COZEN O'CONNOR
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June 16, 2022

VIA IZIS

D.C. Board of Zoning Adjustment
c/o Frederick Hill, Chair
441 4th Street, NW
Suite 210 South
Washington, DC 20001

Re: Applicant's Request for a Two-Year Time Extension of BZA Order

Dear Chairman Hill and Members of the Board:

On behalf of Applicant Kline Operations, LLC (the "Applicant"), the following is an application for a two-year time extension of BZA Order No. 19722 pursuant to Subtitle Y § 705.2 of the Zoning Regulations.

I. Background on Prior BZA Approval

The Board of Zoning Adjustment (the "BZA") pursuant to BZA Order No. 19722 (the "BZA Order") granted the following relief: special exception relief from the penthouse side setback requirements under Subtitle C § 1502.1(c)(4) and the rear yard requirements under Subtitle I § 205.1; and variance relief from the requirements for the number of loading berths under Subtitle C § 901.1, the width of access aisle to loading berth under Subtitle C § 904.2, closed court dimensions under Subtitle I § 207.1, and the floor-to-ceiling clearance height requirement under Subtitle I § 612.4, to allow the construction of a hotel (the "Project") at 925-927 5th Street NW (Square 0516, Lot 827, 828, 829, and 833) (the "Property").

The BZA Order has a final date of January 9, 2019, and became effective on January 19, 2019. A copy of the BZA Order is enclosed. 450K CAP LLC, which obtained party status in opposition to the application, appealed the BZA Order on February 1, 2019 and initiated Court of Appeals Case No. 19-AA-71, styled as *450 K CAP LLC v. D.C. Board of Zoning Adjustment*. By Order dated July 30, 2020 (the "DCCA Order"), the District of Columbia Court of Appeals affirmed the BZA Order. A copy of the DCCA Order is attached hereto as Tab A.

In general, under Subtitle Y § 702.1, an order granting special exception or variance relief is valid for a period of two years. However, "[i]n the event a petition to review an order of the Board is filed in the District of Columbia Court of Appeals, all time limitations of Subtitle Y §§ 702.1 and 702.2 shall commence to run from the decision date of the court's final determination

of the appeal." *See* Subtitle Y § 702.3. Therefore, the Court of Appeals case tolled the time limitation on the validity of the BZA Order, and, such two-year time period began to run on July 30, 2020, which is the date of the Court of Appeals' final determination reflected in the DCCA Order. It follows that the BZA Order does not expire until July 30, 2022.

Accordingly, the Applicant requests this time extension pursuant to Subtitle Y § 705.2, and makes this request in good faith because of the financial effects of the COVID-19 pandemic on the Project approved under the BZA Order.

II. Compliance with Subtitle Y § 705.2

Pursuant to Subtitle Y § 705.2, the Board has the authority to grant a two-year extension of an order upon a finding that the Applicant demonstrates good cause for the extension, and the Board determines the following three requirements are met:

a) The extension request is served on all parties to the application by the applicant, and all parties are allowed thirty (30) days to respond;

b) There is no substantial change of any of the material facts upon which the Board based its original approval that would undermine the Board's justification for approving the original application; and

c) The applicant demonstrates good cause for the requested extension, with substantial evidence for any one or more of the following criteria:

(1) An inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control;

(2) An inability to secure all required governmental agency approvals by the expiration date of the Board's order because of delays that are beyond the applicant's reasonable control; or

(3) The existence of pending litigation or such other condition, circumstance, or factor beyond the applicant's reasonable control.

The Applicant has met the burden pursuant to Subtitle Y § 705.2 to warrant a two-year time extension on the BZA Order, as follows.

A. Service on All Parties to the Application

Pursuant to Subtitle Y § 705.2(a), the extension request must be served on all parties to the application, and all parties are allowed thirty days to respond. This extension request is being served simultaneously on Advisory Neighborhood Commission ("ANC") 6E, which was automatically a party in this proceeding. The Board granted party status to 450K CAP LLC ("450K CAP") and Aubrey Stephenson during the underlying case; thus, they will both be served with this

extension request. The ANC, 450K CAP, and Mr. Stephenson will be allowed thirty days to respond to this request.

B. No Substantial Change of Any Material Facts

There has been no substantial change to any of the material facts upon which the Board based its original approval that would undermine the Board's justification for approving the application. The Project remains the same as reviewed by the BZA, including all of the architectural features related to the specific zoning relief requested. The factors satisfying the relief for the Applicant's Property remain the same as well. As such, there have been no substantial changes to any of the material facts relating to the case or the Project.

C. Substantial Evidence of a Good Cause for the Extension

Finally, the Applicant must demonstrate good cause for an extension by meeting one of three enumerated criteria. Under Subtitle Y § 705.2(c)(1), good cause for a time extension includes "[a]n inability to obtain sufficient project financing due to economic and market conditions beyond the applicant's reasonable control."

The Applicant's Project is a hotel comprising up to 152 rooms. The COVID-19 pandemic, which began in March 2020 while the Court of Appeals case was pending, created substantial hardships for the local, national and international hospitality and leisure industry.[1] The demand for hotel services was directly and negatively impacted by the public health emergency due to factors such as: the suspension of international travel, restrictions on domestic travel, a rising unemployment rate, and a suffering economy. These factors and others related to the pandemic made financing the Project increasingly difficult. Despite the ongoing uncertainty of COVID-19, the Applicant is hopeful that with additional time, the Project can obtain financing because travel restrictions have been lifted, vaccines are more widely distributed, and people are returning to work and resuming vacation plans.

In sum, the negative impacts of the COVID-19 pandemic on financing in the hospitality and leisure industry were beyond the Applicant's reasonable control, and there is substantial evidence of good cause for this two-year time extension request. Accordingly, the Applicant respectfully requests a two-year time extension pursuant to Subtitle Y § 705.2 for the BZA Order.

III. Conclusion

The Applicant has met the burden under Subtitle Y § 705.2 for the Board to grant the requested time extension of the BZA Order. Accordingly, the Applicant respectfully requests that the Board do so and extend the validity of the BZA Order for a period of two years.

[1] Under Subtitle Y § 705.7, an order expiring between October 27, 2020 and June 30, 2022 can be extended administratively due to complications from the COVID-19 pandemic. However, the BZA Order expires on July 30, 2022, which makes it ineligible for a COVID-19 administrative extension by just 30 days.

Sincerely,

COZEN O'CONNOR

Meridith H. Moldenhauer
1200 19th Street NW
Washington, DC 20036

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2022, a copy of this Request for a Two-Year Time Extension with attachments was served via email on the following:

District of Columbia Office of Planning
c/o Stephen Cochran
1100 4th Street SW, Suite E650
Washington, DC 20024
Stephen.cochran@dc.gov

Advisory Neighborhood Commission 6E
Michael Eichler, Chair
Patrick Parlej, SMD
6E01@anc.dc.gov
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450 K CAP LLC
c/o Judah Lifschitz
Shaprio Lifschitz & Schram
1742 N Street NW
Washington, DC 20036
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Aubrey Stephenson
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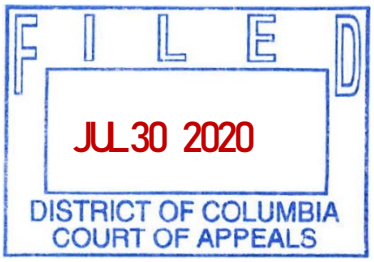
Silver Spring, MD 20910
Jhenry2085@aol.com

Meridith H. Moldenhauer

Tab A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-AA-71



450 K CAP LLC, PETITIONER

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT,

and

KLINE OPERATIONS, LLC, INTERVENOR.

On Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment
(No. 19722)

(Argued February 12, 2020 Decided July 30, 2020)

Before BLACKBURNE-RIGSBY, *Chief Judge*, THOMPSON, *Associate Judge*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Intervenor Kline Operations, LLC ("Kline") sought and received zoning relief from the District of Columbia Board of Zoning Adjustment ("the Board" or "the BZA") in connection with its plans to build a hotel in the District. Petitioner 450 K Cap LLC ("450 K") opposed Kline's application before the Board and now petitions this court for review of the Board's order. We affirm.

I. Factual & Procedural Background

On January 29, 2018, Kline submitted an application to the BZA for zoning relief in order to construct an 11-floor, 153-room, 65,000-square-foot hotel at 923-927 5th Street NW, on the eastern side of 5th Street NW, between I and K Streets NW ("the Property"). The Property consists of Lots 827, 828, 829, and 833 on Square 516. While Lot 833 is L-shaped, the four lots, taken together, are roughly rectangular: the northern and southern borders measure 111.5 feet, the western border measures 60 feet, and the eastern border measures 57 feet. A rear alley,

called Prather Court, runs north halfway up the block between 5th and 4th Streets NW and then west toward 5th Street; an 11.5-foot rear strip of the Property abuts the western end of the alley. The Property falls within the D-4-R Zone. A very small portion of the Property (on the northern side of Lot 829) also falls within the Mount Vernon Triangle Principal Intersection Sub-Area ("MVT/PIA Sub-Area"), which covers the intersection of 5th and K Streets NW.

450 K obtained party status in the matter and opposed Kline's application. 450 K owns a large apartment building located at 450 K Street NW; its property abuts the northern and eastern sides of the Prather Court alley, such that one of the western walls of 450 K's building would be directly across the alley from the eastern wall of Kline's proposed hotel. 450 K argued that the hotel would negatively impact the light, air, and views of twenty-four apartments on the western side of its building, as the windows of those units would be about 8 feet away from the hotel wall, and that the hotel would negatively impact the light of another forty apartments. It also argued that the noise and congestion in the alley resulting from frequent deliveries to the hotel would constitute a nuisance to the residents of its building.

Kline submitted three updates to its application to request additional zoning relief in February and March 2018. The Board held a public hearing on Kline's application on April 4, May 16, and June 20, 2018, during which it considered written submissions, expert testimony, and statements from both Kline and 450 K. While the matter was proceeding, Kline modified its design, in part to address some of 450 K's concerns, including expanding the rear yard of the proposed hotel from zero feet to 1.5 feet and relocating the windows on the east wall of the proposed hotel that would have directly faced the west wall of 450 K's building. Kline then submitted a final revised application, which omitted its earlier request for habitable space (a cocktail lounge) in the penthouse on the roof. The Board also received and considered a letter from the relevant Area Neighborhood Commission ("ANC"), ANC 6E05, which supported the application, subject to certain conditions; two reports from the District Department of Transportation ("DDOT"), which supported the application, subject to Kline's implementation of a proposed loading management plan; and three reports from the District Office of Planning, which supported the application with the habitable penthouse space removed.

