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VIA ELECTRONIC & PHYSICAL DELIVERY

September 6, 2022

Deborah Tackett, Chief of Historic Preservation
Planning Department, Second Floor
City of Miami Beach
1700 Convention Center Drive, 2nd Floor
Miami Beach, Florida 33139

RE: **HPB21-0498** – Request for Certificate of Appropriateness for Demolition and Design and One Variance for Proposed Boutique Hotel Located at 7418 Harding Avenue, Miami Beach, Florida

Dear Debbie:

This law firm represents Brizi Capital, LLC (the "Applicant") in their application for the proposed development of a 38-unit boutique hotel located at 7418 Harding Avenue ("Property"). Please consider this letter the Applicant's letter of intent in support of a Certificate of Appropriateness for Demolition and Design and one variance for the preservation, renovation and rehabilitation of three (3) existing structures into a new, 38-unit boutique hotel ("Proposed Development").

Since the May 10, 2022 Historic Preservation Board meeting, the following changes have been made to HPB File No. HPB21-0498:

- The Applicant purchased the Property from previous applicant;
- The Applicant is proposing minor demolition with regard to the structures within the Property, but all structures will be substantially retained and restored;
- The Applicant reduced the number of hotel units from 48 units to 38 units;
- The Applicant significantly upgraded the landscape plan, specifically within the internal courtyard and along the property lines;
- The Applicant withdrew the rear setback variance request;
- The Applicant withdrew the off-street loading waiver request; and
- The Applicant withdrew the height increase request.

Property Description. The Property consists of approximately 15,000 square feet (0.34 acres) and is developed with three (3) two-story multi-family structures that are classified as Contributing ("Existing Structures"). The Property is located within the North Shore Local Historic District and the North Beach National Register Conservation Overlay District. The Property has a land use designation of Residential Multifamily Low Intensity (RM-1) and is zoned RM-1. Built in 1946, and designed by architect Frank Wyatt Woods, the Existing Structures characterize much of the built environment of the North Shore Historic District and exemplify the plasticity and transparency of Moderne architectural style and the later Post War Modern movements. The existing structures are mirrored and are positioned at 90-degree angles, which create a generous, common internal courtyard and are sheltered by projecting overhang eaves. See Figure 1, below.

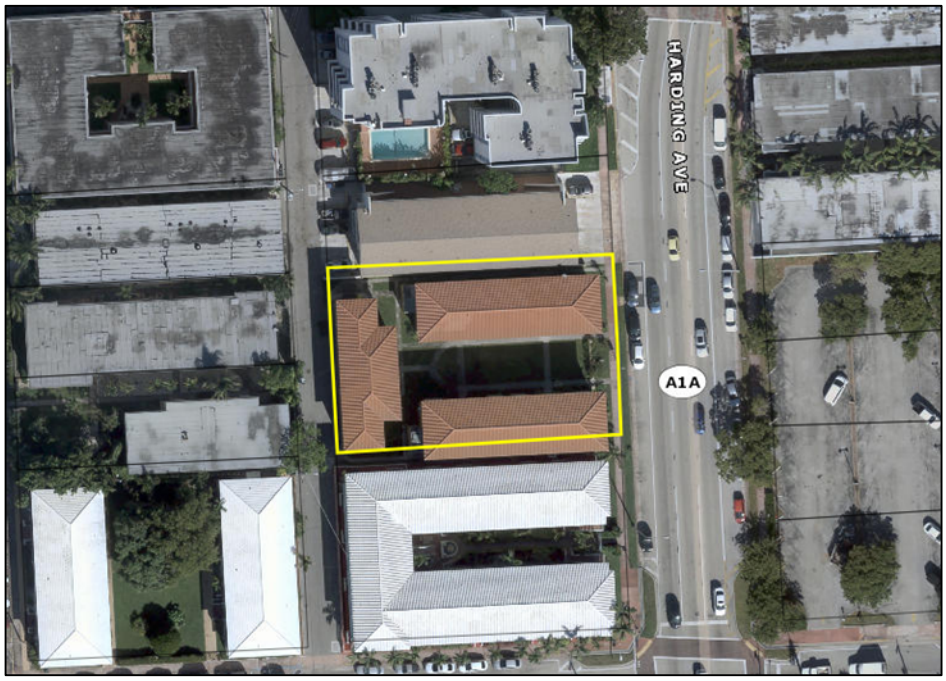

Figure 1

The North Shore Local Historic District is a densely populated urban area that runs from 73rd Street to 87th Street. Buildings in the area include small garden apartment buildings, motels, and institutional and commercial buildings. After World War II, the North Beach area became a lure for residents seeking a tropical resort lifestyle, and the architecture of the buildings conveys that sensibility. Roofs are generally flat, natural stone, slump brick and patterned stucco cover the facades. Most of the buildings wrap around intimate garden patios and courtyards.

As stated above, the Property contains three (3) Contributing structures. The east-west oriented buildings run parallel and create an internal courtyard at the center of the Property. The north-south oriented building is located on the western portion of the Property and provides a backdrop for the internal courtyard when viewing the Property from Harding Avenue. The Existing Structures are constructed with concrete block clad with stucco and features simple post war style. The Existing Structures have low sloped clay tiled roofs with slight overhangs. The Existing Structures provide exterior access via stairwells from the internal courtyard. The ground floor units have entrances directly from a stoop and the exposed staircases lead to a landing balcony between two additional units located on the second floors of each structure. The facades are composed of repeating bay windows, which the Applicant seeks to retain in their original configuration.

Proposed Development. The Applicant proposes to preserve and renovate the Existing Structures into a 38-unit boutique hotel. The north-south oriented structure located on the west portion of the Property fronts Harding Court and will serve as the main hotel area of the Proposed Development ("Main Structure"). The Applicant will renovate and restore the Main Structure to align with the historical nature of the North Shore Local Historic District and Post War Modern movements. Specifically, on the ground floor, the Main Structure will contain the lobby, reception area, business center, and an expansive patio for continental breakfast service for hotel guests. The ground floor of the Main Structure will also contain two (2) hotel units and the second level will contain four (4) hotel units that overlook the internal courtyard.

The Applicant also seeks to restore the two (2) east-west orientated structures located on the north and south property lines into thirty-two (32) hotel units. Specifically, the Applicant will preserve the Existing Structures by retaining and restoring the original configuration of the internal courtyard, retaining the clay tile roofs and primary exterior stairs, and retaining the original window configuration to remain consistent with available historical documentation. In addition to preserving the Existing Structures with their historical Post War architectural character, the Applicant will restore the Existing Structures to comply with modern fire, safety, and accessibility requirements.

Overall, the Proposed Development strikes a balance between preserving the historical nature of the Property and brings the Property into compliance with modern fire, safety, and accessibility requirements. The Proposed Development will transform the Property into an elegant, boutique hotel that will evoke interest from Harding Avenue and reinvigorate the North Beach neighborhood.

Parking. As stated above, the Property is located in the North Beach National Register Conservation Overlay District. For existing apartment buildings, which are classified as Contributing and of which at least 75 percent of the front and street side elevations, and 25 percent of interior side elevations, are substantially retained, preserved and restored, there shall be no parking requirement for the existing structure, any new addition, whether attached or detached. See Sec. 130-32(6)(e)3, Miami Beach City Code ("City Code"). The Proposed Development complies with the above criteria and, as a result, does not trigger any parking requirements under the Code.

Estimated Cost of Construction. The estimated cost of construction is $3,750,000.00.

Evaluation of Appropriateness. The proposed hotel use fits well within the surrounding commercial context of the area as the Property is located along Harding Avenue, a major transit corridor. With approximately 25,000 average daily vehicle trips along Harding Avenue, a one-way street, the heavy traffic volume puts Harding Avenue above the classification of an Arterial Road (between 7,000 and 27,000 daily bidirectional trips) and in the category of Other Freeways and Expressways (between 13,000 and 55,000 daily bidirectional trips). See Exhibit A, FDOT Daily Trip Generation Report. Further, there are numerous businesses and hotels within close proximity to the Property, including a surface parking lot that serves the Walgreens located directly across from the Property on Harding Avenue See Figure 2, below. Due to the Property's location on Harding Avenue and nearby many commercial uses, thus the Proposed Development is in-line with the character of the area. Overall, the Proposed Development effectively converts the previous apartment use to hotel use and does not overwhelm the surrounding area.

