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**VIA ELECTRONIC & HAND DELIVERY**

August 18, 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: **HPB22-0541** – Letter of Intent for Modification of Site Plan Approval for Sobe Center, LLC Located at 1685 Washington Avenue, Miami Beach, Florida

Dear Debbie:

This law firm represents Sobe Center, LLC (the "Applicant") with regard to the above referenced property (the "Property"). On September 17, 2018, the Applicant received a Certificate of Appropriateness and related variances from the Historic Preservation Board (HPB) for design of a new building in a historic district, and the demolition of an existing non-contributing building (the "Approval"). See Exhibit A, HPB Order. Since the Approval, the Applicant has made certain changes to the project. Please let the following serve as the Applicant's revised letter of intent in connection with the requests for approval of modification of the project. Since the September 17, 2018 HPB meeting, the Applicant has:

- Begun the building permit and construction process; and
- Added two (2) outdoor bar counters and one (1) fitness room to the rooftop plans.

Property Description. The Property measures approximately 30,000 square feet and is identified by Miami-Dade County Folio No. 02-3234-019-0730. The Property is zoned CD-3 (Commercial, High Intensity) and is located at the southeast corner of Washington Avenue and 17th Street. As stated above, the Property is currently under construction.

Proposal. As depicted in the renderings and plans entitled "Symphony Park Hotel" prepared by McG Architecture and Planning, the Applicant proposes to construct two (2) outdoor bar

counters and one (1) fitness room on the rooftop of the structure (the "Modification"). In connection with the Modification, the Applicant is also requesting an extension of the previously approved height variance to permit a maximum building height of 83' where 80' is the maximum permitted under the City Code.

Description of Revised Development Program. As stated above, the Applicant is currently in the construction process and seeks to add two (2) accessory outdoor bar counters and one (1) fitness room on the rooftop of the structure. The Modification requires the Applicant to request an extension of the previously approved 3' height variance to additional areas of the roof. The Modification will provide necessary amenity space for hotel guests. In order to accommodate the Modification, the Applicant respectfully requests the approval of the following two (2) requests, as detailed below:

1. Addition of Two Outdoor Bar Counters ("Outdoor Bar Counter Request"); and
2. Extension of 3' Height Variance to additional areas on the roof, to permit a maximum building height of 83' where 80' is permitted ("Height Variance Extension Request").

The Outdoor Bar Counter Request is necessary as the rooftop plans in the Approval do not contain outdoor bar counters. The two (2) proposed outdoor bar counters are permitted in CD-3 and will not be operational between midnight and 8:00 a.m. Further, the impact of the Outdoor Bar Counter Request will be minimal as the Applicant proposes no entertainment use on the rooftop. The Height Variance Extension Request is necessary to accommodate the two (2) proposed outdoor bar counters and one (1) fitness room. In the Approval, the HPB granted a 3' height variance for a limited portion of the 8$^{th}$ floor of the structure. Due to the proposed addition of two (2) outdoor bar counters and one (1) fitness room, the Height Variance Extension Request is necessary to provide the additional required height previously granted for other parts of the rooftop in order to accommodate the Modification.

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 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). See Exhibit B, Shore Club Case. 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 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."

Here, the Applicant is under an obligation to respect the historic district in which its located. As a result, the Applicant has sought to achieve a design of excellent architectural quality. The project team includes local architect McG Architecture, along with award winning French architect Rudy Ricciotti. The granting of the Outdoor Bar Counter Request and Height Variance Extension Request will only result in a more creative use of the permitted architectural spaces within the Property. Further, the Height Variance Extension Request would not be necessary if the property was located outside of a historic district. The request is the minimum necessary in order to allow for the Project that is compatible with its unique location in Miami Beach as a prominent, non-contributing property, within a historic district and facing Soundscape Park, which the design attempts to communicate with architecturally.

The Applicant has developed a project that provides the right balance for an excellent space for hotel guests that does not cause any negative impacts to surrounding properties. The variances will not be injurious to the area or otherwise detrimental to the public welfare. As a result, the impact of the Modification, including proposed outdoor bar counter, will be minimal. Overall, the requests are consistent with the purpose and

intent of the Code and promotes the public welfare in promotion of the restoration of historic properties.

Sea Level Rise and Resiliency Criteria. The Modification 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 design will feature hurricane impact windows.