On July 18, 2018, a majority of the Board voted to grant all of Kline's requested relief, including four area variances and two special exceptions. On

January 9, 2019, the Board issued a final order reflecting its decision. 450 K then petitioned for review to this court, challenging three of the Board's rulings:

1. the grant of area variances as to:

    a. the required number of loadings berths for the proposed building (11-C DCMR § 901.1 (2020)); and

    b. the required width of access aisle to the loading berths for the proposed building (11-C DCMR § 904.2 (2020)); and

2. the grant of a special exception as to the required size of the rear yard for the proposed building (11-I DCMR § 205.1 (2020)).

II. Standard of Review

"This court's standard for reviewing orders of [the] BZA is well-settled." *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). "[W]e must determine: (1) whether the agency has made a finding of fact on each material contested issue of fact; (2) whether substantial evidence of record supports each finding; and (3) whether conclusions legally sufficient to support the decision flow rationally from the findings." *Id.* (citation omitted); *see also First Baptist Church of Wash. v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981) (same). Thus, we will affirm "when the findings of basic facts are each supported by sufficient evidence and, when taken together, rationally lead to conclusions of law and an agency decision consistent with the governing statute." *Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 953 (D.C. 1990) ("*Draude II*"). Stated differently, "[w]e will not reverse the BZA's decision unless its findings and conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of its jurisdiction or authority; or unsupported by substantial evidence in the record of the proceedings before the Court." *Metropole Condo. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 141 A.3d 1079, 1082 (D.C. 2016) (cleaned up).

III. Discussion

Reviewing under this standard, we decline to reverse the BZA's decision.[1]

A. Area Variances: Number of Loading Berths and Width of Access Aisles

The BZA is empowered to grant variances that relieve applicants from complying with the area-related requirements of zoning regulations. D.C. Code § 6-641.07(g)(3) (2018 Repl.) ("Board of Zoning Adjustment'); 11-X DCMR § 1000.1 (2020) ("Variances: General Provisions"). Specifically,

> [t]he BZA is authorized to grant an area variance where it finds that three circumstances exist: (1) there is an

[1] 450 K argues that we should subject the Board's decision to a heightened standard of review because the Board's final order "adopted virtually word for word" the text of a draft order submitted by Kline following the Board's July 18, 2018 vote. In support of this argument, 450 K submitted a redline document comparing Kline's proposed order and the Board's final order. While Kline does not dispute the accuracy of the redline, it argues that this court cannot review the redline because it was not in the BZA's official record. The redline, however, is not evidence, but merely a demonstrative to aid this court's review – one that this court could have created itself. In any event, even if the Board had adopted the proposed order verbatim, this would not necessarily mandate reversal. *Metropole Condo.*, 141 A.3d at 1082. More importantly, the redline demonstrates that the Board did not adopt Kline's proposed order verbatim. As 450 K notes, the Board's final order did reproduce certain mistakes from the proposed order – including a somewhat ambiguous statement suggesting that the buildings would be separated by 18.5 feet, rather than 10 feet (as accurately stated in the findings of fact), and a paragraph that purports to list the "three conditions" of the ANC's support for Kline's building, but then lists only two – which suggests that the Board could have exercised greater diligence in preparing its order. Nevertheless, it is clear that the Board "did not accept uncritically the findings tendered by" Kline because, "[a]lthough the majority of paragraphs were adopted verbatim" from the proposed order, the Board "added sentences and phrases, changed sentence structure, . . . changed the grammar, and, in some places, added entirely new paragraphs." *Watergate E. Comm. v. District of Columbia Zoning Comm'n*, 953 A.2d 1036, 1045 (D.C. 2008). We therefore apply our ordinary standard of review. *See id.*

> extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested variance can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

Metropole Condo., 141 A.3d at 1082 (D.C. 2016) (cleaned up); *see also Draude v. District of Columbia Bd. of Zoning Adjustment*, 527 A.2d 1242, 1254 (D.C. 1987) ("*Draude I*").

The regulations require that lodging buildings of 50,000 to 100,000 square feet have two loading berths, 11-C DCMR § 901.1, and that the access aisles to these loading berths be at least 12 feet wide, *id.* § 904.2, and they specify that hotels qualify as lodging buildings. 11-B DCMR § 200.2(s) (2020). While Kline's 65,000-square-foot proposed hotel would ordinarily be subject to these requirements, Kline sought and received from the BZA two area variances: one variance allowing its building to have only one loading berth (rather than two), and a second variance allowing the access aisle to that berth to be 11.5 feet wide (rather than the minimum of 12). 450 K contends that the BZA's decision to grant these variances cannot be upheld. We disagree.

As to the first prong of the analysis, extraordinary or exceptional condition, the Board found that "the Property's width is narrow in comparison to non-rowhome properties in the square" because the Property is about 60 feet wide and other "non-rowhome" lots "are more than 80 feet in width, with several over 100 feet in width." In addition, it found that the Property "abuts an 11.5-foot-wide portion of the Alley," while "[t]he other large lots that abut the Alley have broad frontages on the Alley, which expand up to 30-feet wide," meaning that "many other properties . . . do not face the same narrow alley width as the Property." The Board also noted that "[a] majority of the non-rowhome lots nearby are exceedingly large" and "the Property is smaller than a majority of such lots in the neighborhood," including "many other lots in Square 516," which is "particularly notable given that the Property is located in the D-4-R zone, which is intended for higher-density development." 450 K asserts that there is no legal basis upon which to distinguish between rowhome and non-rowhome properties, but it does not point to any prohibition on doing so. To the contrary, the relevant statute and regulation provide that "exceptional narrowness [or] shallowness" may serve as the basis for a finding of an extraordinary or exceptional condition. D.C. Code § 6-

641.07(g)(3); 11-X DCMR § 1000.1. While further explication regarding the width and alley access of particular nearby lots may have been helpful, the Board's finding of an exceptional condition was based on substantial record evidence and consistent with the law.[2]

As to the second prong, practical difficulty, the Board found that it would be "practically difficult for [Kline] to design the [hotel] with a second loading berth due to the Property's limited 11.5-foot-wide frontage on the Alley." It also found that, "given the narrow width of the Property and the Alley, the [hotel] would have to be substantially redesigned in order to accommodate a second loading berth," which would "result in the loss of a large portion of the ground level" of the proposed hotel. Further, it found that "[a]s designed, [Kline] has already had to place the loading berth on a diagonal, as opposed to the standard 90-degree angle," and that "the nature of the Property would make installing a second loading space below grade effectively impossible while also remaining compliant with ramping and clearance requirements for the access." This court has stated that "[t]he nature and extent of the burden which will warrant . . . area variance[s] [are] best left to the facts and circumstances of each particular case," *Palmer v. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972), and that the "BZA has the flexibility to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance(s) requested," including

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[2] That said, we acknowledge that some of the Board's statements are questionable. The Board's order refers twice to the "L-shape" of one of the four lots that make up the Property, twice to the "irregular" shape of the Property, three times to the Property's "jogged" shape, and nine times to the Property's "unique" shape. However, as noted, the L-shaped lot fits together with the other three lots in the Property to form a near-perfect rectangle, and the "jog" appears to be minimal at best (3 feet across 111.5 feet, for a 2.7% differential). Nor does the Board provide support for its statement that "no other properties in the neighborhood have a 'jogged' shape like the Property." To the contrary, the official zoning map, which is part of the zoning regulations, 11-A DCMR § 205.3, shows that several of the lots in the immediate vicinity of the Property are less rectangular and have more severely "jogged" lines than the Property, including lots 59, 822, 834, 879, and 881. In addition, the Board's order states that the Property is exceptional in that only a small portion of it falls within the MVT/PIA Sub-Area – though this appears to be relevant only to the Board's grant of a variance as to the floor-to-ceiling height requirements of the Sub-Area, which 450 K does not appeal.

whether the variances are "de minimis"; and "3) the effect the proposed variance(s) would have on the overall zone plan." *Gilmartin*, 579 A.2d at 1171. In light of the fact-intensive nature of the practical difficulty analysis and the flexibility accorded to the Board, considering the burden of a substantial re-design and loss of area on the ground floor in order to create two loading berths, and taking into account the de minimis nature of a reduction in the width of the access aisle to the one loading berth from 12 to 11.5 feet, we conclude that the Board's finding of practical difficulty was supported by substantial evidence. While further explication regarding practical difficulty – perhaps including financial projections or other particulars – may have been helpful, the Board's finding was consistent with our holding that, "at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure." *Id.* at 1170-71.

As to the third prong, the public good and the intent, purpose, and integrity of the zoning plan, this court has previously noted that it is important not to

> confuse[] the "public good" with the more narrow interests of the Condominium [adjacent to the site of a proposed building] and its unit owners; what is beneficial to them, singly or as a group, is not necessarily synonymous with the public good. This does not mean, of course, that petitioner['s] interests are to be discounted; on the contrary, they must be fully considered by the BZA. It does mean, however, that to win reversal of the BZA's decision on this ground, petitioner[] must convincingly show that the [proposed building] will be detrimental to the public good.

Draude II, 582 A.2d at 957. 450 K has not made such a showing. It appears to assume that frequent deliveries to Kline's proposed hotel would be detrimental to the public good, rather than detrimental only to the residents of 450 K's apartment building, but there is no evidence that this is the case. 450 K raised the issue of noise and congestion in the alley as one that would affect its residents, and the Board considered and disposed of the issue – including by crediting Kline's expert testimony over 450 K's evidence regarding the frequency of daily deliveries to the hotel and by relying on DDOT's finding that Kline's loading management plan would mitigate such traffic. *See Draude I*, 527 A.2d at 1251 ("The Board need not provide its reasons for adopting one or another position on the 'basic' or 'underlying' facts which were themselves disputed by the parties," so long as it

"reach[es] sufficiently detailed findings on basic factual issues to demonstrate that it has considered and ruled upon each of the party's contentions." (citation omitted)).

We therefore do not disturb the Board's grant of area variances with respect to the number of loading berths and width of access aisles to the berths.

B. Special Exception: Rear Yard

The BZA may grant a request for a special exception from particular zoning requirements, D.C. Code § 6-641.07(g)(2); 11-X DCMR § 900 (2020), provided that the exception:

> (a) Will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps;
>
> (b) Will not tend to affect adversely[] the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps; and
>
> (c) Will meet such special conditions as may be specified in this title.

11-X DCMR § 901.2. "The applicant for a special exception shall have the full burden to prove no undue adverse impact . . . through evidence in the public record." *Id.* § 901.3.

