GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 18330 of FCP Champlain, LLC, pursuant to 11 DCMR §§ 3103.2 and 3104.1, for a variance from the floor area ratio requirements under § 402, and a special exception to allow an increase in building height under §1403, to permit the development of a residential building in the RC/R-5-B District at premises 2337 Champlain Street, N.W. (Square 2563, Lot 887).

HEARING DATE: April 3, 2012
DECISION DATES: May 15, 2012, May 22, 2012, and July 10, 2012

DECISION AND ORDER

FCP Champlain, LLC ("Applicant") submitted this self-certified application on November 18, 2011, for property located at 2337 Champlain Street, N.W. (Square 2563, Lot 887) (the "Site"). The Applicant requested special exception relief to increase the maximum permitted height from 40 feet to 48 feet, nine inches in the Reed-Cooke ("RC") Overlay District pursuant to §1403 of the Zoning Regulations and for a variance from §402.4 of the Zoning Regulations to increase the permitted floor area ratio ("FAR") by 0.25 FAR (or 3,463 square feet of gross floor area).

The Board of Zoning Adjustment ("BZA" or "Board") convened a hearing on the application on April 3, 2012. Proposed Findings of Fact and Conclusions of Law were submitted on April 17, 2012 (Exhibits 49 and 50), and rebuttal to those documents was submitted on April 24, 2012. (Exhibits 51 and 52.)

The Board was scheduled to deliberate on the application at its regularly scheduled public meeting on May 15, 2012. On that date, the Applicant submitted a request for a postponement of consideration of the decision. The Board scheduled a special public meeting for May 22, 2012, and deliberated on the application at that meeting. The Board voted 5-0-0 to grant the application. Following that vote, the Chairman of the Board requested the Applicant to submit a proposed order for the Board's consideration. On July 10, 2012, the Board denied a request of the party in opposition to strike the proposed order submitted. A full explanation of the Board's rulings is set forth below.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated November 22, 2011, 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") 1C, the ANC within which the subject property is located, Single Member District 1C 07, and the Councilmember for Ward 1. A public hearing was scheduled for April 3, 2012. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the *D.C. Register*, and on January 13, 2012, sent such notice to the Applicant, ANC 1C, and all owners of property within 200 feet of the Site.

Request for Party Status. In addition to the Applicant, ANC 1C is automatically a party in this proceeding. The Erie Condominium Association ("Association"), comprised of the owners of units in the building located at 2351 Champlain Street, N.W., immediately north of and abutting the Site, requested party status in opposition to the application. The Association was represented by Richard Weidis, the president of the Association and the owner of a unit in the Erie Condominium Building ("Erie"), and appeared at the hearing through legal counsel, Laurie Horvitz. Mr. Weidis also requested party status in opposition to the application in his individual capacity. At the hearing, the Board asked Ms. Horvitz to identify any separate interests between the Association and Mr. Weidis, given that the requests for party status were the same in most major respects. Ms. Horvitz acknowledged the overlapping interests and conceded that the interests were aligned. Ms. Horvitz further stated that it was intended that Mr. Weidis would appear and make a presentation during the Association's presentation, as he was identified as a witness. Accordingly, the Board granted party status to the Association and denied the individual party status request of Mr. Weidis.

Applicant's Case. Christine Shiker of Holland & Knight, LLP represented the Applicant. The Applicant presented three witnesses in support of the application: Charlie Kehler, representing the Applicant; Jeff Goins, PGN Architects; and Steven E. Sher, Director of Zoning and Land Use Services at Holland & Knight, LLP. The Board qualified Mr. Goins as an expert in architecture and Mr. Sher as an expert in planning and zoning.

Government Reports. OP filed a report with the Board on March 27, 2012, recommending approval of the application. The OP report set forth each of the provisions of 11 DCMR §§ 1403 and 3104.1 and opined that each requirement of the variance standard had been met. The report also opined that the application met the standards of §§1403.1 and 3103.2. (See Exhibit 35.) DDOT also filed a report with the Board on March 12, 2012, indicating that it had no objection to the requested relief and stating that it "sees no potential adverse impacts on the transportation network as a result of the special exception." (See Exhibit 26.) At the hearing, the Board requested that DDOT clarify its position on vehicle access to the Site. In response, DDOT submitted a supplemental report dated April 17, 2012, reaffirming its position that vehicle access to the Site is required to be from the north-south public alley. (Exhibit 48.)