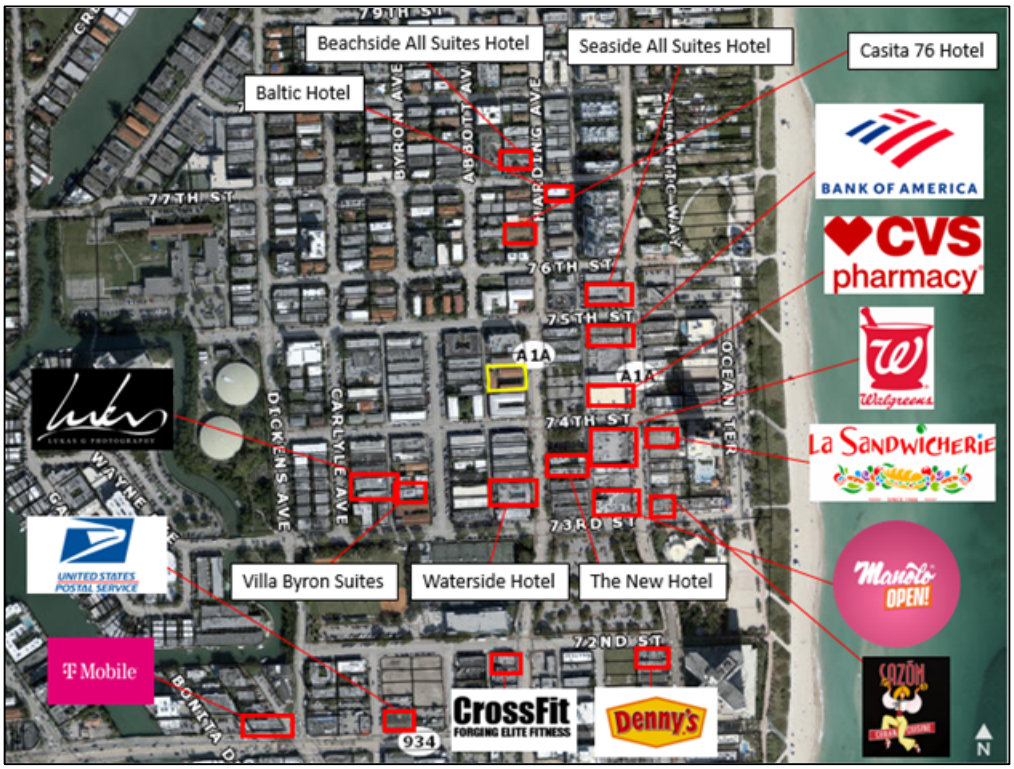

Figure 2

Variance Request. In order to accommodate the Proposed Development, the Applicant respectfully requests the approval of the following variance, as detailed below:

1. Hotel Unit Size Variance – A variance from the requirement of Section 142-870.15(b) to provide a minimum unit size of 210 square feet and up to 300 square feet where, in the North Beach National Register Conservation Overlay, the minimum unit size for Contributing buildings which are substantially retained and restored is 300 square feet ("Hotel Unit Size Variance").[1]

[1] The unit configuration is as follows:

Size (Square Feet)	Number of Units
210 SF	4
220 SF	4
230 SF	4
240 SF	2
250 SF	6
270 SF	10
280 SF	2
290 SF	3

The Hotel Unit Size Variance is necessary because the Applicant proposes to renovate and restore the Existing Structures in a manner consistent with the Property's historical architectural character. Specifically, the Applicant seeks to retain the original window configuration of the buildings to remain consistent with the Post War architecture the Existing Structures evoke. To accomplish this, the multi-family units within the Existing Structures will be reconfigured by converting the large apartment units into smaller hotel units ranging from 210 square feet to 350 square feet. As a result, the Applicant is able to respect and retain the original window configuration by ensuring no interior partition walls will be constructed in conflict with the existing window design.

The Proposed Development will result in a significant improvement of the Existing Structures' current state by bringing the Existing Structures into compliance with necessary life-safety and accessibility regulations and will contribute positively to the boutique hotel experience. Variances to reduce the minimum unit size requirement are regularly granted, as shown by the Historic Preservation Board's approval of similar variance requests for the Essex House Hotel in 2019, The Generator Miami Hotel, Casa Ocean Hotel and Aqua Hotel in 2020, and the Sorrento Villas Hotel in 2021.[2]

Practical Difficulty. Pursuant to the City Charter Subpart B – Related Special Acts, specifically Article I, Section 2, variances may be analyzed where there are practical difficulties or unnecessary hardships. The plain meaning of Article I, Section 2 of the Related Special Acts is to grant the Historic Preservation Board the jurisdiction to determine whether there are "practical difficulties or unnecessary hardships." See Exhibit B, G200 Exchange, LTD. v. City of Miami Beach and Shore Club Property Owner, LLC. 26 Fla. L. Weekly Supp. 461a (Fla. 11th Cir. App. Ct. 2018). In upholding a recent decision by the Historic Preservation Board to grant a variance under the practical difficulty standard, the Appellate Division of the Eleventh Judicial Circuit Court stated:

"the [Historic Preservation] Board followed the Code. In its order, the [Historic Preservation] Board made the requisite findings pursuant to the relevant Code provisions. Based on the record, the [Historic Preservation] Board did not depart from the essential

300 SF	1
320 SF	1
350 SF	1

[2] See HPB19-0353, HPB19-0315, HPB20-0377, HPB20-0387, and HPB21-0460.

requirements of law when it approved the variances [under the practical difficulty standard]."

The Court continued:

"The staff report [. . .] provides sufficient documentation to support the [Historic Preservation] Board's decision to grant the variances. Further, the record reflects that the [Historic Preservation] Board made its decision based on competent substantial evidence."

As a result, the Historic Preservation Board properly considered Article I, Section 2 of the Related Special Acts when the Board Order stated, "[t]he applicant has submitted plans and documents with the application that satisfy Article I, Section 2 of the Related Special Acts, allowing the granting of a variance [i]f the Board finds that practical difficulties exist with respect to implementing the proposed project at the subject property."

Preserving a historic structure provides a practical difficulty when renovating and restoring a structure and converting it into a new use. An excellent example is the Corcoran Gallery of Art ("The Corcoran") located in Washington D.C., adjacent to the White House. The Corcoran is an elaborate Beaux Arts structure that, by its nature, makes the construction of additions difficult and challenging because the new construction must be compatible with the existing historic building. In United Unions, Inc. v. D.C. Bd. of Zoning Adjustment, 554 A.2d 313 (D.C. 1989), The Corcoran sought to obtain certain variances from D.C.'s Board of Zoning Adjustment (BZA) to permit the construction of a proposed seven-story office building located on unimproved land adjacent to The Corcoran. See Exhibit C, United Unions Case. The BZA granted the request and a nearby office building owner appealed the decision. The crux of the case focused on the question, "what exceptional conditions inherent in the property [justified] the variances granted by the BZA?"

The DC Court of Appeals held that, because the original Corcoran Gallery of Art is a registered historic landmark of exceptional design, the applicant was required to comply with landmark preservation laws in the construction of the connected building, and present a plan that would replicate the style, materials, and workmanship of the original Corcoran building. The special status of its original structure as a landmark requiring an

addition consistent with the original plan constituted a "special circumstance" justifying the variances. Specifically, the special qualities of the original Corcoran building and the space on which it was erected required the applicant to conceal rooftop elevator equipment within the building (thereby requiring variances from floor area ratio requirements, court niche requirements, and closed court width and area requirements) and to construct the building in an odd-shaped space in a manner consistent with the original.

Here, similar to United Unions, the Applicant is under an obligation to respect the historic nature of the Existing Structures, which are Contributing. The Applicant does so by retaining and preserving the facades of the Existing Structures, reducing the hotel unit size to ensure the original window configuration is maintained, and restoring the internal courtyard with lush landscaping. This restoration requires the Hotel Unit Size Variance because smaller hotel unit sizes are necessary to preserve the original window configuration by ensuring no partition walls are constructed in conflict with the existing windows. In order to retain the original window configuration and provide space for necessary hotel operations, the hotel unit sizes must be a minimum of 210 SF.[3]

The Applicant has a challenging site with three (3) Contributing structures that the Applicant will preserve. The Proposed Development stays true to that condition and maintains the internal courtyard atmosphere. The Hotel Unit Size Variance is necessary because the required minimum room size applicable to the Property is not feasible to effectively preserve the Property's historical architectural character and maintain the original window configuration. The Hotel Unit Size Variance ensures that the Proposed Development retains and highlights the Existing Structures, window configuration and internal courtyard. Overall, the proposed room sizes are not out of character with the permissible minimum room size for other historic hotel uses in the RM-1 district. The Hotel Unit Size Variance will produce an enhanced design that is consistent with the character of the neighborhood and will highlight the extensive preservation of the Existing Structures.

[3] See again, footnote 1, unit configuration breakdown.