Because Kline's proposed hotel would be 99 feet tall, it was required under the zoning regulations to build a rear yard of at least 20 feet. *See* 11-I DCMR § 205.1.[3] However, it was eligible for a special exception from this requirement, so long as the windows in its proposed building and in a "facing building" would be at a sufficient distance "to provide adequate light and privacy to habitable rooms as determined by the angle of sight lines and the distance of penetration of sight lines into such habitable rooms." 11-I DCMR § 205.5(c). Kline sought and received a special exception allowing it to build a rear yard of only 1.5 feet. 450 K

[3] 11-I DCMR § 205.1 mandates that a rear yard must be at least 2.5 inches long for every foot of building height. 99 x 2.5 = 247.5 inches = 20.6 feet.

argues that the BZA's grant of a special exception must be reversed because the BZA failed to address the adverse impact on the rental value of 450 K's apartments. We disagree.

As an initial matter, 450 K offers no support for the assertion that the Board is required to explicitly consider "rental value" as such in determining whether to grant a special exception. More importantly, the Board directly addressed 450 K's claim that Kline's proposed hotel would "affect adversely the use" of the units in 450 K's building, specifically addressing "light" and "privacy," as required by 11-I DCMR § 205.5(c). With respect to light, the Board cited Kline's sun and shadow study, which showed that a 1.5-foot rear yard would have "a minimal impact on light and air in comparison to" the 20-foot rear yard required by the regulations. With respect to "privacy," the Board noted that Kline had redesigned the proposed hotel "so that there would be no windows facing directly into 450 K Street NW" and had committed to installing translucent window treatments on the eastern-facing windows to enhance privacy, and the Board credited Kline's architect's testimony that hotel guests, unlike residential or office building occupants, will likely not be in the building during the day, which reduces privacy impacts.[4] Hence, while the Board did not explicitly use the term "rental value," it did consider, consistent with the regulation, the elements that would affect the value of the units in 450 K's building – light and privacy – and it made findings on these elements based on the evidence in the record. It then concluded that "the proposed

[4] We acknowledge, however, certain puzzling statements in the Board's order. For example, the Board observed that 450 K's building was "built to its western property line," without a rear yard of its own, which put its western windows "at risk." The Board did not explain its use of that term or why adverse impact need not be fully considered with respect to neighboring property owners who may have obtained their own zoning relief at an earlier date.

Additionally, while the language of 11-I DCMR § 205.5 mentions sight lines in conjunction with light and privacy – and we therefore do not perceive a need for the Board to necessarily consider sight lines separately, given its findings on light and privacy – we note that the Board asserted that "an adjacent property owner is not entitled to views across another property," citing *Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004), in support. However, that case is inapposite, as it concerned a negative prescriptive easement between existing buildings, rather than a special exception under the zoning regulations.

rear yard provides adequate light and privacy to habitable rooms" in 450 K's building.

The Board relied on substantial evidence in the record and made findings in accord with the applicable regulation. We therefore perceive no reason to disturb the Board's grant of a special exception.

IV. Conclusion

For the reasons explained, we conclude that the Board's findings and conclusions are not arbitrary, capricious, an abuse of discretion, inconsistent with law, or unsupported by substantial evidence. We therefore affirm the order on appeal.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies sent to:

Judah Lifschitz, Esquire

Loren L. AliKhan, Esquire
Solicitor General for the District of Columbia

Meredith H. Moldenhauer, Esquire

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Application No. 19722 of Kline Operations, LLC, as amended, pursuant to 11 DCMR Subtitle X § 901.2 for special exceptions under Subtitle C § 1502.1(c)(4) for the penthouse side setback and Subtitle I § 205.1 for the rear yard, and pursuant to 11 DCMR Subtitle X § 1000.1 for variances under Subtitle C § 901.1 for the number of loading berths, Subtitle C § 904.2 for the width of access aisle to loading berth, Subtitle I § 207.1 for closed court dimensions, and Subtitle I § 612.4 from the floor-to-ceiling clearance height requirement, to allow a hotel in the D-4-R Zone at premises 923-927 5th Street, N.W. (Square 0516, Lots 827, 828, 829, and 833).[1]

HEARING DATES: March 28, 2018, April 4, 2018, May 16, 2018, June 20, 2018
DECISION DATE: July 18, 2018

DECISION AND ORDER

On January 29, 2018, Kline Operations, LLC (the "Applicant"), the contract purchaser of the subject premises, submitted a self-certified application (the "Application"), as subsequently amended, requesting special exception relief from the requirements for penthouse side setback and rear yard and variance relief from the requirements for loading berths, width of access aisle to loading berth, closed court dimensions, and floor-to-ceiling clearance height, to allow a 153-key hotel in the D-4-R zone at 923-927 5th Street N.W. (Square 0516, Lots 827, 828, 829, and 833) (the "Property").[2] For the reasons explained below, and following public hearings, the majority of the Board of Zoning Adjustment (the "Board") voted to approve the Application.[3]

[1] The Applicant initially requested special exception relief from Subtitle C § 1500.3(c) to use the penthouse as a cocktail lounge. That request was subsequently removed from the project prior to approval. (*See* Ex. 90.)

[2] The Application was modified after the initial filing to request additional relief. The Applicant added a request for variance relief from the requirements of Subtitle C § 904.2, which governs the width of access aisle to a loading berth. The Applicant also added a request for variance relief from Subtitle I § 612.4 for the floor-to-ceiling clearance height requirement in the Mount Vernon Triangle Principal Intersection Sub-Area.

[3] The Board voted 4-0-1 to approve the requested special exception for rear yard relief and variances for loading berth, width of access aisle, closed court dimensions and floor to ceiling clearance height. The Board voted to 3-1-1 to approve the special exception for the penthouse side setback.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated February 5, 2018, the Office of Zoning sent notice of the application to the Office of Planning ("OP"); Advisory Neighborhood Commission 6E ("ANC"), the ANC for the area within which the subject property is located; the single-member district ANC 6E05; the Office of Advisory Neighborhood Commissions; the District Department of Transportation ("DDOT"); each of the four At-Large Councilmembers; and the Chairman of the Council. (Ex. 17-27.) A public hearing was initially scheduled for March 28, 2018. Pursuant to 11 DCMR Subtitle Y § 402.1, the Office of Zoning mailed notice of the public hearing to the Applicant and the owners of property within 200 feet of the subject Property on February 5, 2018. (Ex. 28.) Notice of the public hearing was also published in the *D.C. Register* on February 9, 2018.

Requests for Party Status. The Applicant and the ANC were automatically parties in this proceeding. The Board reviewed four requests for party status in opposition to the Application. The first request was from 450K CAP LLC ("450K CAP") dated March 13, 2018. (Ex. 43.) The second request was from Aubrey Stephenson dated March 13, 2018. (Ex. 44.) At a hearing on April 4, 2018, the Board granted the party status requests of both 450K CAP and Mr. Stephenson. The Applicant did not object to these party status requests.

The third request for party status was from Michael D. Smith dated March 13, 2018. (Ex. 42.) However, Mr. Smith did not appear at the Board's hearing on April 4, 2018, and, as such, Mr. Smith's party status request was deemed withdrawn. (*See* 11-Y DCMR § 404.10.) The fourth party status request was from Andy Shallal on behalf of Busboys and Poets dated June 8, 2018. (Ex. 79.) Mr. Shallal did not appear at the Board's hearing on June 20, 2018, and the request was also deemed withdrawn. *Id*.

Public Hearings. The Board conducted a public hearing on April 4, 2018. At the end of the hearing, the Board requested additional information and continued the hearing to May 16, 2018. The Applicant requested a postponement of the continued hearing, which the Board granted. Accordingly, the Board held the continued hearing on June 20, 2018.

Applicant's Case. The Applicant provided evidence and testimony in support of the Application. The Applicant produced expert testimony from Erwin Andres of Gorove/Slade Assocaties ("Gorove/Slade") regarding traffic, loading and related transportation issues. The Applicant also produced expert testimony from Stephen Varga, an expert in land use and planning, regarding the Project's consistency with the D-4-R zone. The Project architect, Peter Fillat, also spoke in an expert capacity regarding design elements of the Project, including the functional necessity of requested relief as it pertains to the Project's rear yard and penthouse specifications.

ANC Report. At a regularly scheduled and duly noticed public meeting held on March 6, 2018, with a quorum present, the ANC voted unanimously, by a vote of 5-0-0, to adopt a resolution supporting the Application, including all requests for relief. (Ex. 61.) At the time of the ANC's

vote in support on March 6, 2018, the Applicant had not requested relief pursuant to Subtitle C § 904.2 for the loading access aisle. Thereafter, the ANC's Planning and Zoning Subcommittee recommended approval of the relief from Subtitle C § 904.2, but the full ANC did not take a formal vote on the relief. The ANC also requested conditions of approval for the Application, but the Board did not adopt the ANC's proposed conditions for reasons to be explained below.

OP Report. By report dated March 23, 2018, the OP recommended approval of all requested areas of relief, except for the Applicant's request for special exception from the penthouse setback requirements of Subtitle C § 1502.1(c)(4). (Ex. 52.) OP submitted a second, supplemental report dated May 10, 2018 (Ex. 72) and a third supplemental report dated June 12, 2018 (Ex. 84) continuing to recommend denial of the penthouse setback relief after the Applicant's modifications to the Project plans. After the June 20, 2018 hearing, the Applicant again revised the Project plans and removed penthouse habitable space. Accordingly, by report dated July 6, 2018, OP recommended approval of the penthouse setback relief pursuant to Subtitle C § 1502.1(c)(4). (Ex. 91.) At the public hearings on the Application, OP also recommended its approval of the requested areas of relief.[4]

DDOT Report. DDOT submitted two reports. In DDOT's first report, dated March 14, 2018, DDOT supported the approval of the requested special exceptions and variances conditioned on the implementation of a loading management plan proposed by the Applicant. (Ex. 45.) In the report, DDOT found persuasive the Applicant's Transportation Assessment Memorandum prepared by the Applicant's traffic expert, Gorove/Slade. (Ex. 45.) DDOT's second report, dated May 11, 2018, was filed in response to Board comments during the April 4, 2018 hearing and reiterated DDOT's support for the Application. (Ex. 74.) In the second report, DDOT confirmed that the Applicant had correctly compiled trip generation data for the Project, and that the Project did not meet the threshold requirements for a Comprehensive Transportation Review. (Ex. 74.) DDOT's second report also notes that Gorove/Slade's proposed turning maneuvers for loading access are not irregular for the District of Columbia. (Ex. 74.)

Parties in Opposition. 450K CAP is the owner of the property located at 450 K Street N.W. (Exs. 43, 78.) 450K CAP complained of loss of light, air and views from its property as well as increased alley traffic. (Exs. 43, 78.) 450K CAP also noted objections to the use of the alley for loading access, and the noise caused by increased loading and traffic activity from the hotel. (Exs. 43, 78.) 450K CAP argued that the Applicant had not met the standard for variance relief because the Property was not exceptional and the Applicant did not face a practical difficulty. (Ex. 78.) As to the special exception for the rear yard, 450K CAP asserted at the hearing that the relief would have an adverse affect on 450K CAP. In support of its positions, 450K CAP submitted expert statements and testimony from Joe Mehra regarding traffic and loading impacts. (Ex. 62.) 450 K CAP did not object to the penthouse side setback relief.