ANC Report. ANC 1C submitted a report to the Board dated March 13, 2012, recommending approval of the application. (See Exhibit 32.)

Party in Opposition. The Association, which was the only party in opposition, objected to the proposed apartment building with respect to its alleged adverse effect on the light and air to the Erie, including the light and air to the lower level patios, and diminished enjoyment of the Association's roof decks because of perceived impact on the views from the roof decks and issues of privacy. The Association also alleged that the proposed apartment house would have an adverse impact on the Erie's property values and would set an unacceptable precedent for special exception approval in the neighborhood.

Persons in Support or Opposition. The Board received a letter from King's Creek LLC, the owner of the property immediately to the south of the Site (the "Brass Knob,") in support of the project. (See Exhibit 31.) The Board also received several additional letters in support of the project from nearby neighbors. (See, e.g., Exhibits 36, 37 and 38.)

FINDINGS OF FACT

The Site and the Surrounding Neighborhood

1. The Site is located at Lot 887 in Square 2563. The Site is located on the east side of Champlain Street in the central portion of the square and abuts a north-south alley to the east that has a width ranging from 11 to 13 feet as it abuts the Site, but generally is approximately 15 feet through its entirety. The Site is currently used as a parking lot.

2. The Site is very deep, having a depth of approximately 130 feet. The Site is also irregular in shape because the Site's property line shifts to the south, creating an extended piece along the alley, and because the Site includes a slight bend at its center along Champlain Street. In addition, the Site's topography has a significant slope, generally rising from southwest to northeast. This slope creates a high point at the northeast corner (near the alley) and a low point at the southwest corner (at Champlain Street) and has a difference of more than nine feet.

3. The Site is located in the Reed-Cooke/Adams Morgan area, which contains a wide variety of uses, including residential, retail, commercial, and industrial. Champlain Street has seen much redevelopment for residential use over the last 20 years. Many of these projects have been approved with additional height and density, including the property directly to the south of the Site at 2329 and 2335 Champlain Street, approved for residential development with a maximum height of 50 feet and a maximum FAR of 2.64 (BZA Case No. 18167/17431-B); the property further to the south of the Site at 2301 Champlain Street, approved for residential development with a maximum height of 50 feet and an FAR of 2.75 (BZA Case No. 16931); and the property across Champlain Street to the southwest at 2328 Champlain Street, approved as a planned unit development ("PUD") with a maximum height of 55 feet and FAR of 3.63. (Z.C. Order No. 832).

4. The Site is zoned R-5-B and is located within the Reed-Cooke (RC) Overlay District.

5. The R-5 Districts are designed to permit flexibility for all types of urban residential developments along with those institutional and semi-public buildings that are compatible with adjoining residential uses. The R-5-B District permits developments of a moderate height and density, permitting a maximum height of 50 feet and a maximum FAR of 2.16 FAR including the 20% bonus provided by Chapter 26 for Inclusionary Zoning developments.

6. The primary purpose of the RC Overlay District is designed to protect existing housing and provide for new housing development. (11 DCMR § 1400.2(a)(1).) Although the R-5-B District permits a maximum height of 50 feet, the RC Overlay District restricts the maximum height to 40 feet. The RC Overlay District, however, provides for a special exception from its requirements in order to fulfill the stated objectives of the RC Overlay and in compliance with the standards set forth in §§1403.1(a) through 1403.1(g) of the Zoning Regulations. Although such special exception relief would include increases to height, the Board had previously ruled that such relief cannot exceed the 50 foot height limit applicable to the underlying zone. Application No. 16869 of King's Creek, LLC (2002).

The Applicant's Project

7. The proposed project will replace the existing surface parking lot with a new residential building ("Subject Building"). The Subject Building is positioned mid-block, bounded by Champlain Street on the west, a public alley on the east and existing buildings on the north and south sides. The Subject Building abuts a blank wall of the Erie to the north and a proposed and approved blank wall of the Brass Knob to the south.