Satisfaction of Hardship Criteria. The Applicant's request satisfies all hardship criteria as follows:

(1) Special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same zoning district;

There are special conditions and circumstances that exist which are peculiar to the land and uses. The Applicant has a challenging site with three (3) Contributing structures that the Applicant will preserve. The Proposed Development stays true to that condition and maintains the original window configuration and internal courtyard atmosphere. The Hotel Unit Size Variance is necessary to preserve the historical nature of the Existing Structures as smaller hotel units will ensure no partition walls are constructed in conflict with the historical window configuration. The required minimum hotel unit size applicable to the Property is not feasible to effectively preserve the Property's historical architectural character. The existence of Contributing structures on the Property is a special condition that is peculiar to the land and not applicable to other lands in the same zoning district.

(2) The special conditions and circumstances do not result from the action of the applicant;

This special condition does not result from the actions of the Applicant. The Existing Structures are designated as Contributing and located in the North Shore Local Historic District and the North Beach National Register Conservation Overlay District. The Hotel Unit Size Variance is necessary to preserve the Existing Structures and the proposed hotel unit size meets the minimum criteria applicable to existing Contributing hotels in the RM-1 district. The Property's historical character and classification as Contributing are existing conditions and not the result from any action of the Applicant.

(3) Granting the variance requested will not confer on the applicant any special privilege that is denied by these land development regulations to other lands, buildings, or structures in the same zoning district;

The City Code allows other similarly situated property owners that are preserving historic properties to seek similar variances to accommodate sensitive development. The Hotel Unit Size Variance ensures that the Proposed Development retains and highlights the historical character of the Property, including original window configuration and

internal courtyard atmosphere. The reduced hotel unit size is minimal and not a special privilege conferred to the Applicant as the HPB has granted similar variance requests in the past. See again, footnote 2, above. The City Code permits other similarly situated property owners to make similar requests to accommodate preservations and additions of historic sites and designs that contribute to the context of the historic neighborhood. Therefore, granting of the Hotel Unit Size Variance request, in this case, will not confer any special privilege on the Applicant.

(4) Literal interpretation of the provisions of these land development regulations would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of these land development regulations and would work unnecessary and undue hardship on the applicant;

A literal interpretation of the provisions of the land development regulations would deprive the Applicant rights enjoyed by other properties in the same zoning district. The Hotel Unit Size Variance is necessary to preserve the Existing Structures. Strict adherence to the Code would not allow the Property to be renovated and restored as a boutique hotel while respecting and highlighting its historical architectural character. A literal interpretation of the City Code would make preserving the Existing Structure untenable as the requested hotel unit sizes are necessary to ensure the historical window configuration is maintained.

(5) The variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure;

The Hotel Unit Size Variance relates to the same special condition that prevent strict compliance with the City Code and is the minimum variation of the City Code that will make possible the reasonable use of the Property and preservation of the Existing Structures. The goal of the Proposed Development is to preserve all of the Existing Structures and the Hotel Unit Size Variance ensures that the existing configuration of the windows is maintained.

(6) The granting of the variance will be in harmony with the general intent and purpose of these land development regulations and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare; and

Granting of the Hotel Unit Size Variance will be in harmony with the general intent and purpose of the land development regulations and preservation of structures with historical significance in local historic districts. The Proposed Development preserves the historical window configuration and internal courtyard, which is the intent of the historic preservation regulations. The Proposed Development is compatible with the North Shore Historic District, and, therefore, benefits the public welfare.

(7) The granting of this request is consistent with the comprehensive plan and does not reduce the levels of service as set forth in the plan. The planning and zoning director may require applicants to submit documentation to support this requirement prior to the scheduling of a public hearing or any time prior to the board of adjustment voting on the applicant's request.

Hotel is consistent with the Comprehensive Plan and permitted by the RM-1 regulations. Further, the proposed minimum hotel unit sizes are consistent with the RM-1 regulations. The Hotel Unit Size Variance does not reduce levels of service – the Proposed Development will provide guests with a boutique hotel experience that highlights the historical character of the Property and neighborhood.

Sea Level Rise and Resiliency Criteria. The Project advances the sea level rise and resiliency criteria in Section 133-50(a) as follows:

(1) A recycling or salvage plan for partial or total demolition shall be provided.

The Applicant will provide a recycling or salvage plan during permitting.

(2) Windows that are proposed to be replaced shall be hurricane proof impact windows.

The Project will feature hurricane impact windows.

(3) Where feasible and appropriate, passive cooling systems, such as operable windows, shall be provided.

Abundant landscaping and permeable materials contribute to passive cooling, which represents a significant improvement from the existing condition.

(4) Resilient landscaping (salt tolerant, highly water-absorbent, native or Florida friendly plants) shall be provided, in accordance with Chapter 126 of the City Code.

The Applicant has worked to provide landscaping that is appropriate for the Property, with plant species that are native, salt-tolerant, and Florida-friendly. The proposed plantings are appropriate for the area and specifically selected to increase flood resilience and improve stormwater drainage on the Property.

(5) The project applicant shall consider the adopted sea level rise projections in the Southeast Florida Regional Climate Action Plan, as may be revised from time-to-time by the Southeast Florida Regional Climate Change Compact. The applicant shall also specifically study the land elevation of the subject property and the elevation of surrounding properties.

The Applicant will consider the sea level rise projections for the Proposed Development.

(6) The ground floor, driveways, and garage ramping for new construction shall be adaptable to the raising of public rights-of-ways and adjacent land and shall provide sufficient height and space to ensure that the entry ways and exits can be modified to accommodate a higher street height up to three (3) additional feet in height.

This is a renovation of a historic site. The Applicant will consider the raising of public rights-of-ways for the Proposed Development.

(7) As applicable to all new construction, all critical mechanical and electrical systems shall be located above base flood elevation. All redevelopment projects shall, whenever practicable and economically reasonable, include the relocation of all critical mechanical and electrical systems to a location above base flood elevation.

Proper precautions will be taken to ensure the critical mechanical and electrical systems are located above base flood elevation.

(8) Existing buildings shall, wherever reasonably feasible and economically appropriate, be elevated up to base flood elevation, plus City of Miami Beach Freeboard.

This is a renovation of a historic site. The existing ground floor areas will be, where feasible and appropriate, elevated.

(9) When habitable space is located below the base flood elevation plus City of Miami Beach Freeboard, wet or dry flood proofing systems will be provided in accordance with Chapter of 54 of the City Code.

Wet or dry flood proofing systems will be provided where habitable space is located below BFE.

(10) As applicable to all new construction, water retention systems shall be provided.

Where feasible, water retention systems will be provided.

(11) Cool pavement material or porous pavement materials shall be utilized.

Cool pavement materials and/or porous pavement materials will be utilized.

(12) The design of each project shall minimize the potential for heat island effects on-site.

The Applicant proposes abundant landscaping. These features serve to minimize heat island effect.

Conclusion. Overall, the Proposed Development will transform an unkept multi-family property into an elegant, boutique hotel that will evoke interest from the streetscape and reinvigorate the surrounding area. The Proposed Development and accompanying Hotel Unit Size Variance meet the intent of the Code in all respects and improves resilience of the Property. We therefore respectfully request your favorable review and recommendation. If you have any questions or comments, please call me at 305-377-6236.

Sincerely,

Michael W. Larkin

cc: David Butter

COUNTY: 87
STATION: 0520
DESCRIPTION: SR A1A/HARDING AV/ONE-WAY PAIR SB, 100' N 87 ST
START DATE: 04/20/2021
START TIME: 0000

DIRECTION: S

TIME	1ST	2ND	3RD	4TH	TOTAL
0000	111	93	96	65	365
0100	51	60	53	30	194
0200	28	34	21	23	106
0300	26	18	25	25	94
0400	19	18	23	27	87
0500	36	48	53	73	210
0600	76	146	195	236	653
0700	271	383	412	409	1475
0800	372	444	446	378	1640
0900	362	328	326	328	1344
1000	283	294	344	335	1256
1100	307	359	403	337	1406
1200	371	375	347	350	1443
1300	361	381	408	395	1545
1400	381	373	393	407	1554
1500	451	429	433	414	1727
1600	390	428	452	430	1700
1700	453	442	450	379	1724
1800	447	415	428	362	1652
1900	379	356	353	314	1402
2000	311	295	327	274	1207
2100	245	246	206	184	881
2200	210	192	194	157	753
2300	144	173	130	101	548
24-HOUR TOTALS:					24966

PEAK VOLUME INFORMATION

	HOUR	VOLUME
A.M.	745	1671
P.M.	1630	1777
DAILY	1630	1777

TRUCK PERCENTAGE 4.86 NAN 4.86

CLASSIFICATION SUMMARY DATABASE

DIR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	TOTTRK	TOTVOL
S	264	20560	2919	162	322	65	65	508	66	20	1	0	4	0	10	1213	24966

GENERATED BY SPS 5.0.55P

COUNTY: 87
STATION: 0520
DESCRIPTION: SR A1A/HARDING AV/ONE-WAY PAIR SB, 100' N 87 ST
START DATE: 04/21/2021
START TIME: 0000