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

The design will include operable windows where appropriate. Further, the abundant landscaping and permeable materials contribute to passive cooling.

**(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 with a landscape architect 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 Project features no residentially habitable space below base flood elevation. The finished floor elevation of 9' NGVD is 1' higher than BFE to provide even greater flood and sea level rise protection.

**(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 ground level of the new building will be at BFE +1'.

**(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. The Applicant proposes a thoughtfully designed modification for its new hotel. The granting of the requested site plan modification will be in harmony with the intent and purpose of the City Code, and compatible with the surrounding area. We respectfully request your recommendation of approval of the Applicant's requests. If you have any questions or comments with regard to the application, please give me a call at (305) 377-6236.

Sincerely,

Michael J. Marrero

cc: David Butter

CFN: 20180589162 BOOK 31157 PAGE 2596
DATE:09/26/2018 11:03:41 AM
HARVEY RUVIN, CLERK OF COURT, MIA-DADE CTY

**HISTORIC PRESERVATION BOARD**
**City of Miami Beach, Florida**

MEETING DATE: September 17, 2018

FILE NO: HPB18-0208

PROPERTY: 1685 Washington Avenue

APPLICANT: Sobe Center, LLC

LEGAL: Lots 14, 15, 16 and 17 in Block 31 of Fisher's First Subdivision of Alton Beach, according to the Plat thereof as recorded in Plat Book 2, Page 77, of the Public Records of Miami-Dade County, Florida.

IN RE: The application for a Certificate of Appropriateness for the total demolition of the existing building and the construction of a new hotel including variances to reduce the required tower front setback for residential uses, to exceed the maximum allowed projection into required yards, and to exceed the maximum building height.

## ORDER

The City of Miami Beach Historic Preservation Board makes the following FINDINGS OF FACT, based upon the evidence, information, testimony and materials presented at the public hearing and which are part of the record for this matter:

### I. Certificate of Appropriateness

A. The subject site is located within the Museum Local Historic District.

B. Based on the plans and documents submitted with the application, testimony and information provided by the applicant, and the reasons set forth in the Planning Department Staff Report, the project as submitted:

1. Is consistent with the Certificate of Appropriateness Criteria in Section 118-564(a)(1) of the Miami Beach Code.

2. Is not consistent with Certificate of Appropriateness Criteria in Section 118-564(a)(2) of the Miami Beach Code.

3. Is not consistent with Certificate of Appropriateness Criteria 'b' in Section 118-564(a)(3) of the Miami Beach Code.

4. Is not consistent with Sea Level Rise and Resiliency Review Criteria (1) in Section 133-50(a) of the Miami Beach Code.

5. Is not consistent with Certificate of Appropriateness Criteria 'a-e' in Section 118-564(f)(4) of the Miami Beach Code.

C. The project would be consistent with the criteria and requirements of section 118-564 and 133-50(a) if the following conditions are met:

1. Revised elevation, site plan and floor plan drawings shall be submitted and, at a minimum, such drawings shall incorporate the following:

   a. All interior fixtures located within the ground floor commercial space, including, but not limited to, shelving, partitions, and checkout counters, shall be setback a minimum of ten (10') feet from glazed portion of an exterior wall fronting Washington Avenue and 17th Street, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board. This shall not prohibit moveable tables and chairs or substantially transparent fixtures for display purposes only.

   b. Interior lighting shall be designed in a manner to not have an adverse overwhelming impact upon the surrounding historic district. Intensive 'white' lighting shall not be permitted within the commercial space, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.

   c. The final design and details of all exterior lighting shall be provided, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board. All proposed interior lighting located within the retail area shall be recessed or small pendant lighting.

   d. Final details of all exterior surface finishes and materials, including samples, shall be submitted, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.

   e. All building signage shall require a separate permit. A uniform sign plan for the new ground level commercial spaces shall be required. Such sign plan shall be consistent in materials, method of illumination and sign location, in a manner to be reviewed and approved by the Board.

   f. All roof-top fixtures, air-conditioning units and mechanical devices shall be clearly noted on a revised roof plan and elevation drawings and shall be screened from view, in a manner to be reviewed and approved by staff, consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.