8. When the Applicant first submitted the application, the Subject Building had a maximum height of 50 feet to the top of the parapet. Based on discussions with the Association and its representatives, the Applicant lowered the maximum height of the Subject Building to 48 feet, nine inches to the top of its parapet. At the north property line, the top of the parapet of the Subject Building is only five inches above the top of the parapet of the Erie and the roof of the Subject Building is only two feet, 10 inches above the roof of the Erie. This difference is computed by comparing the elevation of the top of the parapet of the Erie, which is 199 feet, six inches, to the elevation of the top of the parapet of the Subject Building, which is 199 feet, 11 inches, and by comparing the elevation of the roof of the Erie, which is 196 feet, to the elevation of the roof of the Subject Building, which is 198 feet, 10 inches. (Champlain Street Elevation Plan in the record at Exhibit 44.)

9. The Subject Building has a maximum FAR of 2.41 and includes 40 units.

10. The layout of the Subject Building has been broken into two bars separated by a private courtyard, with the bar adjacent to Champlain Street having a double-loaded corridor and the

bar adjacent to the alley having a single-loaded corridor. The separate bars are connected by a bridge on each level. The courtyard design allows for maximum light and air for the proposed 40 units.

11. The Subject Building has been designed to maintain the continuity of a street wall along Champlain Street. The Subject Building is set back off the property line allowing for a pedestrian-friendly experience but also aligning with the Erie building to the north and similarly with the Brass Knob to the south.

12. The architects explored various options for constructing an apartment building on the Site. The studies included construction of a U-shaped building and a T-shaped building at the matter-of-right height of 40 feet. Given the party walls on both the north and south property lines, both of these configurations resulted in units with poor light and air except for the very front units. In addition, these configurations resulted in substandard heights for the units that would be far below market average. This condition results from the required parking and the transverse sloping site.

13. The Subject Building includes a minimum of 20 parking spaces, with at least 11 parking spaces being provided in the partially below-grade parking structure and nine spaces in the rear yard. All parking spaces are accessed from the alley to the east of the Site.

The Zoning Relief Requested

Special Exception under §1403.1

14. Section 1403.1 permits a special exception to increase the permitted height in the RC/R-5-B District to 50 feet, subject to the criteria set forth in §§1403.1(a) through 1403.1(g).

15. In order to fulfill the stated objectives of the RC Overlay and to create a building that is appropriate for the neighborhood, the Applicant requests a special exception to permit a maximum height of 48 feet, nine inches as permitted in §1403 of the Zoning Regulations.

16. As demonstrated in Findings of Fact Nos. 17 through 29, the Applicant has satisfied the applicable criteria in §§1403.1(a) through 1403.1(g) for granting special exception relief from this Overlay requirement.

17. The requested increase in height furthers the goals of the RC Overlay District, including the protection of current housing in the area, the development of new housing in the area, the maintenance of heights and densities at appropriate levels, and protection of adjacent and nearby residents from damaging traffic, parking, environmental, social and aesthetic impacts. (11 DCMR § 1400.2.)

18. The Subject Building provides new housing at an ideal location, near new and existing residential uses.

19. The removal of the parking lot and the increase in the number of residential units in the neighborhood will further improve the surrounding area.

20. The height of the Subject Building will be compatible with the surrounding area, being appropriate to the Erie building immediately adjacent on the north and the approved Brass Knob development immediately adjacent on the south, as well as the overall area. As noted above, the Applicant has lowered the height of the parapet of the Subject Building to be substantially the same as the height of the parapet to the Erie. With this reduction in height, the top of the parapet of the Subject Building will be only five inches above the top of the parapet of the Erie and the top of the roof of the Subject Building will be only two feet, 10 inches above the top of the roof of the Erie. The roof of the Subject Building is within 11 inches of the roof of the proposed Brass Knob to the south.

21. The plans, renderings, and animation presented to the Board clearly indicate that the Subject Building is an appropriate structure designed to fit the context of the street and complete the urban, residential development along the east side of Champlain Street. (Exhibits 40, 44.)