	DIRECTION: S				
TIME	1ST	2ND	3RD	4TH	TOTAL
0000	94	79	79	38	290
0100	51	30	26	19	126
0200	18	19	21	16	74
0300	15	8	19	16	58
0400	19	14	29	22	84
0500	39	34	65	73	211
0600	80	153	183	248	664
0700	268	360	479	445	1552
0800	488	453	491	460	1892
0900	375	349	374	336	1434
1000	334	308	297	317	1256
1100	319	338	327	341	1325
1200	315	383	357	333	1388
1300	338	335	343	340	1356
1400	375	380	415	407	1577
1500	462	461	427	374	1724
1600	420	404	417	432	1673
1700	392	393	455	449	1689
1800	407	399	448	370	1624
1900	374	373	337	308	1392
2000	314	321	289	275	1199
2100	254	242	220	226	942
2200	174	200	184	176	734
2300	141	138	142	124	545
24-HOUR TOTALS:					24809

PEAK VOLUME INFORMATION

	HOUR	VOLUME
A.M.	800	1892
P.M.	1445	1757
DAILY	800	1892

TRUCK PERCENTAGE 5.59 NAN 5.59

CLASSIFICATION SUMMARY DATABASE

DIR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	TOTTRK	TOTVOL
S	227	20305	2888	140	357	69	100	618	79	20	1	0	2	0	3	1386	24809

GENERATED BY SPS 5.0.55P

COUNTY: 87
STATION: 0520
DESCRIPTION: SR A1A/HARDING AV/ONE-WAY PAIR SB, 100' N 87 ST
START DATE: 04/22/2021
START TIME: 0000

	DIRECTION: S				
TIME	1ST	2ND	3RD	4TH	TOTAL
0000	81	74	61	50	266
0100	40	38	32	18	128
0200	27	16	17	13	73
0300	23	14	20	13	70
0400	12	15	18	20	65
0500	33	41	52	74	200
0600	85	138	190	232	645
0700	227	352	447	446	1472
0800	464	478	486	433	1861
0900	381	368	366	295	1410
1000	363	276	324	324	1287
1100	328	347	385	310	1370
1200	325	292	368	422	1407
1300	338	412	367	366	1483
1400	356	384	413	391	1544
1500	445	461	468	402	1776
1600	410	439	451	450	1750
1700	432	434	486	416	1768
1800	434	408	419	456	1717
1900	380	382	358	369	1489
2000	304	338	327	321	1290
2100	244	292	233	220	989
2200	206	221	239	186	852
2300	160	183	164	151	658
24-HOUR TOTALS:					25570

PEAK VOLUME INFORMATION

	HOUR	VOLUME
A.M.	745	1874
P.M.	1645	1802
DAILY	745	1874

TRUCK PERCENTAGE 7.13 NAN 7.13

CLASSIFICATION SUMMARY DATABASE

DIR	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	TOTTRK	TOTVOL
S	273	20518	2946	159	321	100	100	999	116	23	1	0	5	0	9	1824	25570

GENERATED BY SPS 5.0.55P

26 Fla. L. Weekly Supp. 461a

Online Reference: FLWSUPP 2606G200

Municipal corporations -- Zoning -- Side setback -- Variance -- Challenge to historic preservation board's grant of variances to construct porte cochere on property within historic district -- Issues raised for first time in petition for writ of certiorari are not reviewable -- Notices for hearings before the board complied with procedural due process -- Decision to grant variances was supported by competent substantial evidence, including staff report, and board did not depart from essential requirements of law by considering whether there existed "practical difficulties or unnecessary hardships" before approving variances

G200 EXCHANGE, LTD., Petitioner, v. CITY OF MIAMI BEACH and SHORE CLUB PROPERTY OWNER, LLC, Respondents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 15-278 AP. L.T. Case No. 7539. July 13, 2018. On Petition for Writ of Certiorari of a Final Order issued by the City of Miami Beach Historic Preservation Board File Number 7539. Counsel: Kevin Markow, Becker & Poliakoff, P.A., for Petitioner. Eve A. Boutsis, City of Miami Beach, for Respondent.

(Before JOHN THORNTON, RODOLFO RUIZ and MARCIA DEL REY, JJ.)

(THORNTON, J.) This is a petition for writ of certiorari from the decision of the Miami Beach Historic Preservation Board file number 7539. G200 Exchange, LLC ("Petitioner") is a unit owner in the Setai Resort and Residences Condominium ("Setai"), a property immediately adjacent to the Shore Club Hotel owned by the Shore Club ("Shore Club"). Petitioner filed the Petition for Writ of Certiorari requesting the Circuit Appellate Court issue an order to show cause pursuant to Florida Rule of Appellant Procedure 9.100(h) against the City of Miami Beach ("Miami Beach"); and following the order to show cause requests that the Circuit Appellate Court quash the City of Miami Beach Historic Preservation Board's ("Board") order approving the certificate of appropriateness for construction of Shore Club's port cochere. Petitioner is specifically challenging the granting of the two variances approved by the Board. Petitioner cites to City of Miami Beach Code ("Code") section 118-358 as authority for filing the petition for writ of certiorari.[1]

On March 12, 2015, the Shore Club applied for a variance to construct a porte cochere on 20th street which is the northern boundary of the Shore Club Hotel. The Shore Club is zoned RM-3, residential multifamily, high intensity. However, its location within the Miami Beach's Ocean Drive/Collins Avenue Local Historic District required it to apply to the Board to request a variance for the porte cochere. *See* City of Miami Beach, Fla., Code § 118-351(a)(2) (2014).

In the standard application form, the Shore Club requested a variance and referenced an attached letter of intent in the application's summary of proposal section. The letter of intent requested a modification of a previously approved certificate of appropriateness and a single variance pursuant to section 142-1132(g), which pertains to single-family and townhomes districts, to permit a zero setback driveway located on the north side of the property. The Shore Club requested the variance because the "Applicant cannot construct the driveway and comply with the side yard setback requirement without demolishing the historic structure. . . . The variance requested is the minimum variance required to provide the necessary driveway without demolishing the historic structure." The Shore Club sought a variance to construct the porte cochere citing the incorrect code section. It is agreed that the application cited to the incorrect code provision. The Shore Club submitted its final architectural plans showing that the proposed driveway would extend out to eight feet seven inches in width. Miami Beach contends that "following the filing of the Shore Club's initial application for the porte cochere, and as a product of the Shore Club's collaboration with City staff, it was determined that the Shore Club would need two different variances to construct the proposed porte cochere."

On July 14, 2015, the Miami Beach's Planning Department released its staff report. It states, "[t]he applicant, Shore Club Property Owner, LLC, is requesting a Certificate of Appropriateness for the construction of a porte co[c]here at the north faÃ§ade of the Cromwell Hotel building including variances to waive the minimum

required side setback facing a street for the construction of a driveway along 20th Street and to Waive the minimum required width for such driveway." The staff report acknowledges that the Shore Club requested one variance for the zero setback. However, the staff report indicates that in order for the zero setback to comply with the Code, it would also require a variance regarding the width of the driveway. The staff report recommended approving the application subject to the conditions enumerated in the draft order to "address the inconsistencies with aforementioned Certificate of Appropriateness criteria and Practical Difficulty and Hardship Criteria, as applicable."

On April 5, 2015, the Board posted public notice of a hearing for May 12, 2015 regarding the Shore Club's application for variances to waive the minimum required setback and to waive the minimum width for the construction of a porte cochere. At the May 12, 2015 hearing, the Board voted to continue the application until the July hearing.[2] On July 14, 2015, the Board posted public notice of a hearing for July 14, 2015 regarding the Shore Club's application for variances to waive the minimum required setback and to waive the minimum width for the construction of a porte cochere.

The Board opened discussion regarding the Shore Club's application by announcing that, "[t]he Applicant is requesting a Certificate of Appropriateness for the construction of a new porte cochere on the north faÃ§ade of the Cromwell Hotel including variances to waive the minimum required side setback facing the street for the construction of a driveway along 20th Street and to waive the minimum required width for such driveway." The Board discussed the application and then opened the hearing for public comment. Petitioner's attorney, Marcy Oppenheimer Nolan, came forward on its behalf for public comments. Ms. Nolan stated that "[w]e are in opposition of this variance." She stated Petitioner's opposition to the variance and explained that she did not have authority from Petitioner to agree with the application. Ms. Nolan explained that when "we're looking at the variance criteria, . . . , we talk about self-created hardship" and that there were alternatives for the location of the driveway. She concluded her opposition to the application by requesting that the Board defer its vote until September to give the Petitioner and the Shore Club the opportunity to "work this out."