2. A revised landscape plan, prepared by a Professional Landscape Architect, registered in the State of Florida, and corresponding site plan, shall be submitted to and approved by staff. The species type, quantity, dimensions, spacing, location and overall height of all plant material shall be clearly delineated and subject to the review and approval of staff. At a minimum, such plan shall incorporate the following:

a. The landscape plan for the interior courtyard atrium shall include the introduction of the following plant species: Pond Apple, Green Buttonwood and Bald Cypress, or similar native species, in a manner to be reviewed and approved by staff, consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.

b. The A fully automatic irrigation system with 100% coverage and an automatic rain sensor in order to render the system inoperative in the event of rain.

c. A Silva Cell Rooting system or approved equivalent shall be provided with the required canopy shade trees in the public ROW facing Washington Av and 16th St subject to the review and approval of the City's Urban Forester. In the event that existing underground utilities prevent the installation of any of the required trees, a contribution to the Tree Trust Fund should be submitted equivalent to cost of material and installation inclusive of irrigation, landscape uplighting (two fixtures per tree), silva cell or approved equivalent, planting soil, trees, and bound aggregate.

**In accordance with Section 118-537, the applicant, the owner(s) of the subject property, the City Manager, Miami Design Preservation League, Dade Heritage Trust, or an affected person may appeal the Board's decision on a Certificate of Appropriateness to a special master appointed by the City Commission.**

## II. Variance(s)

A. The applicant filed an application with the Planning Department for the following variance(s):

1. A variance to exceed by 3'-0" the maximum building height allowed of 80'-0" for a property fronting on 17th Street in order to construct a mixed-use building up to 83'-0" in height.

2. A variance to reduce by 17'-5" the required tower front setback of 50'-0" to construct a new mixed-use building at 32'-7" from the front property line facing Washington Avenue.

3. A variance to exceed by 2'-4" the maximum allowed projection of 6'-0" in required yards for balconies and roof overhang in order to construct a new building with a projection of 8'-4" into the front yard facing Washington Avenue.

~~4. A variance to exceed by up to 2'-0" (12.5%) the maximum allowed projection of 4'-0" (25%) for balconies within the pedestal and tower street side setback of 16'-0" in order to construct a new building with a projection of up to 6'-0" (37.5%) into the street side yard facing 17th Street.~~ **Variance Withdrawn by applicant.**

B. The applicant has submitted plans and documents with the application that satisfy Article 1, Section 2 of the Related Special Acts, only as it relates to variance(s) allowing the granting of a variance if the Board finds that practical difficulties exist with respect to implementing the proposed project at the subject property.

The applicant has submitted plans and documents with the application that also indicate the following, as they relate to the requirements of Section 118-353(d), Miami Beach City Code:

That 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;

That the special conditions and circumstances do not result from the action of the applicant;

That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to other lands, buildings, or structures in the same zoning district;

That literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this Ordinance and would work unnecessary and undue hardship on the applicant;

That the variance granted is the minimum variance that will make possible the reasonable use of the land, building or structure;

That the granting of the variance will be in harmony with the general intent and purpose of this Ordinance and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare; and

That 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.

C. The Board hereby grants the requested variance(s) and imposes the following condition based on its authority in Section 118-354 of the Miami Beach City Code:

1. Substantial modifications to the plans submitted and approved as part of the application, as determined by the Planning Director or designee, may require the applicant to return to the Board for approval of the modified plans, even if the modifications do not affect variances approved by the Board.

**The decision of the Board regarding variances shall be final and there shall be no further review thereof except by resort to a court of competent jurisdiction by petition for writ of certiorari.**

**III. General Terms and Conditions applying to both 'I. *Certificate of Appropriateness'* and 'II. *Variances'* noted above.**

A. A recycling/salvage plan shall be provided as part of the submittal for a demolition/building permit, in a manner to be reviewed and approved by staff.

B. Where one or more parcels are unified for a single development, the property owner shall execute and record a unity of title or a covenant in lieu of unity of title, as may be applicable, in a form acceptable to the City Attorney.

C. All applicable FPL transformers or vault rooms and backflow prevention devices shall be located within the building envelope with the exception of the valve (PIV) which may be visible and accessible from the street.

D. A copy of all pages of the recorded Final Order shall be scanned into the plans submitted for building permit, and shall be located immediately after the front cover page of the permit plans.

E. The Final Order shall be recorded in the Public Records of Miami-Dade County, prior to the issuance of a Building Permit.