22. The existing curb cut on Champlain Street which provides access to the existing parking facility will be removed, and the Subject Building will provide all access from the existing north-south alley abutting the east boundary of the Site. The location of this access is consistent with DDOT's policies for access and is supported by both DDOT and OP.

23. The setback of the Subject Building will provide a wider pedestrian way in front of the building. This setback, along with the removal of a driveway from Champlain Street and the access to all parking spaces from the rear of the building, will minimize conflicts with pedestrian traffic, will create no dangerous or otherwise objectionable traffic condition, and will result in an enhanced and superior streetscape.

24. The Subject Building includes a minimum of 20 parking spaces in compliance with the Zoning Regulations. According to the DDOT report in the record at Exhibit 26, the proposed parking is an acceptable ratio.

25. Given the size of the proposed Subject Building, no loading facilities are required by the Zoning Regulations. All loading can be accommodated from the street.

26. Because the Site is not located within a C-2-B Zone District, the criteria in § 1403.1(d) are not applicable.

27. Because the Subject Building incorporates only residential uses, there will be no unexpected or unusual noise associated with the project that would adversely affect adjacent or nearby residences.

28. The operation of the Subject Building will not involve any outdoor storage of materials nor outdoor processing, fabricating, or repair. Garbage from the units will be accommodated in a storage area on the first floor.

29. This Subject Building will not adversely affect adjacent or nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting the area. The Subject Building provides an important development of new residential units, is well-designed to match the scale and use of adjacent and nearby developments, and allows light and air to the adjacent buildings. The Subject Building replaces an existing surface parking lot that accommodates more than 50 cars each night during the weekend. Thus, the Subject Building will serve to eliminate that additional traffic and replace it with a new building designed to match the scale and use of adjacent and nearby developments.

30. The Subject Building will not adversely impact on the light and air to the Erie, including its lower level patios. The Applicant presented detailed shadow studies indicating that the Subject Building with the requested height and density would have no effect on the windows or roof decks of the Erie when compared to a building that could be constructed on the Site as a matter of right Similarly, the detailed shadow studies also indicated that the Subject Building with the requested height and density would have no effect on the lower level patios of the Erie when compared to a building that could be constructed on the Site as a matter of right.

31. The Subject Building will not adversely impact the views from the Erie's roof decks. The Applicant presented detailed views evidencing the limited impact on views from the Erie's roof decks. The Erie includes four private roof decks, and the testimony focused on the impacts to the two roof decks on the southern portion of the Erie. The Association provided photographs of the views to the west showing sunsets and to the south showing views to the Washington Monument. The Subject Building will have no impact on the views to the west because it is located to the south of the Erie. The Applicant provided evidence that the increased building height has no adverse impact on the views from the roof deck to the south because the parapet of the Subject Building is only five inches above the parapet of the Erie. Furthermore, the Applicant has lowered the penthouse to only eight feet above the parapet and set it back at least 18 feet from the north property line to reduce any impact on the views from the roof deck. The Applicant provided view depictions to the south indicating that the Subject Building will not impact views from the Erie to the Washington Monument. (View from East Side of Terrace Looking South and View from West Side of Terrace Looking South in Exhibit 44.)

32. Nor will the Subject Building adversely affect the privacy of the occupants of adjacent properties, The Applicant agreed to limit access to the roof of the Subject Building to the occupants of the seven individual units on the top floor of the front bar of the building; the plans do not provide common access to the roof for the overall building. In addition, the Applicant presented a plan illustrating that the closest active roof deck space would be a minimum of 20 feet from the north property line. (Site Plan in the record at Exhibit 44.) Given that roof decks on abutting buildings are a common, urban feature, this additional setback limits any potential adverse impact on the Erie with respect to privacy within the roof deck space on the Erie.

Variance from §402.4

33. Section 402.4 of the Zoning Regulations limits development on the Site to 1.8 FAR. The Applicant requests a variance from § 402.4 to develop the Subject Building with 2.41 FAR.

34. As demonstrated in Findings of Fact Nos. 35 through 42, the Applicant has satisfied the burden of proof for granting a variance from § 402.4.