[4] OP's recommendation of approval for the penthouse setback relief was submitted in writing following the close of the hearing on June 20, 2018.

The second party in opposition, Mr. Stephenson, is the owner of the property located at 462 K Street N.W. (Ex. 67A.) Mr. Stephenson complained of noise and potential property damage associated with the construction of the hotel. (Ex. 67A.) Mr. Stephenson also raised issues relating to increased traffic and blockage of the alley as well as potential negative impact on his property value. (Ex. 67A.)

FINDINGS OF FACT

THE SUBJECT PROPERTY

1. The subject Property is an assemblage of four lots located at 923-927 5th Street N.W. (Square 516, Lots 827, 828, 829, and 833) with a total land area of 6,639 square feet.

2. The Property is located in the D-4-R zone. A small portion of the Property (18'-wide x 72'-deep) is within the Mount Vernon Triangle Principal Intersection Sub-Area (the "MVT/PIA"). The MVT/PIA has particular dimensional, design and use requirements. The remainder of the Property is outside the MVT/PIA.

3. The Property is irregularly shaped due to the unique "L-shaped" Lot 833 that fronts on 5th Street N.W. and wraps around the rear of Lots 827, 828, and 829.

4. The rear of Lot 829 is not flush with Lot 833, which contributes to the Property's irregular shape. As a result, the rear of the Property's northern side lot line is pulled in from the front, northern side lot line by three feet. Accordingly, the Property is not rectangular in shape.

5. Due to the Property's unique shape, the Property does not abut Lots 832 to the north or Lot 61 to the east. Rather, the Property is separated from those lots by the "stem" of Lots 834 and 881, respectively.

6. The Property is 60' wide along 5th Street. The rear of the Property is only approximately 57' wide due to the shape of Lot 833.

7. The Property is unimproved except for facades of previously razed buildings on Lot 827 and Lot 829.

8. The Property abuts an alley to the north, which is known as Prather Court (the "Alley"). While the Alley varies in width from 30-feet-wide to 20-feet-wide, due to the Property's unique shape, the portion of the Alley that abuts the Property is only 11.5' in width.

9. 5th Street is 80'-wide.

10. The Property has no curb cut. It is only accessible from the 11.5'-wide alley to the rear.

11. The Property is located in the Mount Vernon Triangle neighborhood, which is comprised

primarily of retail, restaurants, and large apartment buildings. The Mount Vernon Triangle is completing its transition from a PDR area to a neighborhood of high-rise apartments and non-residential uses as permitted by the zoning and recommended in the Comprehensive Plan.

12. The historic buildings to the north have recently undergone renovations.

13. The Walter E. Washington Convention Center is located approximately three blocks from the Property. Additionally, two blocks to the west is the "Capitol Crossing" mixed-use development that is currently under construction.

14. The Property is located in the Mount Vernon Triangle Historic District, and the Applicant obtained concept approval from the District's Historic Preservation Review Board.

15. The Property is well-serviced by public transportation. The Property is 0.3 miles from the Gallery Place/Chinatown Metro Station, and 0.7 miles from Union Station. The Property also has direct access to numerous bus lines, including the P6, D4, 74, 80, 70, X2, and Circulator. There are a number of Capital Bikeshare stations and ZipCar vehicles within 0.5 miles of the Property.

THE APPLICANT'S PROPOSAL

16. The Applicant proposes to subdivide the four lots that comprise the Property into a single lot and construct a hotel with up to 152 rooms (the "Project").

17. The Project will have a total building height of 99' with 11 stories plus a 10'-tall mechanical penthouse. The Applicant initially proposed a two-story penthouse with habitable space, but revised the Project plans to incorporate a one-story penthouse with only mechanical space. (Ex. 90.)

18. Since the Property abuts a neighboring property that is improved with a contributing historic structure that is built to a lower height, the Project is required to provide a 1:1 side penthouse setback. However, the proposed Project only provides an eastern side penthouse setback that is 6'4$^{5}/_{8}$" and the western side penthouse setback that is 5'8$^{1}/_{8}$".

19. The Project will have a total floor area ratio ("FAR") of 9.93. The Applicant is acquiring credits in order to exceed the maximum permitted non-residential FAR of 3.5, as permitted in the D-4-R zone.

20. The ground floor of the Project is proposed to be 19'8" in height and 24' in depth. A portion of the ground floor is within the MVT/PIA, which requires a minimum ground floor that is 22' in height to a depth of 36'.

21. The Project will have a rear yard of 1.5 feet. Pursuant to Subtitle I § 205.1, a rear yard in the D zone must be a minimum depth of 2.5 inches per one foot of building height, but

no less than 12 feet. The Project proposes a building height of 99', which would require a minimum rear yard of 20.6'.

22. The rear façade of the Project has windows on only the northern portion of the building in order to maintain privacy for adjacent properties to the east across the Alley.

23. Similarly, the northern façade of the Project is designed with windows on only the front half of the building to maintain privacy for adjacent properties that front on K Street N.W.

24. There will be a closed court on the northern and southern side of the proposed Project. The northern-facing closed court is proposed at 6'2" in width and 322.9 sq. ft., but must be 18'5" in width with an area of 684.5 sq. ft. The southern-facing closed court is proposed at 6'2" in width and 204.7 sq. ft., but must be 16.66' in width with an area of 555.6 sq. ft.

25. The Project will not provide any parking, which is not required in the D-4-R zone.

26. The Project will have one loading berth to the rear of the proposed building with access from the Alley. Under Subtitle C § 901.1, two loading berths are required for a lodging use with 50,000 to 100,000 gross floor area. The proposed Project will have approximately 66,884 gross floor area and, thus, two loading berths are required. A service/delivery space is not required for a lodging use.

27. The Project's loading berth is accessed from the Alley, which is 11.5'-wide at the rear of the Property. As such, the Alley is less than the required 12' in width for an access aisle or driveway to a loading berth.

THE BZA APPLICATION AND REQUESTED RELIEF

28. On January 29, 2018, the Applicant submitted the self-certified Application seeking special exception relief from the requirements for penthouse setback (Subtitle C § 1502.1(c)(4)) and rear yard (Subtitle I § 205.5) and variance relief from the requirements for loading berths (Subtitle C § 909.1) and closed court (Subtitle I § 207.1).

29. On February 15, 2018, the Applicant requested additional special exception relief to permit the use of penthouse habitable space for a restaurant or cocktail lounge pursuant to Subtitle C § 1500.3. The Applicant later revised the proposed Project to remove any penthouse habitable space and, as such, withdrew this request for special exception relief.

30. On February 27, 2018, the Applicant requested additional variance relief from the requirement for floor-to-ceiling height in the MVT/PIA pursuant to Subtitle I § 612.4.

31. On March 14, 2018, the Applicant requested additional special exception relief from Subtitle C § 904.2 for the minimum required width of an access aisle or driveway leading to a loading berth.

PENTHOUSE SETBACK

32. The Applicant originally proposed a two-story, 20'-tall penthouse that featured one story of habitable space for a restaurant or cocktail lounge and a second story for mechanical equipment. (Exs. 14, 68.)

33. During the pendency of the Application, the Applicant reduced the size of the penthouse, and eventually removed the second story and limited the penthouse height to 10' and to contain only mechanical equipment. (Ex. 90.)

34. The front and rear penthouse setbacks are 10'-deep, which are fully compliant with the Zoning Regulations. (Ex. 90.)

35. Though the Applicant reduced the design of the penthouse, the penthouse side setbacks are 6'4$^{5}/_{8}$" on the eastern side and 5'8$^{1}/_{8}$" on the western side. To comply with the requirements of Subtitle C § 1502.1(c)(4), the penthouse must be set back at a 1:1 ratio, which would equal 10'. (Ex. 90.)

36. The Applicant submitted sun studies in the record that demonstrate the penthouse setback relief will not have an adverse effect on neighboring properties. (Ex. 68, Ex. E.)

37. The overall height of the penthouse is in harmony with the surrounding properties in the neighborhood.

38. The Applicant demonstrated that a strict application of the setback requirements would result in an unreasonable design for the penthouse mechanical equipment. (Ex. 68.)

39. A fully compliant penthouse would also result in a long and narrow design that would be visually intrusive in the neighborhood.

REAR YARD

40. The Project was initially designed with no rear yard, but the Applicant revised the Project plans to include a 1.5-foot rear yard to promote light and air for neighboring properties. (Exs. 39, 90.)

41. The Project will be buffered from any structures to the rear by 10', which includes the width of the Alley.

42. The Applicant redesigned the eastern-facing portion of the Project so that there are no windows facing directly into the building at 450 K Street, N.W. (Ex. 90; 6/20/18 Hearing Transcript ("Tr.") at p. 155.)

43. The property at 450 K Street N.W. was built with western-facing windows that are "at-risk." (Ex. 39; 4/4/18 Hearing Tr. at p. 131.)

44. The hotel use for the Project will limit any adverse effects because, unlike an apartment

building or an office, hotel guests are in their room for a shorter period of time. (6/20/18 Hearing Tr. at pp. 268-269.)

45. The Applicant has agreed to install translucent window treatments for the eastern-facing windows in order to protect the privacy of neighboring properties, including the property owned by 450K CAP (Ex. 39, Ex. 52; 4/4/18 Hearing Tr. at pp. 116-117.)

LOADING

46. The Applicant proposes one loading berth on the ground level of the Project, which will be accessed from the Alley. (Ex. 90.)

47. The Property is an interior lot and there is no curb cut for loading access from 5th Street N.W. It is unlikely that DDOT would authorize a curb cut from 5th Street N.W. (Ex. 39.)

48. The Applicant has designed the loading berth on a diagonal in order to account for the width of the Alley. (Ex. 90.)

49. DDOT issued two reports confirming that it has no objection to the requested loading relief in the Application. (Exs. 45, 74.)

50. The Applicant's traffic expert, Mr. Andres, evaluated the proposed loading in accordance with DDOT guidelines and found that one loading berth is sufficient to meet the needs of the proposed hotel use. (Exs. 68B, 70.)

51. Gorove/Slade also produced turning diagrams that demonstrate the proposed loading berth can be accessed by trucks, including trucks that are 30 feet in length. (Ex. 68B, 70.)

52. DDOT found that the proposed loading access and necessary turning radius is "not irregular" for a property in the District. (Ex. 74.)

