade out to the property line. Here, a ground floor setback of approximately five to 10 feet effectively widens the public sidewalk to the range of 14 feet, consistent with DDOT standards. In conformance with the provisions of the ARTS Overlay, the design is also being reviewed by HPRB to ensure its compatibility with the historic district and the surrounding area.

**Interplay of Zoning Regulations with DUKE Plan and the Comprehensive Plan**

One witness, testifying on behalf of herself and other business owners on 9th Street in Square 393 across 8<sup>th</sup> Street from the Property, claimed that the new building would not be consistent with the DUKE Plan, which recommends a minimum of 20% affordable housing to be provided on the site. The DUKE Plan was adopted prior to the adoption of the Inclusionary Zoning program.

The Board concludes that its authority in evaluating the merits of variance and special exception applications is limited to the standards set forth in the zoning enabling act and the zoning regulations. (See D.C. Code § 6-641.07(g).) The Board is not charged with interpreting the Comprehensive Plan or the DUKE Plan, a small area plan approved by the Council but which is not an official part of the Comprehensive Plan.<sup>1</sup> *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1034 (D.C. 1995)("The Board's limited function is to assure that the regulations adopted by the Zoning Commission are followed;...Thus the only question before us is whether the Board correctly followed the regulations – not the Comprehensive Plan – in granting ... [the] application.").

The Board likewise concludes that it is prohibited from applying the provisions of the DUKE Plan in evaluating requests for special exception or variance relief.

**Great Weight to ANC and OP**

Section 13(b)(d) of the Advisory Neighborhood Commission Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Code § 1-309.10(d)(A)), requires that the Board's written orders give

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<sup>1</sup> The DUKE Plan was approved in a resolution adopted by the District of Columbia Council on June 21, 2005, as a small area plan formally known as the Shaw/U Street Cultural Destination District Plan. The DUKE Plan therefore does not meet the District Charter's perquisites for being considered part of the Comprehensive Plan; namely that it be transmitted by the Mayor as a bill, approved by the Council as an act, and reviewed and approved by the National Capital Planning Commission. (DC Official Code § 1-204.23 (2006 Repl.).)

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"great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 1B recommended approval of the requested relief. The Board accords the ANC recommendation the great weight to which it is entitled and concurs in its recommendation.

The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Code § 6-623.04) to give great weight to OP recommendations. The Board also concurs with OP's recommendation that the zoning relief should be granted.

Based upon the record before the Board, and having given great weight to the ANC and OP reports filed in this case, the Board concludes that the Applicant has met the burden of proof pursuant to 11 DCMR § 3103.2 for an area variance under §§ 774, 772, 2101, and 2201, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Board also concludes that the Applicant has met the burden of proof for special exception relief, pursuant to 11 DCMR §§ 3104.1, 411.5, 1906, and 1903.3 that the requested relief can be granted as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

It is therefore **ORDERED** that the application is hereby **GRANTED**, subject to the approved plans, as shown on Exhibit 25, and **SUBJECT** to the **CONDITIONS** below. For the purposes of these conditions, the term "Applicant" shall mean the person or entity then holding title to the Property. If there is more than one owner, the obligations under this Order shall be joint and several. If a person or entity no longer holds title to the Property, that party shall have no further obligations under this Order; however, that party remains liable for any violation of these conditions that occurred while an Owner.

1. The Applicant shall comply with zoning requirements to provide bicycle parking/storage facilities.
2. The Applicant shall commit that all parking costs be unbundled from the cost of lease or purchase. Parking costs must be set at no less than the charges of the lowest fee garage located within ¼ mile.
3. The Applicant shall identify a project's TDM Leader (for planning, construction, and operations), and provide DDOT/Zoning Enforcement with annual TDM Leader contact updates.
4. The Applicant shall post all TDM commitments on-line, publicize availability, and allow the public to see what commitments have been promised.

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5. The Applicant shall provide website links to CommuterConnections.com and goDCgo.com on developer and property management websites.
6. The Applicant shall provide an on-site business center to residents with access to copier, fax, and internet services.
7. The Applicant shall install a Transportation Information Center Display (kiosk) within the residential lobbies containing printed materials related to local transportation alternatives, and maintain a stock of materials at all times.
8. The Applicant shall provide secured bicycle parking/storage facilities.
9. The Applicant shall host a transportation mobility fair six months after both of the residential buildings have opened. The transportation fair will be advertised to all residents and retail workers. The onsite TDM coordinator will work with DDOT's goDCgo team to organize representatives that are experts in the non-auto transportation options that serve the site. Each person that attends the event will be educated on the various options and representatives will work with attendees to help them tailor the use of non-auto options to their specific transportation needs. Based on the turnout of the transportation fair and feedback gleaned by the onsite TDM coordinator, a determination will be made if the event will be repeated the following year.
10. The Applicant shall fund the installation of a new traffic signal at 8<sup>th</sup> Street and Florida Avenue, N.W.
11. The Applicant shall have the flexibility to modify mix and location of units, and to modify the design of the building to address any comments from the D.C. Historic Preservation Review Board during final review of the project so long as the modifications do not require any additional areas of zoning relief.

**VOTE:**        **5-0-0** (Lloyd J. Jordan, Anthony J. Hood, Nicole C. Sorg, Rashida Y.V. MacMurray, and Jeffrey L. Hinkle to approve)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**

A majority of the Board Members approved the issuance of this order.

**ATTESTED BY:**

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

**FINAL DATE OF ORDER:** September 14, 2012

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

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

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

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

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS



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PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT  
BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.