Exceptional and Extraordinary Conditions

35. The Site has a depth of approximately 130 feet, which is very deep for residential development given the light and air required for the units and the need for certain dimensions to create either a single- or double-loaded corridor.

36. The Site is irregular in shape. While the Site is more or less rectangular in shape, the southern property line jogs more than 10 feet further to the south as it goes east. This shift creates an extended piece of the lot along the alley and makes access to the partially below-grade space from this point practically difficult. In addition, the Site slightly bends at its center along Champlain Street, which creates a pinched dimension at the rear of the building.

37. The topography of the Site has a significant slope, generally rising from southwest to northeast. This slope creates a high point at the northeast corner (near the alley) and a low point at the southwest corner (at Champlain Street) and has a difference of more than nine feet. At the same time, the Site slopes along both the alley and Champlain Street façades. Along the alley façade, the elevation changes by almost 2.5 feet, while the elevation changes almost 4.75 feet along Champlain Street.

Practical Difficulties

38. To maintain a pedestrian-friendly streetscape in keeping with the goals of the RC Overlay and to provide access in accordance with the policies of DDOT, the Applicant is providing access to the parking facility from the alley. This point of access creates a practical difficulty for the Subject Building to comply with the FAR requirements. Specifically, a garage entry

would normally be located at the low point of the lot allowing for ease of entry and construction and reducing the slope necessary to access a below-grade level. However, OP's and DDOT's indications that those agencies would not support allowing access from Champlain Street at the front of the building, combined with the unique topography and irregular shape of the lot, results in the garage entry located at the highest point of the Site (i.e., at the northeast corner of the Site). In order to provide access and comply with code requirements, the overall structure of the Subject Building therefore must be raised approximately five feet because there is insufficient travel distance for the ramp to be able to get under the building at grade and for the garage to be entirely accommodated below-grade. This results in the ceiling of the underground parking level being in part more than four feet above the adjacent finished grade. A portion of the lowest level is therefore considered a basement; which must be counted within FAR. The raised structure also results in a raised first level for development at the rear of the Site that otherwise would not be counted as FAR.

39. Neither the parking area nor the portion of the first level of development at the rear of the building would be included in FAR if access could be taken from the street similar to the building to the north or from the southeast corner of the development from the alley (i.e., the low end of the Site), similar to the approved development to the south. Accordingly, the Subject Building includes 3,182 square feet of gross floor area within the project that would not otherwise be included if the Applicant was not required to lift the building to provide access. This square footage along with the lobby space is equal to the total FAR variance requested of 3,463 square feet of gross floor area. No additional residential units are added as a result of the requested variance.

No Harm to Public Good or Zone Plan

40. The project will maximize residential uses of the Site, as encouraged by the RC Overlay District, and will improve the aesthetics of this area by replacing a parking lot with a residential building.

41. As to harm to the public good, the Board reaffirms its determinations made in findings of fact numbers 27 through 32 above.

42. The design of the Subject Building results in an improved streetscape. The Applicant has placed three residential units at the street wall at grade along Champlain Street and has located the parking away from the street, which is in keeping with accepted urban design principals and the goals of the RC Overlay District. In addition, given the narrow public space and the goals for an activated and walkable community, the entire Subject Building has been set back from the property line to create a wider, more appropriate pedestrian walkway.

CONCLUSIONS OF LAW

Preliminary Issue

As noted, the Board deliberated upon this case on May 22, 2012 and thereafter voted to grant the application. Following the vote, the Chair requested the Applicant:

> To propose an order for the Board in light of the findings that were made by the Board today and present it to the Office of Zoning to be considered by the Board and modified, if necessary.

(Transcript of Special Public Meeting of May 22, 2012, p. 17.)

The Applicant submitted such an order on June 5, 2012. The draft order was then transmitted to the Office of the Attorney General ("OAG"), which made several changes to the text in order ensure its legal sufficiency. OAG then presented its revised draft to the Board and the Office of Zoning. The Board made no revisions to the OAG revised draft. Finally, the Office of Zoning made technical corrections to the draft order and issued this Order in its current form.