53. Mr. Andres testified that the width of the Alley is "more than adequate" for the anticipated loading traffic. (4/4/18 Hearing Tr. at p. 141.)

54. The Applicant agreed to a Loading Management Plan that was designed to mitigate any potential adverse impacts on neighboring properties and the Alley. (Exs. 45, 70.)

CLOSED COURT

55. The Applicant proposes a closed court from floors 3 through 11 on both the southern and northern sides of the Project. (Ex. 90.)

56. A building with a lodging use in the D-4-R zone must have a closed court that is 2.5 inches wide for each foot of height, but no less than 12'-wide, and the area of the court must be twice the square of the court's width, but no less than 250 sq. ft.

57. For the proposed Project, the northern-facing closed court is proposed at 6'2" in width and 322.9 sq. ft., but must be 18'5 in width with an area of 684.5 sq. ft. The southern-facing closed court is proposed at 6'2" in width and 204.7 sq. ft., but must be 16.66' in width with an area of 555.6 sq. ft.

58. If the Applicant provided fully compliant closed courts, the resulting building would be approximately 25 feet in width for the center portion of the building. (Ex. 39.)

59. A 25'-wide building would not meet certain Building Code requirements. (Ex. 39.)

60. The Applicant cannot design the Project without the two closed courts because windows cannot be located on the lot lines. Such a design would result in units that do not have access to light and air and, therefore, are not habitable under the Building Code. (Ex. 39.)

61. The proposed hotel operator requires vertical duct risers along the corridors, which further decreases the potential width of the closed courts. (Ex. 39.)

FLOOR-TO-CEILING HEIGHT IN THE MVT/PIA

62. The MVT/PIA is a subarea of the Downtown (D) Zones, the objective of which is to require uses and building design that offer a focal point for food, beverage, and entertainment. (11-I DCMR § 612.1.)

63. The Property is located in the "B" module of the MVT/PIA, which requires the ground floor to be 22' in height for at least 50% of the depth of the ground floor. (11-I DCMR § 612.4.)

64. A relatively small portion of the Property that is approximately 18' wide by 72' deep is located in the MVT/PIA. (Ex. 39, Tab F.)

65. The proposed Project's ground floor is 19'8" in height to a depth of 24'. (Ex. 90.)

66. For the Applicant to gain an extra two feet of height in a small portion of the northwest corner of the Project would require a substantial redesign, including loss of a significant portion of the third floor. (Exs. 39, 52.)

67. A reconfiguration would require the alteration of the facades on the Property, which would be unlikely to be considered consistent with the purposes of the Historic Landmark and Historic District Protection Act of 1978. (Ex. 39.)

ACCESS AISLE TO LOADING BERTH

68. Due to the Property's unique shape, the Property's frontage on the Alley is 11.5'. The Zoning Regulations require that an access aisle or driveway to a loading berth be a minimum of 12' in width.

69. There is no alternative access aisle for the Project's loading berth, as there is no curb cut on 5th Street N.W. (Ex. 39.)

70. The Alley's system is extensive in Square 516 and varies in width from 30-feet-wide to 20-feet-wide elsewhere.

71. The Applicant's traffic expert provided an AutoTurn analysis to demonstrate that a 30-foot truck could maneuver within the Alley and adequately access the Project's loading berth. (Ex. 70.)

EXCEPTIONAL CONDITIONS

72. The Property is a uniquely shaped assemblage of four lots that features a rear lot line that is jogged. As a result of the Property's unique shape, the Property is more than three feet narrower in the rear than in the front.

73. The Property is an interior lot that abuts an 11.5-foot-wide portion of the Alley. The other large lots that abut the Alley have broad frontages on the Alley, which expand up to 30-feet wide.

74. The Property's width is narrow in comparison to non-rowhome properties in the square. The other non-rowhome (non-rowhouse) lots in the square are more than 80 feet in width, with several over 100 feet in width.

75. The portion of the Property that is located in the Mount Vernon Triangle Principal Intersection Sub-Area is 18 feet by 72 feet, which is an unusually small and narrow portion of a property to be located in the Sub-Area.

76. The exceptional conditions affecting the Property are unique to the neighborhood and distinguish the Property from nearby properties.

PRACTICAL DIFFICULTIES FOR CLOSED COURT, LOADING BERTH NUMBER AND ACCESS, AND MVT FLOOR-TO-CEILING HEIGHT

77. The Applicant would face a practical difficulty with strict compliance of the court requirements because the resulting building would be extremely narrow at approximately 25 feet in width.

78. If the Applicant removed the courts on the northern and southern sides of the proposed Project, then the Applicant could not incorporate windows on either of those sides because the resulting building would be flush on the lot line. The building code does not permit windows on a lot line.

79. It is practically difficult for the Applicant to design the Project with a second loading berth due to the Property's limited 11.5-foot-wide frontage on the Alley.

80. The Applicant could not meet the ramping and clearance requirements for loading berths if the Applicant were required to provide two loading berths for the Project.

81. Strict application of the loading access requirement would create a practical difficulty for the Applicant because the Property cannot have a curb cut from 5th Street N.W., and the portion of the Alley abutting the Property is only 11.5-feet in width.

82. It would be practically difficult for the Applicant to design and construct the lobby and ground floor space with the required floor-to-ceiling clearance height because only a small portion of the Property is located in the Mount Vernon Triangle Principal Intersection Sub-Area.

83. A Project design that is fully compliant with the floor-to-ceiling clearance height would necessarily reduce the proposed third floor of the building.

NO SUBSTANTIAL DETRIMENT TO PUBLIC GOOD OR ZONE PLAN

84. The Project furthers the intent and goals of the D-4-R zone by redeveloping vacant, underutilized lots with a high-density hotel use. The proposed lobby and ground level will also provide ample space to meet the goals of the Mount Vernon Triangle Principal Intersection Sub-Area to activate the streetscape and promote pedestrian-friendly uses.

85. The Project, including the proposed courts, has been designed in a way that promotes light and air for neighboring properties and simultaneously incorporates historic preservation elements.

86. The loading needs of the hotel can be accommodated with one loading berth. The loading relief will not be of detriment to the public good, but any negative impact will be limited by the Applicant's proposed Loading Management Plan.

CONCLUSIONS OF LAW

Special Exceptions

The Applicant requests special exception relief pursuant to Subtitle C § 1502.1(c)(4) from the requirement for penthouse side setback and Subtitle I § 205.1 from the requirement for rear yard in order to construct the proposed hotel at the Property. The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2012 Repl.) to grant special exceptions, as provided in the Zoning Regulations. Subtitle X § 901.2 provides that the Board may grant special exceptions when it finds that the grant 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 in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions.

Relief granted through special exception is presumed appropriate, reasonable, and compatible with other uses in the same zone. The Board's discretion "is limited to a determination of whether the exception sought meets the requirements of the regulations. *See First Baptist Church of Washington v. D.C. Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981) (*quoting Stewart v. D.C. Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). Once the applicant has met its burden, the Board ordinarily must grant the application. *See id.*

Penthouse Side Setback Relief (Subtitle C § 1502.1(c)(4))

The Board may grant relief from the penthouse setback requirements of Subtitle C § 1502.1(c)(4) by special exception if the Board finds that the Project meets the specific conditions set forth under Subtitle C § 1504.1 and the general special exception conditions under Subtitle X § 901.2. In particular, the Applicant must demonstrate that strict application of the setback requirements would result in construction that is unduly restrictive, prohibitively costly, or unreasonable, or is inconsistent with building codes (Subtitle C § 1504.1(a)); that the relief requested would result in a better design of the roof structure without appearing to be an extension of the building wall (Subtitle C § 1504.1(b)); that the relief requested would result in a roof structure that is visually less intrusive (Subtitle C § 1504.1(c)); that operating difficulties such as meeting D.C. Construction Code, Title 12 DCMR requirements for roof access and stairwell separation or elevator stack location to achieve reasonable efficiencies in lower floors, size of building lot, or other conditions relating to the building or surrounding area make full compliance unduly restrictive, prohibitively costly or unreasonable (Subtitle C § 1504.1(d)); that every effort has been made for the housing for mechanical equipment, stairway, and elevator penthouses to be in compliance with the required setbacks (Subtitle C § 1504.1(e)); and the intent and purpose of the Zoning Regulations is not materially impaired by the structure, and the light and air of adjacent buildings is not affected adversely (Subtitle C § 1504.1(f)).

In this case, the Applicant requires relief of 3'7$^{3}/_{8}$" on the northern side of the penthouse and 4'3$^{7}/_{8}$" on the southern side of the penthouse abutting the courts. The Board notes that the penthouse satisfies the 1:1-side setback elsewhere. As discussed below, three out of the four voting Board members concluded that the Applicant has met each of the special conditions under Subtitle C § 1504.1, as follows. 450K CAP did not testify regarding concerns about the side setback relief.

Consistent with Subtitle C § 1504.1(a), the Board finds that the Applicant has demonstrated that strict application of the penthouse side setback requirements in the minimal areas around the courts results in construction that is unduly restrictive, prohibitively costly, unreasonable, or inconsistent with the building code. The Applicant provided evidence sufficient to prove that, due to the narrow width of the Property and its interior, mid-block location that necessitates the creation of closed courts to locate windows for bedroom units along the north and south building facades, full compliance with the 1:1 penthouse side setback requirements around the court areas would be unduly restrictive and unreasonable for the proposed penthouse design. As it relates to the elevator and stair overruns, the Applicant's architect testified that to move the elevator and stair to

accommodate the 1:1 setbacks in these areas would end up "being impossible to get the other parts of the [mechanical] program to work." (4/4/18 Hearing Tr. at p. 109.)

There is also substantial evidence in the record that the Applicant could not provide functional mechanical equipment to operate a hotel absent relief from the penthouse setback requirements. The Applicant's architect testified that the mechanical equipment could not be grouped tighter because "it's a function of being [able] to service the [mechanical] units and having the right amount of air circulation around the units." (6/20/18 Hearing Tr. at p. 169.) The Applicant demonstrated that compliant side setbacks would not allow for Variant Refrigerant Flow ("VRF") components to have ample circulation space on the rooftop, and that such mechanical opponents "would not work properly" in the basement. (4/4/18 Hearing Tr. at p. 110.) The VRF units are 5.5' in height and could not be moved to other parts of the roof because they would not be appropriately set back. (6/20/18 Hearing Tr. at pp. 170, 174.) The Board members who approved this relief determined that the Applicant had met this requirement and that the Applicant could not continue to adjust the penthouse to comply with the Zoning Regulations. The Board finds that compliance with the penthouse side setback requirements would result in construction that is unduly restrictive, unreasonable and inconsistent with the building code because the Applicant could not design functioning mechanical equipment or incorporate stairs and an elevator overrun.