At the close of Ms. Nolan's public comments, the Board asked its city attorney, Ms. Boutsis, if "we're comfortable as a Board voting today, do they have standing to make us delay our vote?" Ms. Boustis replied that "[t]hey could just appeal or re-hear a request, you know." Thereafter, the Board inquired as to the Setai's attorney, Mr. Robbins, opinion. Mr. Robbins agreed with Ms. Nolan that "they're probably aren't all the strict requirements of hardship . . . with the conditions proposed by their representatives, concerning the driveway, we will not appeal this matter, even if there is no showing of actual hardship under the code." And, Mr. Robbins supported the variance if the conditions stated by the Shore Club's attorney were incorporated into the final order. After further discussion, the Board voted to approve the certificate of appropriateness for construction of the Shore Club's port cochere.

The Circuit Appellate Court has jurisdiction pursuant to Rule 9.030 c), Fla. R. App. P., (2018). Miami Beach and the Shore Club contend that Petitioner failed to preserve the issues for the review by the Circuit Appellate Court thereby waiving its arguments on appeal; and that Petitioner failed to exhaust its administrative remedies.[3] Petitioner contends that it is an affected person pursuant to section 118-537(b) as its property is within 375 feet of the variances reviewed by the Board. At the time of the Board's decision, the Petitioner could seek review of its decision pursuant to section 118-358 or 118-537. The language of section 118-537 is permissive.[4] Petitioner chose to directly file the petition for writ of certiorari to the appellate court pursuant to section 118-358. Petitioner is an affected person and has preserved the issues for appellate review. The Petitioner has standing.

The standard of review of an administrative action is three pronged. *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624 (Fla. 1982); *Florida Power & Light Co. v. City of Dania,* 761 So. 2d 1089 (Fla. 2000) [25 Fla. L. Weekly S461a]. The circuit court, appellate division, is to determine (1) whether procedural due process was accorded, (2) whether the essential requirements of law have been observed, and (3) whether the administrative findings and judgments are supported by competent substantial evidence. *Id.* The appellate court may act only to correct errors of law, and it cannot substitute its judgment for that of the administrative agency. *Gersanik v. Dept. of Prof'l Reg., Board of Medical Examiners,* 458 So. 2d 302, 304 (Fla. 3d DCA 1984).

Procedural due process requires notice, an opportunity to be heard, the right to present evidence, and to cross-examine witnesses. *Jennings v. Dade County,* 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991), *rev. denied,* 598 So. 2d 75 (Fla. 1992). Due process requires that quasi-judicial bodies provide a fair hearing and an impartial tribunal. *See Bd. of Public Instruction of Broward County v. State ex rel. Allen,* 219 So. 2d 430, 431 (Fla. 1969). "Procedural due process requires both fair notice and a real opportunity to be heard . . . 'at a meaningful time and in a meaningful manner.' " *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla.2001) [26 Fla. L. Weekly S502a] (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)). The approval of a variance that is not in compliance with notice and public hearing requirements is void. *Webb v. Town Council of Town of Hilliard,* 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000) [25 Fla. L. Weekly D2334a]. Petitioner argues that the notices for Board's May 12, 2015 and July 14, 2015 fail to comply with procedural due process. Respondent contends that due process was complied with. Here, Petitioner received notice and the opportunity to be heard regarding both variances. Therefore, the notices comply with procedural due process.

The Supreme Court of Florida defines a departure from the essential requirements of law as something far beyond legal error. *Jones v. State,* 477 So. 2d 566, 569 (Fla. 1985). The departure from the essential requirements of law must be an inherent illegality or irregularity, an abuse of power, an act of tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. *Id.*

> An applicant seeking special exceptions and unusual uses need only demonstrate to the decision-making body that its proposal is consistent with the [ ] land use plan; that the uses are specifically authorized as special exceptions and unusual uses in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. If this is accomplished, then the application must be granted unless the opposition carries its burden, which is to demonstrate that the applicant's requests do not meet the standards and are in fact adverse to the public interest.

Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708, 709 (Fla. 3d DCA 2000) [25 Fla. L. Weekly D481a]. If the opposition demonstrates that the variance is inconsistent with land use plan then the variance should be denied. *Id.* at 708, n.3.

Section 118-561 requires Miami Beach issue a certificate of appropriateness prior to any construction of a building located within the historic district. Section 118-562 provides the requirements for an application for a certificate of appropriateness. While section 118-352(2) authorizes the Board to issue variances for properties within its jurisdiction, sections 118-352 and 118-353 provide that the variance application must be filed with the proper board.

The parties agree that the Shore Club incorrectly applied for a variance pursuant to section 142-1132(g), which regulates driveways and parking spaces for single-family houses and townhomes. However, the Shore Club argues that Petitioner failed to preserve review of the deficient application by failing to object to its deficiency during the Board's hearing. *First City Sav. Corp. of Texas v. S & B Partners,* 548 So. 2d 1156, 1157 (Fla. 5th DCA 1989)("As long as due process is afforded, the circuit court in a certiorari proceeding should not fault the zoning authority for refusing to consider issues which were not properly presented before it at the public hearing"). Petitioner rebuts Miami Beach's argument contending that "fundamental errors are reviewable on appeal irrespective of the developer's argument as to preservation" citing *Sanford v. Rugin,* 237 So. 2d 134, 137 (Fla. 1970) and *Coleman Co., Inc., v. Cargil Intern. Corp.,* 731 So. 2d 2, 4 (Fla. 3d DCA 1998) [23 Fla. L. Weekly D2693b].

In *Sanford,* the court determined that " '[f]undamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rugin,* 237 So. 2d 137; *Coleman Co., Inc., v. Cargil Intern. Corp.,* 731 So. 2d at 4. Typically, fundamental error is a doctrine applicable to trials. *Pinkney v. Sec' y, Dep't of Corrs.,* 876 F.3d 1290, 1299-1302 (11th Cir. 2017) [27 Fla. L. Weekly Fed. C415a] ("Fundamental error, the Florida decisions teach, is 'error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.' ").

It is a departure from the essential requirements of the law to address issues stemming from a public hearing not preserved on appeal. *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So.2d 188 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D2170b]("Appellate review is confined to issues decided adversely to appellant's position, or issues that were preserved with a sufficiently specific objection below."); *First City Sav. Corp. of Texas v. S & B Partners,* 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989). The Shore Club is correct that Petitioner failed to preserve this issue for review. Therefore, Petitioner is precluded from bringing the issue of the deficient application for the first time in the petition.

Petitioner contends that the staff report failed to address the section 118-353(d) requirements. The Shore Club again alleges that Petitioner failed to preserve this issue for review. Again, the Shore Club is correct. *See First City Sav. Corp. of Texas v. S & B Partners,* 548 So. 2d at 1156-57; *Clear Channel Communications, Inc. v. City of North Bay Village,* 911 So. 2d at 188. If Petitioner had preserved this issue for review, section 118-353(d) requires that the "applicable board" make the required findings. However, section 118-353(d) does not require the staff report make the requisite findings. Section 118-562(b) provides that the application "shall include such information and attached exhibits as the board and the planning department determine are needed to allow for complete evaluation of the proposed demolition, construction and other physical improvements" needed to evaluate the application.

Petitioner argues that the Board improperly considered Article I, Section 2 of the Related Special Acts as it is not within the Board's jurisdiction. The Board's order states the "[t]he applicant has submitted plans and documents with the application that satisfy Article I, Section 2 of the Related Special Acts, allowing the granting of a variance [i]f the Board finds that practical difficulties exist with respect to implementing the proposed project at the subject property." Miami Beach refutes Petitioner's argument contending that this section authorizes the Board to determine whether there are practical difficulties or unnecessary hardships.

Municipal ordinances and state statutes are governed by the same rules of statutory construction. *See Rinker Material Corp. v. City of North Miami,* 286 So. 2d 552 (Fla. 1973); *Stroemel v. Columbia County,* 930 So. 2d 742, (Fla. 1st DCA 2006) [31 Fla. L. Weekly D1251a]; *Rose v. Town of Hillsboro Beach,* 216 So. 2d 258 (Fla. 4th DCA 1968). "In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meaning of the words." When possible, all parts of a statute or ordinance are to be read together in order to achieve consistency. *Forsythe v. Longboat Key Beach Erosion Control District,* 604 So. 2d 452, 455 (Fla. 1992); *Unruh v. State,* 669 So. 2d 242, 245 (Fla. 1996) [21 Fla. L. Weekly S104a]; *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So. 2d 1, 6, 8 (Fla. 2004) [30 Fla. L. Weekly S15a]. An ordinance or statute "must be construed in its entirety and as a whole." *Koile v. State,* 934 So. 2d 1226, 1233 (Fla. 2006) [31 Fla. L. Weekly S501a], quoting *St. Mary's Hosp., Inc. v. Phillipe,* 769 So. 2d 961, 967 (Fla. 2000) [25 Fla. L. Weekly S980a]. Furthermore, the doctrine of in pari materia requires that statutes relating to the same subject are to be construed harmoniously. *Zold v. Zold,* 911 So. 2d 1222, 1229-1230 (Fla. 2005) [30 Fla. L. Weekly D2554c]; *Forsythe,* 604 So. 2d at 455. However, judicial deference need not be given if the ordinance's construction conflicts with the plain and ordinary meaning of the statute. *See Miami-Dade County v. Gov't Supervisors Assn of Fla.,* 907 So. 2d at 593-594 [30 Fla. L. Weekly D1745a].