By letter dated June 11, 2012, the Association stated its objection to the Applicant's June 5th filing and requested that the Board strike it. The Association made three arguments in support of its request:

1. The proposed order failed to include all of the findings made during the Board's deliberations;

2. The order included findings not made during those deliberations, particularly in the proposed finding of fact 44; and

3. The Chair violated § 3121.7 by not permitting the Association to reply.

As to the first two points, the Association offers a far too literal reading of the Chair's request. Ordinarily when a Board decision is adverse to a party, OAG drafts a proposed order for the Board's consideration. It is the Board's expectation that the draft order will address all elements needed to grant zoning relief. This may involve augmenting findings made by the Board during its deliberations and omitting Board findings that were unnecessary to reach its ultimate decision. In this case the Chair was simply asking the Applicant to perform this task instead of OAG in order to expedite the issuance of the order and to allow OAG to focus on its other order writing assignments. As noted, the proposed order was just the starting point of the process. OAG and the Board reviewed the draft and necessary revisions were made, including the elimination of proposed finding of fact 44. There is no need to strike what amounted to a suggestion.

For this same reason, no reply by the Association was needed. The Chair's request for a proposed order came after the Board's vote to approve the application. The proposed order was therefore not submitted to persuade the Board to take any action, but only to set forth the factual and legal bases of the action taken. The only conceivable purpose for a reply to the proposed order would be to convince the Board to reconsider its decision. However, the reconsideration process begins after this Order is issued. (*See* 11 DCMR § 3126.) The Association's reliance on § 3121.6 is misplaced. That subsection states that the Board must permit responses to exhibits, information, or briefs submitted after the close of the hearing. The provision does not pertain to submission of proposed findings of facts, which is governed by §§ 3121.3 and 3121.4, and for which no response are permitted. In any event, § 3121 governs procedures leading up to the Board's vote and therefore has no bearing upon a post-decision filing of an order requested by the Board. For all of these reasons the Association's request to strike the Applicant's proposed order is denied.

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. Section 1403 of the Zoning Regulations provides specifically for special exceptions from the provision of the RC Overlay, including height. Special exceptions must also meet the specific conditions enumerated in the particular sections pertaining to them. In this case, along with the general requirements of §3104, the Applicant also has to meet the requirements of §1403.1.

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)). Thus, contrary to the assertions of the Association, the Applicant is not required to provide evidence that it is not able to construct to a matter-of-right height so long as the Applicant provides evidence of compliance with each standard of the special exception. Furthermore, the Applicant is not required to provide evidence of a practical difficulty to justify the relief because that is not the appropriate standard for the special exception requested.

For purposes of the special exception from the maximum permitted height, the Applicant must prove that it has complied with the requirements of §§1403.1 and 3104.1 of the Zoning Regulations. Based on the evidence and testimony and Findings of Fact above, the Board concludes that the Applicant has complied with each of the criteria listed in §§1403.1(a) through 1403.1(g). Specifically, the Subject Building at the proposed height will substantially advance

the stated purposes of the RC Overlay District because the project results in the creation of new residential units in a development that maintains heights and densities at appropriate levels. The vehicular access and egress from the alley on the east side of the Site is designed and located so as to minimize conflicts with pedestrian ways, to function efficiently and to create no dangerous or otherwise objectionable traffic condition. The Subject Building provides adequate off-street parking and loading. The Site is not zoned C-2-B; thus, § 1403.1(d) is not applicable. As a residential building, the Subject Building will not have unexpected or unusual noise so it will not adversely affect adjacent or nearby residences. The operation of the Subject Building will not involve any outdoor storage of materials nor outdoor processing, fabricating or repair and thus complies with § 1403.1(f).

The Subject Building at the proposed height will not adversely affect adjacent and nearby property or be detrimental to the health, safety, convenience, or general welfare of persons living, working, or visiting in the area. The Board is satisfied by the Applicant's testimony, the support from OP, the support from ANC 1C, and the support from other nearby property owners that the Subject Building will have no adverse impact on the community.