Pursuant to Subtitle C § 1504.1(b), the Board finds that the requested side setback relief will result in a better design that does not appear as an extension of the building wall. The Applicant reduced the penthouse design from the plans filed with the initial application. The initial design featured a two-story penthouse that is 20 feet in height with one story dedicated for a cocktail lounge or restaurant use and the second story to mechanical equipment. As noted by the OP, this design was not preferred because "it's designed to look like an extension of the building wall, that it would be considerably more intrusive." (4/4/18 Hearing Tr. at p. 135.) Accordingly, the Applicant revised the design of the penthouse so that it is only one story for mechanical equipment only. Most notably, the approved penthouse design provides for a distinct penthouse structure; whereas, the initial design appeared more as an extension of the lower stories. As such, Subtitle C §1504.1(b) has been met.

Pursuant to Subtitle C § 1504.1(c), the Board finds that the side setback relief will result in a roof structure that is visually less intrusive. The proposed Project will meet the 1:1 setback from the front and rear of the building, as well as most of the sides, but for the area around the closed court insets, which will limit any visual intrusion along 5th Street or to the rear of the Project. The height of the proposed penthouse is lower than the penthouse height requirement of the zone and is comparable in massing and height of other penthouses on large building within the square. As noted above, the Applicant's redesign of the penthouse lowered the height of the penthouse and further distinguished the penthouse from the massing of the rest of the building.

Pursuant to Subtitle C § 1504.1(d), the Board finds that the Applicant will experience operating difficulties in meeting certain construction code requirements regarding stairwell separation and elevator stack location. In addition to that described above, the Project architect testified directly

to this point, stating that "we can't move [the stairs] any closer together. And we can't move them in the middle [of the building], because a hotel, typically, is a double-loaded corridor." (6/20/18 Hearing Tr. at p. 171.) The architect continued that the elevator bank and stairwells are "as far apart as could possibly can be [sic], because we have, again, hotel rooms on the exterior of the building." (6/20/18 Hearing Tr. at p. 171.) Likewise, the Project architect testified that the VRF mechanical systems could not be located anywhere else on the roof while remaining in compliance with the penthouse screening requirements. (6/20/18 Hearing Tr. at p. 174.)

Pursuant to Subtitle C § 1504.1(e), the Board finds that the Applicant adequately demonstrated that every effort has been made to house mechanical equipment, stairway, and elevator penthouses in compliance with the required side setbacks. The record is replete with evidence and testimony that the Applicant extensively redesigned the penthouse. (Exs. 68, 90.) The penthouse design went through multiple iterations before the Applicant determined to remove the second story. Further, as the Project architect testified, "we have done studies to show that if we did a non-occupied [one story] penthouse, we still are not compliant."[5] (6/20/18 Hearing Tr. at p. 157.) Therefore, the Board finds that the Applicant has met this condition.

Pursuant to Subtitle C § 1504.1(f), the Board finds that the intent and purpose of the Zoning Regulations is not materially impaired by the Project, and the light and air of adjacent buildings is not affected adversely. With the exception of the side setbacks, the Applicant's proposed penthouse design is fully compliant with the Zoning Regulations, including full 1:1 setbacks in the front and rear of the Project. Further, the penthouse satisfies the 1:1 setback requirement on certain areas of the side setbacks, just not around the closed courts. The Applicant has proposed a penthouse that is 10 feet in height, 50% lower than the maximum 20-foot height in the D-4-R zone. (*See* Subtitle I § 532.5.) The penthouse design aligns with the massing and height of nearby penthouses in the Mount Vernon neighborhood. The penthouse design is in harmony with historic preservation goals, as reflected by the concept approval of the Project by the Historic Preservation Review Board ("HPRB"). Further, the Applicant provided sun studies that demonstrated the penthouse does not create shadows on adjacent properties. (Ex. 68, Tab E.) The sun studies were submitted based on a previous design with a 20' penthouse; however, the Board finds the sun studies persuasive because the Applicant reduced the size of the proposed penthouse since producing the sun studies. The proposed courts on the southern and northern sides of the Project will also limit any impact on light and air. Accordingly, the Board finds that the Applicant has met this final condition under Subtitle C § 1504.1.

For the reasons discussed above, and in accordance with Subtitle X § 901.2, the three out of the four voting Board members concluded that approval of the requested special exception relief for penthouse side setbacks will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property. The Board finds that the Project is in harmony with the intent of the penthouse side setback regulations

[5] The Applicant did not submit the one-story mechanical penthouse design until after the hearing on June 20, 2018. Nonetheless, the Applicant testified, through the Project architect, that such a design could not be compliant with the penthouse setback requirements.

because the penthouse, as designed, is not visually intrusive as viewed from adjacent streets. The northern and southern courts provide visual depth so that the penthouse does not present as another story, but a distinct rooftop structure. Additionally, the Board finds that the penthouse setback is respectful of the neighboring historic structures.

Rear Yard Relief (Subtitle I § 205.1)

The Board may grant relief from the rear yard requirements of Subtitle I § 205.1 by special exception provided the Board finds that the Project meets the specific conditions set forth under Subtitle I § 205.5 and the general special exception conditions under Subtitle X § 901.2. Pursuant to Subtitle I § 205.5, the Applicant must establish that no window to a residence use is located within 40 feet of another facing building (Subtitle I § 205.5(a)); no window to an office use shall be located within 30 feet of another facing office window, nor 18 feet in front of a facing blank wall (Subtitle I §205.5(b)); a greater distance may be required between windows in a facing building than the minimum prescribed in (a) or (b) if necessary to provide adequate light and privacy to habitable rooms as determined by the angle of sight lines and the distance of penetration of sight lines in such habitable rooms (Subtitle I § 205.5(c)); and the building must provide adequate off-street service functions, including parking and loading areas and access points (Subtitle I § 205.5(d).) As outlined below, the Board finds that the Applicant has met these special conditions and is therefore entitled to relief from the rear yard requirement in the D-4-R zone.

The Board finds that the requirements of Subtitle I § 205.5(a)-(b) are not applicable to the Project because the Applicant proposes a hotel, which falls under the lodging use definition in the Zoning Regulations. (*See* Subtitle B § 200.2(u).) The Zoning Regulations provide separate and distinct use categories for a residential use and an office use. To that end, the Board credits OP's report that the District's Zoning Administrator confirmed in a meeting that the Applicant's proposed hotel use is not a residential use and, therefore, is not subject to Subtitle I § 205.5(a)-(b). (Ex. 52.) As such, the requirements of Subtitle I § 205.5(a)-(b) governing the distance between windows of adjacent properties does not apply to the Project.

Pursuant to Subtitle I § 205.5(c), the Board finds that the proposed rear yard provides adequate light and privacy to habitable rooms as determined by the angle of sight lines and distance of penetration in such habitable rooms. After submitting the initial design, the Applicant revised the Project to incorporate a 1.5-foot-wide rear yard. In addition to the 8.5-foot-wide portion of the Alley that abuts the Project's rear yard, the Project will be separated from 450 K by ten feet, which will provide adequate light and privacy to habitable rooms. Likewise, the Board credits the Applicant for redesigning the eastern-facing portion of the Project so that there are no windows facing directly into the building at 450 K Street N.W. (Ex. 90.) The Board also notes that there will be no windows on the rear portion of the Project's southern elevation, which will limit any privacy impact on the building at 462 K Street N.W. The Applicant also agreed to install translucent window treatments for the eastern-facing windows in order to protect the privacy of residents at 450 K Street N.W.

Pursuant to Subtitle I § 205.5(d), the Board finds that the Project will provide adequate off-street service functions, including parking and loading areas and access points. As detailed in more depth below, the Board concludes that the Project will have adequate loading facilities to meet the needs of the planned hotel use. While parking is not required in the D-4-R zone, the Applicant engaged with two nearby private parking garages to provide additional parking for hotel guests and staff. (Ex. 39, Tab C.) The Board credits the conclusions of the Applicant's traffic expert as well as DDOT that the Project's parking, loading and access points will be adequate.

Further, the Board finds that the Applicant has met the general special exception conditions pursuant to Subtitle X § 901.2 for rear yard relief. The Board concludes that approval of the requested special exception relief for rear yard will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property.

The Board credits the testimony of the Applicant's expert in land use and planning, Stephen Varga, and OP's analysis that the rear yard relief is in harmony with the intent of the Zoning Regulations because the D-4-R Zone promotes the development of high-density neighborhoods in the Mount Vernon Triangle area. (4/4/18 Hearing Tr. at pp. 112-113; 6/20/18 Hearing Tr. at p. 183.) Further, the Board agrees with Mr. Varga that relief from the rear yard requirements is permitted by special exception in the D zones because many of the lots are small and narrow, as is the case with the Property. (4/4/18 Hearing Tr. at p. 113.) The Board notes that strict application of the rear yard requirement would result in a structure only 90 feet in depth that would further exacerbate the Applicant's ability to meet other zoning standards, including the penthouse setback, court dimension, and loading requirements.

The Board also finds that the rear yard relief will not affect adversely the use of neighboring property. 450K CAP objected to the Applicant's requested rear yard relief stating that it would have a negative effect on the light and air available to its property. (Ex. 78.) 450K CAP claimed that the proposed 1.5-foot-wide rear yard would "result in a very narrow light well that will be detrimental to the tenants in the 450K Building who face the hotels' rear wall, substantially impacting their light and air, as well as privacy and views." (Ex. 78.)

As to light and air, the Board notes that 450K CAP acknowledged that its building was built to its western property line, which means that the western-facing windows are "at-risk." (6/20/18 Hearing Tr. at p. 229.) Further, the building at 450 K Street N.W. is much taller than the proposed Project, further limiting the Project's impact on light and air. (6/20/18 Hearing Tr. at pp. 216-217.) To that end, the Board credits the Applicant's sun study demonstrating that the Project will have a minimal impact on light and air in comparison to by-right construction at the Property. (Ex. 68, Tab D.) When evaluating adverse effects on neighboring property, the D.C. Court of Appeals has approved the Board's use of comparing the proposed structure to a by-right structure. *See Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1253 (D.C. 1987). In *Draude*, the Court found that the comparison of a proposed project to a matter-of-right project was a reasonable standard when seeking to determine whether an addition to a property was "objectionable." *See id*. The

Board has followed this direction when evaluating solar studies in other cases. *See* BZA Case No. 16536 (order reflects Board consideration of shadow study comparison between proposed project and matter-of-right project); *see also* BZA Case Nos. 18886, 19230.