Article I, Section 2 of the Related Special Acts states:

> Except for those variance requests specified as part of applications for development approval within the jurisdiction of the Design Review Board or Historic Preservation Board, where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of said Zoning Ordinance, the board of adjustment shall have the power in passing upon appeals, to vary or modify any regulations of provision of such ordinance relating to the use, construction, or alteration of buildings or structures, or the use of lands, so that the spirit of the Zoning Ordinance shall be observed, public safety and welfare secured, and substantial justice done.

The plain meaning of Article I, Section 2 of the Related Special Acts is to grant the Board the jurisdiction to determine whether there are "practical difficulties or unnecessary hardships." The Board followed the Code. In its order, the Board made the requisite findings pursuant to the relevant Code provisions. Based on the record,

the Board did not depart from the essential requirements of the law when it approved the variances to construct the porte cochere.

Competent substantial evidence is "such relevant evidence as a reasonable mind would accepts as adequate to support a conclusion." *State Beverage Dep't v. Ernal, Inc.,* 115 So. 2d 566, 569 (Fla. 3d DCA 1959)(quoting *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)).

> The issue before the court is not whether the agency's decision is the 'best' decision or the 'right' decision or even a 'wise' decision, for these are technical and policy-based determinations properly within the purview of the agency. . . . The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the 'pros and cons' of conflicting evidence . . . . As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Dusseau v. Metro. Dade County Bd. of County Comm'rs, 794 So. 2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

The two part test is whether (1) the evidence will establish a substantial basis of fact from which one fact can be reasonably inferred; and (2) whether the evidence is sufficiently relevant and material so that a reasonable mind would accept it as adequate to reach the conclusion under review. *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957). In applying the competent substantial evidence standard, the standard requires the reviewing court to defer to the agency's technical expertise and special vantage point in making decisions about its operations. *Dusseau,* 794 So. 2d at 1276.

If a panel fails to follow the proper standard, it will result in a district court quashing an appellate circuit court's opinion for failing to follow the essential requirements of the law. *Miami-Dade County v. Valdes,* 9 So. 3d 17, 20 (Fla. 3d DCA 2009) [34 Fla. L. Weekly D194a] ("These findings and the opinion issued by the circuit court reflect that the circuit court: (A) failed to consider whether there was competent evidence that supported the Board's decision; and (B) reweighed the evidence, which it was not permitted to do."). Nor may a panel consider matters outside of the arguments raised by the Petitioner in the tribunal below, if such alleged errors were not preserved, raised clearly, concisely and properly stated on appeal. *City of Miami v. Cortes,* 995 So. 2d 604, 606 (Fla. 3d DCA 2008) [33 Fla. L. Weekly D2691d]. A staff report recommendation wherein all applicable criteria are reviewed constitutes competent substantial evidence. *Village of Palmetto Bay v. Palmer Trinity Private School, Inc.,* 128 So. 3d 19 (Fla. 3d DCA 2012) [37 Fla. L. Weekly D1599c]. The staff report and the hearing provides sufficient documentation to support the Board's decision to grant the variances. Further, the record reflects that the Board made its decision based on competent substantial evidence.

The petition for writ of certiorari is hereby respectfully **DENIED**. (RUIZ and DEL REY, JJ., concur.)

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[1]Code section 118-358 was repealed on December 19, 2015. However, when the petition was filed it was in effect. At that time, the code stated that "the decision of the board of adjustment, historic preservation board, or design review board, solely, with respect to variances shall be final. There shall be no other review of the variance except by resort to a court of competent jurisdiction." City of Miami Beach, Fla., Code § 118-358 (2014).

[2]The March 24, 2015 Board hearing is not in the record.

[3]Miami Beach adopted the Shore Club's preservation argument.

[4]Code section 118-537 was repealed on December 19, 2015. However, when the petition was filed it was in effect. At that time, the code stated that the "historic preservation board ***may*** consider a petition for rehearing by

. . . an affected person." City of Miami Beach, Fla., Code § 118-537(1) (2014)(emphasis added). Section 118-537(4) provided that "an affected person ***may*** appeal the board's decision to a special master appointed by the commission." City of Miami Beach, Fla., Code § 118-537(4) (2014)(emphasis added).

* * *

Westlaw.
554 A.2d 313
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(Cite as: 554 A.2d 313)

CUnited Unions, Inc. v. District of Columbia Bd. of Zoning Adjustment
D.C.,1989.

District of Columbia Court of Appeals.
UNITED UNIONS, INCORPORATED, Petitioner,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent.
Board of Trustees of the Corcoran Gallery of Art, Intervenor.
No. 88-598.

Argued Dec. 16, 1988.
Decided Feb. 10, 1989.

Owner of a structure adjacent to a public art gallery appealed from a decision of the District of Columbia Board of Zoning Adjustment allowing a proposed addition to the gallery and granting special exception and variances to permit construction according to the submitted design. The Court of Appeals, Mack, J., held that: (1) Board of Zoning Adjustment's findings and conclusions were supported by substantial evidence; (2) historic landmark status of building was an exceptional situation justifying variances; and (3) proposed parking facility within addition would not violate zoning requirements.

Affirmed.

West Headnotes

[1] Zoning and Planning 414 535

414 Zoning and Planning
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k535 k. Evidence in General. Most Cited Cases
Traffic expert who evaluated adverse impact on local traffic patterns of proposed addition to art gallery, for which special exception and variances were sought, had adequate basis for his opinions; expert indicated he had done physical counts of traffic flow through intersection many times and that reading of traffic flow on particular date was only the most recent measurement, expert was properly concerned with effect of traffic flow during peak hours, rather than off-peak hours, and his reliance on figures which were latest available at the time of his testimony was appropriate, particularly absent evidence that conditions had changed sufficiently to undermine those findings during short intervening period.

[2] Zoning and Planning 414 544

414 Zoning and Planning
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k544 k. Findings and Reasons for Decision. Most Cited Cases
Board of Zoning Adjustment's finding that proposed addition to art gallery for which variances and special exceptions were sought would not significantly affect traffic flow in the area were supported by substantial evidence presented by applicant's expert, and it was not required to explain why it favored that evidence over contrary evidence; findings articulated in clear, certain and express terms the Board's basis for decision and there was obvious rational connection between findings and decision.

[3] Zoning and Planning 414 435

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(C) Proceedings to Procure
414k435 k. Evidence and Fact Questions. Most Cited Cases
Board of Zoning Adjustment did not breach substantial evidence requirement in failing to obtain written review of proposed development from department of public works where, although office of planning received no report from department of public works, it did independently evaluate proposal and consult with department by telephone, which, when considered with its primary reliance on findings of traffic expert, satisfied substantial evidence requirement for approving planned development.

[4] Zoning and Planning 414 503

414 Zoning and Planning

414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k503 k. Architectural or Structural Designs in General. Most Cited Cases
Special status of gallery's original structure as a registered historic landmark requiring an addition consistent with the original plan constituted a "special circumstance" justifying a special exception and variances for additions to the building.

[5] Zoning and Planning 414 ⚿509

414 Zoning and Planning
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k509 k. Garages and Parking Lots. Most Cited Cases
A proposed parking facility within an addition to a gallery for which a special exception and variances were granted did not violate local zoning regulation requiring that the maximum number of parking spaces provided equal the minimum number required, which did not apply where the proposed principal use and parking facilities occupied the same lot and the same structure as the principle special purpose use.

***314** Benny L. Kass, with whom Catherine Haley Rost, Washington, D.C., was on the brief, for petitioner.
Frederick D. Cooke, Jr., Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., filed a Statement in Lieu of Brief, for respondent.
Christopher H. Collins, with whom Whayne S. Quin, C. Francis Murphy, and Edward L. Donohue, Washington, D.C., were on the brief, for intervenor.

Before ROGERS, Chief Judge, and MACK and TERRY, Associate Judges.

MACK, Associate Judge:
Petitioner United Unions, Inc., the owner of a structure adjacent to the Corcoran Gallery of Art, appeals from a decision of the District of Columbia Board of Zoning Adjustment ("The Board" or "BZA") allowing intervenor's proposed addition to the Gallery and granting a special exception and variances to permit construction according to the submitted design.[FN1] On appeal, petitioner principally argues that a proposed parking facility within the addition was not properly considered by the Board and would violate zoning ordinances. Petitioner contends that the entrance to the proposed parking facility would be too narrow to allow ingress and egress without requiring repeated interruptions of entering traffic, and that, together with the additional traffic the project would generate, this condition would exacerbate existing traffic snarls impeding access to petitioner's own adjacent driveway.