While the Association raised concerns about the potential adverse effects of the additional height on the Erie, those concerns have been adequately addressed by the conditions below and the adjustments that the Applicant has made to the project since submitting the application. Specifically, the top of the parapet on the north wall of the Subject Building will be only five inches above the top of the Erie's parapet. The Applicant's shadow studies clearly demonstrate that there will be no adverse impact on the windows, roof decks, or lower level patios when compared to a matter-of-right building, and the Association presented no evidence to the contrary. The Subject Building is an appropriate structure designed to fit the context of the street and complete the urban, residential development along the east side of Champlain Street.

While the Association claims that there will be an adverse impact on the views from the roof deck, it is well-settled in the District of Columbia that a property owner is not entitled to a view across another person's property without an express easement. See *Hefazi v. Stiglitz*, 862 A.2d 901 (D.C. 2004). This Board and the Zoning Commission have consistently found that a property owner has no right to a view across another person's property. *See, e.g.*, BZA Order No. 13518, BZA Order No. 13305, Z.C. Order No. 11-03. Despite the fact that the Association has no right to a view across the Site and that the Association has no express easement for a view across the Site, the Applicant has made significant efforts to maintain the views from the Erie. First, the Applicant has provided evidence that the increase height will not noticeably diminish the views from the Erie because the top of the Subject Building's parapet is only five inches above the top of the Erie's parapet. Second, the Applicant has lowered its penthouse well below the height permitted as a matter of right, which is 18 feet, six inches. Third, the Applicant has incorporated a 2:1 set back (at least 18 feet) of its penthouse from the wall of the Erie to reduce any potential impact on the views from the Erie's roof deck, even though the Subject Building sits on a lot line and no setback is required for the penthouse from its north property line.

Furthermore, the Applicant agreed to limit access to the roof deck to the occupants of only the seven residential units on the top floor of the front bar of the building and to ensure that the closest active roof deck space would be a minimum of 20 feet from the north property line. These agreements are incorporated as conditions to the approval granted herein and limit any potential adverse impact on the Erie with respect to privacy within the roof deck on the Erie.

The Association provided no reliable or convincing evidence to establish that the replacement of the parking lot with the Subject Building will have an adverse economic impact on the Erie or any other building within the neighborhood. In addition, the BZA is required to evaluate each project on its own merits to determine compliance with the applicable standards of the Zoning Regulations. Thus, the Association's concern regarding a dangerous precedent of approving the special exception is without merit.

Based on the findings of fact and the reasons discussed herein, the Board concludes that the requested special exception 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.

Variance Relief

Standard of Review

The Applicant seeks an area variance from the maximum FAR restrictions under § 402.4 to allow the construction of the Subject Building on the Site. Under § 8 of the Zoning Act (D.C. Code § 6-641.07(g)(3) (2001 ed.), 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 an area variance from the maximum FAR requirements of § 402.4 of the Zoning Regulations.

Exceptional and Extraordinary Conditions

The Board concludes that the Site is affected by a confluence of several exceptional and extraordinary conditions. First, the Site is very deep for an apartment house. The depth of approximately 130 feet creates significant challenges for creating residential units given the light and air required for the units and the need for certain dimensions to create either a single- or double-loaded corridor. Second, the Site is irregular in shape. Specifically, the shift in the southern property line results in complexities relating to access to the partially below-grade space, and the slight bend at the Site's center along Champlain Street creates a pinched dimension at the rear of the building. Third, the topography of the Site creates a further challenge and constraint. Specifically, the significant change in slope creates a high point at the northeast corner (near the alley) and a low point at the southwest corner (at Champlain Street) and has a difference of more than nine feet. As well, the Site slopes along both the alley and Champlain Street facades. Along the alley façade, the elevation changes by almost 2.5 feet, while the elevation changes almost 4.75 feet along Champlain Street.

Practical Difficulties

The confluence of these exceptional and extraordinary conditions creates practical difficulties for the Applicant in complying with the maximum FAR requirement set forth in § 402.4 of the Zoning Regulations. See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1979) (uniqueness may stem from a confluence of factors).