As to privacy and views, 450K CAP produced images reflecting the potential views from the Project into residences at 450 K Street N.W. (Ex. 78, Tab A.) However, the Board finds that the Applicant has proposed a building design that is sensitive to the privacy of neighboring properties, including 450 K Street N.W. As outlined above, the Applicant redesigned the Project's eastern elevation so that there would be no windows facing directly into 450 K Street N.W. (Ex. 90.) The Board also credits the Applicant's testimony that the nature of the proposed hotel use will create minimal impact on the privacy of neighboring properties. In particular, the Applicant's architect testified that a hotel user is different than a residential or office user in that the hotel user "primarily goes there to sleep. And then they wake up in the morning and they go off to their way." (6/20/18 Hearing Tr. at p. 269.) As such, "the amount of daylight hours and actual living time in this building is substantially different and less than if it were a residential use or an office us [sic]." (6/20/18 Hearing Tr. at p. 269.) As with light and air, the Board also notes that any claimed privacy impacts were exacerbated by the fact that the building at 450 K Street N.W. is built to the western property line, and that property does not have its own rear yard. Finally, the Board notes that it is well settled that an adjacent property owner is not entitled to views across another property. *See Hefazi v. Stiglitz*, 862 A.2d 901, 911 (D.C. 2004).

Mr. Stephenson, the other party in opposition, objected to the rear yard relief on the grounds that it could cause his property value to decrease. (6/20/18 Hearing Tr. 233.) However, Mr. Stephenson did not produce any evidence that would support this assumption and stated to the Board, through counsel, that he did not have any appraisals or numbers to confirm this claim. (6/20/18 Hearing Tr. 239.) Accordingly, the Board does not find Mr. Stephenson's objection regarding the rear yard relief to be persuasive. In making this finding the Board is not shifting the burden of proof to Mr. Stephenson, but simply noting that Mr. Stephenson offered no credible evidence to allow the Board to evaluate his assertion.

In sum, the Applicant has met its burden for special exception relief from the rear yard requirements of Subtitle I § 205.1.

Area Variances

The Applicant seeks area variances from the requirements for the number of loading berths under Subtitle C § 901.1, the width of access aisle to loading berth under Subtitle C § 904.2, closed court dimensions under Subtitle I § 207.1, and the floor-to-ceiling clearance height requirement in the Mount Vernon Triangle Principal Intersection Sub-Area under Subtitle I § 612.4. The Board is authorized under § 8 of the Zoning Act to grant variance relief where, "by reason of exceptional narrowness, shallowness, or shape of a specific property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property," the strict application of the

Zoning Regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. (*See* 11 DCMR Subtitle X § 1000.1.)

Extraordinary or Exceptional Conditions. For the purposes of variance relief, the extraordinary or exceptional conditions affecting a property can arise from a confluence of factors provided that the extraordinary condition affects only a particular property. *See Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990). Here, the Board finds that the Property is faced with an extraordinary or exceptional condition as a result of a confluence of four factors: (1) The Property is an assemblage of four lots that create a unique shape due to the "L-shaped" Lot 833 that fronts on 5th Street N.W. and wraps around the rear of Lots 827, 828, and 829; (2) The Property has limited access to the Alley; (3) The Property is narrow in comparison to non-rowhome lots in Square 516 and the nearby Mount Vernon Square neighborhood; and (4) A small portion of the Property is located in the MVT/PIA.

The Board finds that the Property's exceptional conditions are distinct and unique to the neighborhood. *See Ait-Ghezala v. D.C. Bd. of Zoning Adjustment*, 148 A.3d 1211, 1217 (D.C. 2016). The Board notes that no other properties in the neighborhood have a "jogged" shape like the Property. A majority of the non-rowhome lots nearby are exceedingly large and, as such, the Property is smaller than a majority of such lots in the neighborhood. Likewise, the Board notes that many other properties have broad frontages on the Alley and do not face the same narrow alley width as the Property. In addition to the small portion of the Property in the MVT/PIA, this confluence of factors makes the Property exceptional and unique for the neighborhood.

450K CAP argues that the Property is not exceptional because it is a "rectangular property" and is "larger than most lots in this square." (6/20/18 Hearing Tr. at p. 215.) The Board does not find these arguments persuasive. As will be discussed below, the Property's unique "jogged" shape directly creates a practical difficulty with strict application of the loading requirements. The Board finds that the Property is not rectangular but is, in fact, uniquely shaped so that there is minimal access to the Property from the Alley. Further, the Board finds that the Property is smaller than many other lots in Square 516. This is particularly notable given that the Property is located in the D-4-R zone, which is intended for higher-density development. As such, the Board rejects 450K CAP's arguments and finds that the Property is faced with extraordinary and exceptional conditions in satisfaction of the first prong of the variance test.

Practical Difficulties. An applicant for area variance relief is required to show that the strict application of the zoning regulations would result in "practical difficulties." *See French v. D.C. Bd. of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995). A show of practical difficulty requires "'[t]he applicant to demonstrate that … compliance with the area restriction would be unnecessarily burdensome." *See Metropole Condominium Ass'n v. D.C. Bd. of Zoning Adjustment*, 141 A.3d 1079, 1084 (D.C. 2016) (*quoting Fleishman v. D.C. Bd. of Zoning*

Adjustment, 27 A.3d 554, 561-62 (D.C. 2011)). In determining whether an applicant faces a practical difficulty, the Board may consider factors including the added expense and inconvenience to the applicant inherent in alternatives that would not require the requested variance relief. *See Barbour v. D.C. Bd. of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976).

As to the closed court relief, the Board finds that the Applicant will face a practical difficulty with strict application of the closed court requirements, which would result in a building that is unusually narrow and lacking functionality as a hotel. The Board notes that strict compliance with the closed court requirements would require a closed court on the northern and southern sides of the building that are approximately 18.3 feet in width. The resulting building would be approximately 25 feet wide and highly impractical as a hotel, particularly in light of the Applicant's planned double-loaded corridors. The Board also notes that the Applicant cannot eliminate the proposed courts because the resulting building would not permit the installation of windows on the northern or southern side of the Project. This would create a practical difficulty because the Applicant could not comply with Building Code requirements for habitable rooms.

As to the floor-to-ceiling clearance requirement, the Board finds that the Applicant faces a practical difficulty with strict compliance due to the design challenges associated with only a small portion of the Project being located in the Mount Vernon Triangle Principal Intersection Sub-Area. The Board notes that only an 18-foot wide by 72-foot deep section of the Property is located in the Sub-Area. Strict application of this requirement would require the Applicant to design portions of the ground floor and second floor with different ceiling heights. The Board also concurs with OP that given the historic buildings to the north, strict application of this requirement would result in the Applicant losing a substantial portion of the third story for only two additional feet of height on the ground level. (Ex. 52.) Further, HPRB opined on the proposed design and concluded that changes to the height of the proposed floor-to-ceiling clearance would necessitate further reconfiguration and would likely fail to meet historic preservation demands due to the existing historic façade on the Property.

As to the loading berth, the Board finds that the Applicant would face a practical difficulty in incorporating the required two loading berths at the Property as a result of several factors. First, given the narrow width of the Property and the Alley, the Project would have to be substantially redesigned in order to accommodate a second loading berth. Such a redesign would result in the loss of a large portion of the ground level to provide the requisite turning movements for a second loading berth. As designed, the Applicant has already had to place the loading berth on a diagonal, as opposed to the standard 90-degree angle. Further, the Board finds that the nature of the Property would make installing a second loading space below grade effectively impossible while also remaining compliant with ramping and clearance requirements for the access.

As to the width of the access aisle to loading, the Board finds that the absence of a curb cut from 5th Street N.W. coupled with the fact that DDOT is unlikely to approve a curb cut as creating practical difficulties for the Applicant to comply with the loading requirement. The Applicant does not have a viable alternative to the Alley because the Applicant cannot provide a curb cut off

5th Street for loading access. The Applicant's traffic expert testified that "the DDOT design and engineering manual which … states explicitly that if you have access to an alley you must use the alley for [loading] access." (4/4/18 Hearing Tr. at p. 142.) In this regard, the Board notes that counsel for 450K CAP concurred that "DDOT doesn't like loading off of streets." (6/20/18 Hearing Tr. at p. 224.) Accordingly, the Applicant would face a practical difficulty with strict compliance with the 12-foot-wide access aisle requirement because the Project must utilize the existing Alley for loading access.

No Substantial Detriment to Public Good or Zone Plan. The Board finds that approval of the requested variance relief will not result in substantial detriment to the public good or cause any impairment to the zone plan. As previously discussed, the Applicant proposes to construct an aesthetically-pleasing and pedestrian-friendly hotel in one of the highest density zones in the District – a zone that *prioritizes* development of vibrant and active lodging and nightlife uses. Accordingly, the Board credits the testimony of Mr. Varga as well as the OP that the Project fulfills the intent and purpose of the D-4-R zone and Mount Vernon Triangle Sub-Area and satisfies numerous Comprehensive Plan and small area plan recommendations. (4/4/18 Hearing Tr. at pp. 111-114, Ex. 52, Ex. 60, Tab B.)

As to the closed court relief, the Board finds that the Project will provide adequate light and air to surrounding properties. The Board notes that the court relief will not have a substantial impact on either the three-story historic property to the north or the historic property to the south, as these buildings are both much lower in height than the proposed Project. The courts preserve historic preservation goals as reflected in HPRB's concept approval of the Project design.

As to the floor-to-ceiling clearance height, the Board credits OP's conclusion that the objectives of the Mount Vernon Triangle Principal Intersection Sub-Area have been met through the Project, as proposed. In particular, the Applicant proposes a 20-foot tall ground floor level with a coffee shop that is open to the public. This proposed utilization of the ground floor space will accomplish the goals of the Sub-Area to promote walkability and active uses on the ground level.

As to the relief for the loading berth and access aisle, the Board finds that the relief will not have a substantial detriment on the public good or the zone plan. As explained below, the Board credits the conclusions of DDOT regarding the loading-related relief as well as the evidence and testimony from the Applicant's traffic expert. The Board notes that 450K CAP and Mr. Stephenson held a contrary view but, as will also be explained below, finds their arguments unpersuasive.

DDOT issued two reports on the Project, both of which confirm that DDOT has no objection to the requested relief. (Exs. 45, 74). Of particular note, DDOT found that one loading berth would meet the needs of the Project provided the Applicant implemented the Loading Management Plan. (Ex. 45.)

The Applicant's traffic expert confirmed DDOT's conclusion that the loading facilities will meet the needs of the Project. (Ex. 70.) The Applicant's traffic expert from Gorove/Slade submitted three memorandums in the case record and testified at two hearings regarding the loading relief.

Gorove/Slade provided information as to the number of deliveries predicted for the Project, including a letter from the proposed hotel operator confirming that two deliveries per day are expected for the Project. (Ex. 70; 6/20/18 Hearing Tr. at p. 262.) The Board credits the statements of the proposed hotel operator over the claims of 450K CAP and Mr. Stephenson that the Project would likely require additional loading trips. (Exs. 62, 78, 80.) Accordingly, the Board finds that one loading berth will be sufficient to meet the needs of the Project and will not be of detriment to the public good.