FN1. The real party in interest, the Trustees of the Corcoran Gallery of Art, briefed the case and appeared for oral argument in lieu of the Board, which filed a Statement in Lieu of Brief relying on its decision below and on intervenor's defense thereof.

More particularly, petitioner contends that the Board's findings of fact and conclusions of law were unsupported by substantial evidence in the record; the Board failed to comply with its own procedural rules by not obtaining the review of the Department of Public Works; the application was not supported by a showing of some practical difficulty or exceptional situation inherent in the property to justify the variances; and the BZA erroneously denied a motion to remand the application to the Zoning Administrator. After briefly discussing the facts, we address each of these contentions below. Finding them all to be without merit, we affirm.

I

The Corcoran Gallery of Art, an elaborate Beaux Arts structure by the celebrated architect Ernest Flagg, houses a substantial collection of American art and an art school, and is one of Washington's principal architectural landmarks. Located on the block bounded by E Street, Seventeenth Street, New York Avenue, and Eighteenth Street, Northwest, it shares a single square in an SP-2 zone with the office building owned and occupied by United Unions.[FN2] The square also includes land currently unimproved with construction, owned by the Trustees of the Corcoran Gallery, and adjacent to both buildings. To augment revenues for the operation of the Corcoran Gallery, the Trustees sought to improve this vacant land with a seven-story office addition to the original Corcoran building, executed in the same style and including features consistent with the overall design of the

original structure. The addition would include rental offices for professional tenants and a below-surface parking facility for 142 vehicles. After hearing the arguments of all interested parties, including the petitioner and intervenor here, as well as expert testimony and statistical evidence, the BZA approved the Trustees' plan and granted the necessary zoning exceptions. This appeal followed.

> FN2. The regulations permit, among other uses, offices for international and nonprofit organizations, labor unions, and certain professional persons in an SP-2 (special purpose) zone. 11 DCMR § 508.1 (1987).

II

Petitioner argues that the BZA's findings were unsupported by substantial evidence in the record, and therefore were arbitrary ***315** and capricious. Under the substantial evidence test, the BZA's decision will be upheld if it has articulated findings on each contested issue of fact,[FN3] the conclusion rationally flowed from the facts,[FN4] and there was sufficient evidence supporting each finding. *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 640 (D.C.1985). Petitioner specifically argues that while 11 D.C.M.R. § 508.4 requires that the proposed use of property in an SP district "shall not create dangerous or otherwise objectionable traffic conditions," the applicant's only evidence to that effect was insufficient to establish under this test that this condition was met.

> FN3. The BZA's findings of fact must state the basis for its decision expressly, clearly, and in certain terms. *Dupont Circle Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 390 A.2d 1009, 1101 (D.C.1978).

> FN4. There must be some rational connection between the findings of fact and the decision based upon them. *Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470, 473 (D.C.1972) (citing *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)).

The Corcoran's principal evidence was presented by its traffic expert, Robert L. Morris, who testified that, based on his evaluation of traffic data published by the Washington Metropolitan Council of Governments and on his personal observation and measurements of existing conditions, the proposed project would have no significant adverse impact on local traffic patterns. The Council of Governments statistics showed a traffic flow of 17,400 cars per day through the adjacent intersection, to which the proposed development would add 65 cars per hour during peak hours-about one car per minute. The observations and measurements personally conducted by Mr. Morris were generally made during peak traffic periods in the morning, from 8:00 to 9:00 a.m.

[1] Petitioner argues that these measurements were not extensive enough to support Mr. Morris' conclusions, which the BZA accepted. Specifically, it argues that Mr. Morris conducted measurements on only one morning, December 1, 1987, from 8:00 to 9:00 a.m. This is a misreading of the record. In his testimony before the BZA, Mr. Morris indicated that he had done physical counts of the traffic flow through the intersection near the Corcoran (although no count of traffic flow past the Corcoran) "many times," and that the December 1, 1987 reading of traffic flow was only the most recent measurement he had made.

In like vein, petitioner contends that Mr. Morris never measured traffic conditions over a twenty-four hour period. However, Mr. Morris properly limited his counts to the peak periods of traffic flow through the area, rather than averaging the traffic flow figures through the area over a twenty-four hour period. Thus, the method adopted by Mr. Morris actually presented the "worst-case" statistics most favorable to petitioner. Mr. Morris had no reason to be interested in the traffic conditions existing during off-peak hours; his concern was determining the effect of the proposed development on traffic flow during peak hours.

Finally, petitioner argues that Mr. Morris relied on outdated Council of Governments statistics published in 1985. We find, however, that Mr. Morris' reliance on Council of Governments figures from 1985 was not improper in December 1987. These were, as he testified, the latest figures available at that time, and there is no evidence that, during the short intervening

period, conditions had changed sufficiently to undermine findings informed by those records. We emphasize, of course, the relatively short period intervening between the publication of the statistics relied upon and their use, as well as the fact that these statistics were only used in conjunction with Mr. Morris' own observations and measurements.

[2] Essentially, petitioner argues that the BZA could not have reached the result that it did in the face of conflicting evidence that the proposed structure would have disastrous effects on E Street traffic. However, an agency, as a finder of fact, ***316** may credit the evidence upon which it relies to the detriment of conflicting evidence, and need not explain why it favored the evidence on one side over that on the other.[FN5] *Gunty v. Department of Employment Services,* 524 A.2d 1192, 1198-99 (D.C.1987); *Monaco v. District of Columbia Board of Zoning Adjustment,* 409 A.2d 1067, 1070 (D.C.1979). The BZA chose to accept the data presented by the applicant's expert. This data was sufficient to support the BZA's finding that the proposed use would not significantly affect traffic flow past United Unions and the Corcoran. The findings articulate in clear, certain, and express terms the basis for the BZA's decision, and there is an obvious rational connection between those findings and that decision. It therefore appears that the applicant presented substantial evidence upon which the BZA could, in properly exercising its discretion, conclude that the proposed development would not create dangerous or objectionable traffic conditions.

> FN5. Of course, an agency does not have unbridled discretion in resolving a conflict of evidence, and must sometimes specifically explain its decision to credit the witnesses and evidence on one side rather than those on the other. As we have noted elsewhere,
>
> > [i]t is conceivable, though not the case here, that the evidence in support of the finding could be so weak, in contrast with the evidence to the contrary, that an agency-to avoid a remand-would have to give persuasive reasons for its reliance on particular testimony; otherwise, the evidence could not be deemed "reliable, probative, and substantial."
>
> *Citizens Ass'n v. District of Columbia Zoning Comm'n,* 402 A.2d 36, 47 n. 19 (D.C.1979) (quoting D.C.Code § 1-1509(e) (1981)); *see also Shav v. District of Columbia Bd. of Zoning Adjustment,* 334 A.2d 175, 178 n. 10 (D.C.1975) (agency findings must indicate "reasons for rejecting the expert testimony in favor of that of lay witnesses ... if judicial review is to be meaningful").

III

[3] The regulations provide that, on receiving an application for approval of a planned development of the type proposed, the BZA "shall submit the application to the Director of the Office of Planning for coordination, review, report, and impact assessment, along with reviews in writing from all relevant District departments and agencies, including the Department of Public Works...." 11 DCMR § 500.6. Petitioner argues that, while the BZA did submit the application to the Office of Planning, that office failed to obtain the written review of the Department of Public Works. While petitioner concedes that the Department of Public Works is not required to make a report for every application and that the BZA may proceed without a written review from the Department of Public Works if that department is unable to make a timely response to the Office of Planning's inquiry, *see*11 DCMR § 3318.6, petitioner argues that the BZA actually purported to rely on the recommendations of both offices in its findings. Thus, petitioner argues, the BZA relied on incomplete or nonexistent facts, and thereby breached the substantial evidence requirement.

However, we do not read the record to suggest that the BZA purported to rely significantly on a finding by the Department of Public Works. In its findings, the BZA recounted the testimony of Mr. Morris, an expert in transportation planning and traffic engineering, regarding the minimal impact of the proposed parking facility on the flow of traffic, and the BZA indicated that it concurred in his evaluation of the proposal. Board of Zoning Adjustment, Findings of Fact, Application No. 14703 of the Board of Trustees of the Corcoran Gallery of Art, Jan. 6, 1988, ¶ 14. Later, at paragraph nineteen (19) of the same document, the Board reinforced its finding by

reference to an opinion of the Office of Planning, which, the BZA stated, had reviewed the application in consultation with the Department of Public Works, and had found that "the proposal [would] not create dangerous or other objectionable traffic conditions." Although the Office of Planning received no report from the Department of Public Works, it did independently evaluate the proposal and it did consult the Department of Public Works by telephone, with the results described in the Board's findings. Given this independent evaluation, and the Board's primary reliance***317** on Mr. Morris' findings, it cannot be said that the Board breached the substantial evidence requirement. To this extent, the degree of written participation by the Department of Public Works was immaterial.