F. Satisfaction of all conditions is required for the Planning Department to give its approval on a Certificate of Occupancy; a Temporary Certificate of Occupancy or Partial Certificate of Occupancy may also be conditionally granted Planning Departmental approval.

G. The Final Order is not severable, and if any provision or condition hereof is held void or unconstitutional in a final decision by a court of competent jurisdiction, the order shall be returned to the Board for reconsideration as to whether the order meets the criteria for approval absent the stricken provision or condition, and/or it is appropriate to modify the remaining conditions or impose new conditions.

H. The conditions of approval herein are binding on the applicant, the property's owners, operators, and all successors in interest and assigns.

I. Nothing in this order authorizes a violation of the City Code or other applicable law, nor allows a relaxation of any requirement or standard set forth in the City Code.

J. Upon the issuance of a final Certificate of Occupancy or Certificate of Completion, as applicable, the project approved herein shall be maintained in accordance with the plans approved by the board, and shall be subject to all conditions of approval herein, unless otherwise modified by the Board. Failure to maintain shall result in the issuance of a Code Compliance citation, and continued failure to comply may result in revocation of the Certificate of Occupancy, Completion and Business Tax Receipt.

IT IS HEREBY ORDERED, based upon the foregoing findings of fact, the evidence, information, testimony and materials presented at the public hearing, which are part of the record for this matter, and the staff report and analysis, which are adopted herein, including the staff recommendations, which were amended and adopted by the Board, that the application is GRANTED for the above-referenced project subject to those certain conditions specified in Paragraph I, II,III of the Findings of Fact, to which the applicant has agreed.

PROVIDED, the applicant shall build substantially in accordance with the plans entitled "Symphony Park Hotel", as prepared by MCG Architecture + Planning, dated July 30, 2018, as

approved by the Historic Preservation Board, as determined by staff.

When requesting a building permit, the plans submitted to the Building Department for permit shall be consistent with the plans approved by the Board, modified in accordance with the conditions set forth in this Order. No building permit may be issued unless and until all conditions of approval that must be satisfied prior to permit issuance, as set forth in this Order, have been met.

The issuance of the approval does not relieve the applicant from obtaining all other required Municipal, County and/or State reviews and permits, including final zoning approval. If adequate handicapped access is not provided on the Board-approved plans, this approval does not mean that such handicapped access is not required. When requesting a building permit, the plans submitted to the Building Department for permit shall be consistent with the plans approved by the Board, modified in accordance with the conditions set forth in this Order.

If the Full Building Permit for the project is not issued within eighteen (18) months of the meeting date at which the original approval was granted, the application will expire and become null and void, unless the applicant makes an application to the Board for an extension of time, in accordance with the requirements and procedures of Chapter 118 of the City Code; the granting of any such extension of time shall be at the discretion of the Board. If the Full Building Permit for the project should expire for any reason (including but not limited to construction not commencing and continuing, with required inspections, in accordance with the applicable Building Code), the application will expire and become null and void.

In accordance with Chapter 118 of the City Code, the violation of any conditions and safeguards that are a part of this Order shall be deemed a violation of the land development regulations of the City Code. Failure to comply with this **Order** shall subject the application to Chapter 118 of the City Code, for revocation or modification of the application.

Dated this 20 day of September, 2018

HISTORIC PRESERVATION BOARD
THE CITY OF MIAMI BEACH, FLORIDA

BY: _____
DEBORAH TACKETT
CHIEF OF HISTORIC PRESERVATION
FOR THE CHAIR

STATE OF FLORIDA )
)SS
COUNTY OF MIAMI-DADE )

The foregoing instrument was acknowledged before me this 20th day of September 2018 by Deborah Tackett, Chief of Historic Preservation, Planning Department, City of Miami Beach, Florida, a Florida Municipal Corporation, on behalf

of the corporation. She is personally known to me.

GABRIELA C. FREITAS
MY COMMISSION #GG131281
EXPIRES: AUG 03, 2021
Bonded through 1st State Insurance

NOTARY PUBLIC
Miami-Dade County, Florida
My commission expires: 8-3-21

Approved As To Form:
City Attorney's Office: _____ ( 9/18/18 )

Filed with the Clerk of the Historic Preservation Board on _____ ( 9/20/18 )

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**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).

* * *

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



**C**United 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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