Similarly, 450K CAP argued that the Project would create too much activity in the Alley. (6/20/18 Hearing Tr. at pp. 210-211.) 450K CAP did not provide any basis for this anecdotal assertion. To that end, the Board notes that 450K CAP also has access to its building's loading through the Alley. (6/20/18 Hearing Tr. at pp. 230-231.) Notwithstanding, the Board credits the Applicant's Loading Management Plan, as confirmed by DDOT, to mitigate any negative impact that the Project's loading activities may have on neighboring properties along the Alley. (Ex. 45.) The Loading Management Plan is an express condition of the Board's approval for the Project. The Board also notes that there are multiple entry points along the Alley that can provide access points for neighboring properties, and the "east-west" portion of the Alley is 30 feet wide, providing ample space for vehicles to navigate. (6/20/18 Hearing Tr. at p. 264.)

450K CAP also claims that the Alley is not wide enough to allow for trucks to access the Project's loading berth. (Exs. 62, 78, Tab C.) 450K CAP questions the findings of Gorove/Slade as to the necessary turning radius for trucks in the Alley. (Exs. 62, 78.) The Board does not find 450K CAP's argument to be persuasive. First, as Gorove/Slade notes, the width of the Alley is the same whether the Applicant is seeking zoning relief or constructing a by-right building at the Property. (Ex. 68, Tab C.) Nonetheless, Gorove/Slade produced numerous detailed turning diagrams that sufficiently demonstrate the Alley is accessible for trucks up to 30 feet in length. (Ex. 68, Tab C, Ex. 70.) Gorove/Slade created the turning diagrams using the "AutoTURN" program, a method that is acceptable by the Board as accurately depicting the Alley conditions and turning movements of trucks. (Ex. 68, Tab C.) Indeed, DDOT confirmed that while the movements in the alley are "constrained," the condition "is not irregular in the District's alley networks. (Ex. 74.) DDOT also noted that the buildings at 450 K Street N.W. and 459 I Street N.E. have loading bays off the Alley, suggesting that trucks are able to appropriately maneuver within the Alley. (Ex. 74.)

Both 450K CAP and Mr. Stephenson raised concerns regarding the potential for the Project's loading to affect the use of their properties. (Exs. 62, 80.) The Board relies on the Applicant's Loading Management Plan to limit any effects of the Project's loading on neighboring properties. In particular, the Board notes that the Applicant has agreed that no trucks will queue along 5th Street N.W., deliveries will be scheduled so that the capacity of the Project's loading space is not exceeded, trucks may not be larger than 30 feet in length, and loading operations will be limited to 7:00 a.m. to 7:00 p.m. These conditions, as well as others, will help to limit any effect the Applicant's loading facilities would have on neighboring properties or the public good.

Through its traffic expert, Mr. Mehra, 450K CAP also claimed that the Applicant was required to produce a Comprehensive Transportation Review but failed to do so. (Exs. 62, 78.) The Board

finds the assertions made by Mr. Mehra to be unpersuasive. DDOT confirmed that the Applicant was not required to produce a Comprehensive Transportation Review. (Ex. 74.) As to any alleged impacts of the Project on parking or transportation networks, the Board finds that the Project is not required to provide any parking because it is within the D-4-R zone. Nonetheless, the Applicant has implemented several methods to limit any potential effect on parking. In particular, the Applicant produced letters of intent to reserve 20 parking spaces in nearby private parking garages. (Ex. 39, Tab C.) The Applicant has also worked extensively with DDOT and will request a no parking loading zone directly in front of the Project for drop-offs. (Ex. 39.) The Board also notes that the Property is located in a transit-rich, walkable part of the District. Additionally, the Applicant is providing bicycle parking in excess of that required under the Zoning Regulations.

Great Weight

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

The Board is also required to give "great weight" to the issues and concerns raised by the affected ANC. (D.C. Official Code §§ 1-309.10(d)(3)(A).) Great weight means acknowledgement of the issues and concerns of the ANC and an explanation of why the Board did or did not find their views persuasive.[6]

On March 6, 2018, ANC 6E voted unanimously to support relief under Subtitle C § 1502.1(c)(4) for the penthouse side setback and Subtitle I § 205.1 for the rear yard, and variances under Subtitle C § 901.1 for the number of loading berths, Subtitle I § 207.1 for closed court dimensions, and Subtitle I § 612.4 from the floor-to-ceiling clearance height requirement. The ANC also voted to support the special exception relief for use of the penthouse as a cocktail lounge or bar, although the Applicant later withdrew this relief. At the time of the ANC's vote of support, the Applicant had not added its request for relief under Subtitle C § 904.2 for the width of access aisle to loading berth. Nonetheless, Commissioner Anthony Brown, who is the Chair of the ANC's Zoning and Planning Subcommittee, testified that the Subcommittee had considered the relief under Subtitle C § 904.2 and voted to support the relief. (6/20/18 Hearing Tr. at pp. 255-256.) The Board finds that the ANC had notice of the Applicant's request for relief under Subtitle C § 904.2, but the ANC chose not to vote on this area of relief and did not state any issues or concerns in the case record.

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

While the ANC voted to support the aforementioned relief, the ANC conditioned its overall support on the Board's implementation of three conditions in order to address issues and concerns raised by community members. The ANC raised the following issues and concerns in connection with the requested conditions:

- "Residents expressed concern that a hotel in the middle of block on 5th Street would increase the already high traffic area with visitors and vendors loading and off-loading in front of the future hotel. To address this concern, ANC 6E conditioned its support on the applicant requesting three reserved parking spaces in front of the property on 5th Street from the District Department of Transportation"; and

- "The narrow alleyway behind the hotel is utilized by residents and vendors for four residential buildings in addition to several businesses. To address this concern, ANC conditioned its support on the applicant working with the surrounding property owners to construct a workable plan to prevent congestion and accidents in the narrow alleyway."[7]

The Board found that the project will not result in adverse parking or traffic impacts and therefore the conditions proposed are unnecessary. Further, the Commission cannot compel DDOT to reserve parking spaces or the Applicant to meet with others. The first is within DDOT's sole discretion and the second violates the Applicant's right of free association. The Board is not mistaking "its lack of authority to approve the proposals for a lack of jurisdiction to assess the impact of the proposals on the surrounding neighborhood". *See Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 750–51 (D.C. 1990). Rather, the Board finds that neither condition is legally required.

Based on the findings of fact and conclusions of law, the Board concludes that the Applicant has satisfied the burden of proof with respect to the request for a special exception under Subtitle C § 1502.1(c)(4) for the penthouse side setback and Subtitle I § 205.1 for the rear yard, and variances under Subtitle C § 901.1 for the number of loading berths, Subtitle C § 904.2 for the width of access aisle to loading berth, Subtitle I § 207.1 for closed court dimensions, and Subtitle I § 612.4 from the floor-to-ceiling clearance height requirement, for the premises at 923-927 5th Street N.W. (Square 0516, Lots 827, 828, 829, and 833). Accordingly, it is **ORDERED** that the application is **GRANTED AND, PURSUANT TO SUBTITLE Y § 604.10, SUBJECT TO THE APPROVED PLANS AT EXHIBIT 90 AND THE FOLLOWING CONDITIONS:**

1. Trucks shall be restricted from queuing and loading along 5th Street, N.W.

2. Vendors and on-site tenants shall be required to coordinate and schedule deliveries, and a

[7] The third condition requested by the ANC concerns hours for the penthouse habitable space, which was later removed from the Project.

loading coordinator shall be on duty during delivery hours.

3. Trucks accessing the on-site loading space shall be limited to a maximum of 30 feet in length.

4. No more than one 30-foot truck shall be allowed in the loading area.

5. Deliveries shall be scheduled such that the loading space's capacity is not exceeded.

6. In the event that an unscheduled delivery vehicle arrives while the loading space is full, that driver shall be directed to return at a later time when the loading space will be available so as to not impede the alley that passes adjacent to the loading space.

7. Inbound and outbound truck maneuvers shall be monitored to ensure that trucks accessing the loading space do not block vehicular traffic.

8. Trucks using the loading space shall not be allowed to idle.

9. Trucks must follow all District guidelines for heavy vehicle operation.

10. Loading space operations shall be limited to daytime hours, 7:00 AM – 7:00 PM, with signage indicating these hours posted prominently at the loading space.

11. The Applicant shall provide bicycle parking spaces required by zoning.

12. The Applicant shall ensure adequate TDM marketing at each step in the booking and arrival process for guests.

13. The Applicant shall facilitate employee carpool matching services sponsored by the Metropolitan Washington Council of Governments.

14. The Applicant shall install Transportation Information Centers (electronic screens) within the hotel's lobby, which will display information related to local transportation alternatives.

The Vote

For relief under Subtitle I § 205.1 for the rear yard, Subtitle C § 901.1 for the number of loading berths, Subtitle C § 904.2 for the width of access aisle to loading berth, Subtitle I § 207.1 for closed court dimensions, and Subtitle I § 612.4 from the floor-to-ceiling clearance height requirement

VOTE: **4-0-1** (Carlton E. Hart, Lorna L. John, Anthony J. Hood, and Lesylleé M. White (by absentee ballot) to APPROVE; Frederick L. Hill not participating).

For relief under Subtitle C § 1502.1(c)(4) for the penthouse side setback

VOTE: 3-1-1 (Carlton E. Hart, Lorna L. John, and Lesylleé M. White (by absentee ballot) to APPROVE; Anthony J. Hood opposed; Frederick L. Hill not participating).

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: January 9, 2019

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

PURSUANT TO 11 DCMR SUBTITLE Y § 702.1, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A REQUEST FOR A TIME EXTENSION PURSUANT TO SUBTITLE Y § 705 PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THE REQUEST IS GRANTED. PURSUANT TO SUBTITLE Y § 703.14, NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO SUBTITLE Y §§ 703 OR 704, SHALL TOLL OR EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR SUBTITLE Y § 604, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR SUBTITLE A § 303, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL 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.

June 08, 2022

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

AGENT AUTHORIZATION FOR 923 5th Street NW

Chairperson Hill and Honorable Members of the Board:

This letter serves as notice that Bradley Kline of Kline Operations, LLC authorizes counsel, Cozen O'Connor, with Meridith Moldenhauer as counsel to be the authorization agent in connection with the application before the Board of Zoning Adjustment regarding the properties located at 923 5th Street NW. Pursuant to Subtitle Z § 200.3 of the Zoning Regulations, this authorization includes the power to bind Kline Operations, LLC in the case before this Board.

Sincerely,

KLINE OPERATIONS, LLC

Bradley Kline, Member