IV

[4] We likewise reject petitioner's argument that the applicant failed to meet the regulatory requirement of demonstrating an exceptional condition inherent in the property to justify the variances granted by the BZA. Because the original Corcoran Gallery is a registered historic landmark of exceptional design, the applicant was required to comply with landmark preservation laws in the construction of the connected building, and presented a plan that would replicate the style, materials, and workmanship of the original Corcoran building. The applicant urges that the special status of its original structure as a landmark requiring an addition consistent with the original plan constituted a "special circumstance" justifying the special exception and variances. Pursuant to the applicant's request, the BZA granted a special exception under 11 DCMR § 508 to allow the addition of an office building with accessory parking to an existing art gallery, and variance relief from the floor area ratio requirements of 11 DCMR § 531.1, the requirements of a court niche under 11 DCMR § 536.8, and the width and area requirements of a closed court under 11 DCMR § 536.1.

Petitioner, however, contends that other plans consistent with the original design would not have required the special exception and variances, and that mere landmark status, in and of itself, does not qualify as a "special condition" within the meaning of the zoning laws. It points out that, in order to qualify for a variance, an applicant must show "difficulties or hardships ... due to unique circumstances peculiar to the applicant's property and not to general conditions in the neighborhood." *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 539 (D.C.1972) (citations omitted). Moreover, petitioner says, the mere inclusion of a property within an historic district does not qualify as a special circumstance, because it does not uniquely affect the property at issue. *Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939, 942 (D.C.1987).[FN6] Petitioner observes that a number of buildings in the vicinity of the Corcoran Gallery are historic landmarks, and the Gallery's circumstances can hardly be called "unique" in context.

> FN6. In *Capitol Hill*, we held, "If this fact [inclusion in an historic district] were sufficient to justify a finding of uniqueness, then each and every parcel of land within [an historic district] would be entitled to a variance on this basis." *Id.*

At the outset, we emphasize that *Capitol Hill* controls landmark districts, not landmark buildings. While the status of inclusion within a landmark district is a characteristic shared by all buildings within that district, the landmark status of a single building is legally predicated on the unique attributes of that building.[FN7] Further, the fact that there are other landmarks in the vicinity does not transform the neighborhood into an historic district.

> FN7. *See* 16 U.S.C. § 470a (1982 & Supp. IV 1986) (authorizing Secretary of Interior to establish criteria for designation of National Historic Landmarks); 36 C.F.R. § 65.4(a)(4) (1988) ("The quality of national significance is ascribed to ... buildings ... [t]hat embody the distinguishing characteristics of an architectural type or specimen exceptionally valuable for a study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction ..."); D.C.Code § 5-1003 (1988) (establishing local historic preservation review board to carry out purposes of 16 U.S.C. § 470*et seq.*).

The Corcoran's designation as an historic landmark reflects characteristics of exceptional design

requiring special treatment in the planning of contiguous structures and additions. The application specified needs of particular design imposed by the special qualities of the original Corcoran building and the space on which it was erected, particularly the need to conceal rooftop elevator equipment within the building (thereby adding to its floor area ratio) and to construct the building in an odd-shaped ***318** space in a manner consistent with the original. These are special conditions simply not shared by the other buildings in the area, and they justify the BZA's discretionary judgment that the variances were warranted.

Petitioner's related argument, that appellant has failed to demonstrate that failure to grant the variance would cause the owner "peculiar and exceptional practical difficulties" related to unique characteristics of the property, *Russell v. District of Columbia Board of Zoning Adjustment*, 402 A.2d 1231, 1235 (D.C.1979), is met in similar fashion. Petitioner, pointing out that financial difficulties do not constitute "practical difficulties" for the purposes of this requirement, *Capitol Hill Restoration Society v. District of Columbia Bd. of Zoning Adjustment*, 398 A.2d 13, 16 (D.C.1979) (unnumbered footnote); *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C.1976), argues that the only practical difficulties suggested by the applicant were the financial needs that led it to apply to build office space. However, neither the applicant nor the BZA made any statement or finding to suggest that this was the case; rather, the peculiar difficulties of adding onto the original Corcoran building seem to comprise the practical difficulties that the variances were designed to surmount.

V

[5] Finally, petitioner contends that the BZA improperly denied its motion to remand the application to the Zoning Administrator to consider petitioner's argument that the proposed below-surface parking facility would violate local zoning regulations. Petitioner urges that 11 D.C.M.R. § 510.3 requires that "[t]he total number of parking spaces provided for the principal use shall not exceed the minimum number of spaces required for the principal use," and that in the applicant's case, the minimum number required is 66.[FN8] The application calls for 142 parking spaces, exceeding the putative maximum by 76 spaces. Petitioner argues that the excess parking cannot be "accessory parking" within the meaning of the regulations, *see*11 DCMR § 2101.1, and the facility must therefore be an all-day parking garage for commuters. It argues that a special exception must be obtained for an all-day commuter parking facility under 11 DCMR § 506, and therefore a remand to the Zoning Administrator was required.

> FN8. Under 11 DCMR § 2101.1, there must be a minimum of one parking space for every 1800 square feet of gross floor area in excess of 2000 square feet in an SP-2 office building. Since the proposed building would contain 120,449 square feet, the minimum number of parking spaces required would be 66.

However, this contention assumes that 11 DCMR § 510.3, requiring that the maximum number of parking spaces provided equal the minimum number required, is applicable where the proposed principal use and parking facilities occupy the same lot. In fact, this regulation is inapplicable in such instances, including the current application. As a matter of statutory construction, the general words used in this subsection should be read as restricted by the specific subject matter and language of their context.[FN9] Moreover, we should defer to an agency in its interpretation of its own regulations unless it is plainly erroneous or inconsistent with the plain meaning of the regulations. *Dietrich v. District of Columbia Board of Zoning Adjustment*, 320 A.2d 282, 286 (D.C.1974); ***319***Taylor v. District of Columbia Board of Zoning Ad*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&ReferencePositionType=S&SerialNum=1973101859&ReferencePosition=232*justment*, 308 A.2d 230, 232 (D.C.1973).[FN10] As the BZA found, section 510.3 is a subsection of section 510 of the Zoning Regulations, which governs accessory parking spaces elsewhere than on the lot on which the principal SP use is located.[FN11] Nothing in section 510.3 suggests that it is intended to govern parking facilities other than on those governed by section 510 as a whole. Thus, section 510.3 governs only accessory parking elsewhere than the same lot accommodating the principal use. This is also a sensible reading of section 510.3, since it would prevent an applicant from building parking facilities

that would involve excessive "spillover" from the office facility being served, but allow the applicant to use space entirely within a facility to accommodate vehicles that might otherwise crowd external traffic. Of course, the use of such space remains subject to other regulations controlling space usage within the principal use structure. Here, the applicant sought only to build parking on the same lot-and indeed, within the same structure-as the principal SP use. Thus, the proposal was not barred by section 510.3.

FN9.*See United States v. Stever*, 222 U.S. 167, 174, 32 S.Ct. 51, 53, 56 L.Ed. 145 (1911) (generic statutory language appearing amid more particular language "should be construed as applicable to cases or matters of like kind with those described by the particular words"); *Woods v. Spoturno*, 37 Del. 295, 183 A. 319, 325, 327 (1936) (meaning of general terms explained by particular terms by which they are surrounded); *Hodgerney v. Baker*, 324 Mass. 703, 88 N.E.2d 625, 627 (1949) (generic terms must be understood in context of more particular terms of provision); *State ex rel. Utilities Comm'n v. Union Elec. Membership Corp.*, 3 N.C.App. 309, 164 S.E.2d 889, 892 (1968) (provision governing subject encompassed by broader language of other provisions controls with respect to more specific scope of its own subject).

FN10. We have held this to be true even where, as here, the agency itself is not responsible for their promulgation. *Wallick v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 1183, 1184 & n. 3 (D.C.1985) (rules promulgated separately by Zoning Commissioner); *Sheridan-Kalorama Neighborhood Council v. District of Columbia Bd. of Zoning Adjustment*, 411 A.2d 959, 961 & n. 5 (D.C.1979).

FN11.*See*11 DCMR § 510.1 ("Accessory parking spaces elsewhere than on the same lot or part of the same lot on which any principal SP use is permitted ... shall be permitted in an SP district if approved by the Board of Zoning Adjustment ..."). Nothing in 11 DCMR § 510.2 and ensuing subsections suggests a change in the intended subject of the regulation.

VI

For the foregoing reasons, the decision of the District of Columbia Board of Zoning Adjustment is

AFFIRMED.

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