Because the Applicant provides access to the Subject Building from the alley to the east of the Site, practical difficulties are created impacting compliance with the Zoning Regulations. Specifically, a garage entry would normally be located at the low point of the lot allowing for ease of entry and construction and reducing the slope necessary to access a below grade-level. However, OP's and DDOT's indications that those agencies would not support allowing access from Champlain Street at the front of the building, combined with the topography and irregular shape of the lot, results in the garage entry located at the highest point of the Site (i.e., at the northeast corner of the Site). In order to provide access and comply with code requirements, the overall structure of the Subject Building must be raised approximately five feet because there is insufficient travel distance for the ramp to be able to get under the building at grade and for the garage to be entirely accommodated below-grade due to the topography of the Site. This results in the ceiling of the underground parking level being in part more than four feet above the adjacent finished grade. As a result, this portion of the lowest level is considered a basement (11 DCMR § 199.1, definition of "Basement") and therefore counts towards the building's FAR.[1]

[1] "Floor area ratio" is defined at 11 DCMR § 199.1 as "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." The term "gross floor area" is defined at 11 DCMR § 199.1 to include basements. Subsection

The raised structure also results in a raised first level for development at the rear of the Site that otherwise would not be counted as FAR.

Neither the parking area nor the portion of the first level of development at the rear of the building would be included in FAR if access could be taken from the street similar to the Erie to the north or from the southeast corner of the development from the alley (i.e., the low end of the Site), similar to the Brass Knob to the south. The confluence of all these factors results in a slight increase of 0.25 FAR (or 3,463 square feet), with such FAR not providing any additional residential units than that which could have been provided within the permitted FAR if the practical difficulties associated with the Site and access did not exist.

No Harm to Public Good or Zone Plan

The requested relief can be granted without harm to the public good and without threat to the integrity of the zone plan. The Board has already explained in its discussion of the special exception why the Subject Building will not tend to adversely affect the use of neighboring properties. The Board specifically concluded that there would be no adverse impact on the light, air, or privacy of Erie residents and found no merit in the Association's claims of adverse impact on the residents' views or property values or its argument that the grant of this application would create a dangerous precedent. The Board's reaffirms these decisions with respect to this prong of the variance test.

In addition, the Board finds that the project will maximize residential uses of the Site, as encouraged by the RC Overlay District. The development of this project will improve the aesthetics of this area by replacing a parking lot with a residential building and improving the streetscape. The Applicant has placed three residential units at the street wall at grade along Champlain Street and located the parking away from the street, which is in keeping with accepted urban design principals and the goals of the RC Overlay District.

Similarly, the Subject Building has been set back from the property line up to five feet in some locations to widen the narrow public space and create a wider, more appropriate pedestrian walkway which furthers the goals for an activated and walkable community. The Subject Building is an appropriate structure designed to fit the context of the street and complete the urban, residential development along the east side of Champlain Street. Finally, The Subject Building incorporates only residential uses, which are appropriate for the R-5-B District and strongly encouraged by the RC Overlay. Accordingly, the integrity of the zone plan would not be impaired by the granting of the variance.

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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199.1 defines a "basement" as the "portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade."

"great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 1C 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 detailed analysis and 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 § 402.4, 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 and 1403.1, and 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 30, and the following conditions:

1. Access to the roof deck shall be limited to the occupants of the seven residential units on the top floor of the front bar of the Subject Building, as identified on the plans presented to the Board in the record at Exhibit 44.

2. The roof deck space for the Subject Building shall be set back at least 20 feet from the north property line and shall be demarcated by an open metal railing.

Vote taken on May 22, 2012:

VOTE: **5-0-0** (Lloyd J. Jordan, Marcie I. Cohen, Nicole C. Sorg, Rashida Y.V. MacMurray, and Jeffrey L. Hinkle to approve the application.)

Vote taken on July 10, 2012:

BY CONSENSUS: (Nicole C. Sorg, Rashida Y.V. MacMurray, and Jeffrey L. Hinkle to Dismiss the Motion to Strike and Adopt to issue the

appropriate order; Lloyd J. Jordan and Marcie I. Cohen by absentee ballot to dismiss the motion to strike)

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

FINAL DATE OF ORDER: July 26, 2012

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

BZA APPLICATION NO. 18330

As Director of the Office of Zoning, I hereby certify and attest that on July 26, 2012, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____
SARA A. BARDIN
Director, Office of Zoning