3 August 2005

Re: Appeal of DCRA permits for 1636 Irving St. NW

To the Board of Zoning Adjustments:

We are appealing the decision by the Department of Consumer & Regulatory Affairs to award building permits and a certificate of occupancy to the condominium complex next door to us at 1636 Irving Street NW.

This building was a residential property of the same size and scale as our homes and other neighboring properties when it was purchased last year by city residents Robb Lakritz and Joshua Adler, who operated under the name of Gallatin Construction. They also have operated under the names Lakritz Adler and 1636 Irving LLC, the corporation currently listed in city tax records as the owner of the condominiums.

Lakritz and Adler, who have prior experience in development in various neighborhoods of the city, have more than doubled the size of the building while converting it into a seven-unit condominium complex.

This expansion is completely outside the character of the neighborhood and clearly in violation of the applicable zoning law. It violates not some obscure paragraph of an R-4 zone, but the most fundamental aspect of R-4, namely the limit of 900 square feet per unit. Using that rule, the property, like ours, is eligible for two or three units at most. Instead it was built into seven units without any attempt to seek the permission of the BZA despite petitioners' repeated complaints to the DCRA and Councilman Jim Graham's office that such prior approval was required.

The director of the Department of Consumer & Regulatory Affairs, Patrick Canavan, in an attached letter, has admitted his agency made those errors and invited our appeal to the BZA of his agency's decision. In that letter,

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addressed on May 26 to the chairman of our Advisory Neighborhood Commission, Director Canavan promised disciplinary action against DCRA officials responsible for this decision, and said he was "deeply disturbed that such gross mistakes were made at the highest levels of the zoning administration and with such serious consequences."

"At the very time when I have committed to restoring the confidence of the community in this agency, I cannot allow this situation to undermine that confidence," Canavan wrote.

Director Canavan also concluded in that letter that he could not force the developers to scale back the project to code because of mistakes made by city officials, and that he felt that the threat of legal action by the developers left the city with the only viable option of allowing the admittedly illegal building to stand.

In his letter, Director Canavan said allowing the illegal structure to stand ``as is'' was justified in part because the city only ``later learned, once construction had been completed and the units sold,'' that it was illegal. ``This was not an easy decision, but one we think was appropriate given the unique circumstances we were facing,'' Canavan said.

We the petitioners argue that this is clearly not the case, for several reasons.

One, the petitioners have and will provide upon request ample documentation of our many written, electronic and verbal communications to city officials, in which we made known our concerns about the potential illegality of this building – from before ground was even broken on the construction to the days before and after the units were put up for sale. When the developers first proposed this project, in fact, the petitioners published a community-wide letter, and also wrote to Councilman Graham and our ANC representatives several times, making clear our displeasure with this project and our concerns about its potential legality.

Our documentation also shows that DCRA officials and Councilman Jim Graham's office received and acknowledged our complaints, but never adequately investigated the many specific allegations until after the units were put on the market, despite our increasingly vocal calls for work stoppages and investigations as the project neared completion.

As such, the petitioners argue that the DCRA forfeited Director Canavan's right to approve the certificates of occupancy and otherwise allow the illegal building to stand and not enforce the city's own laws simply because some (but not all) of the required permits were issued. We also believe the threat of legal action by the developers should not have influenced the city in deciding not to enforce its own laws — certainly without giving equal consideration to the concerns and wishes of the petitioners and other concerned parties similarly (and adversely) affected by such a decision.

Second, Director Canavan in his letter focused on just one of many egregious mistakes that he acknowledged were made by city officials, glossing over several others that are of equal concern and that in and of themselves merit a significant BZA review of this entire matter. Petitioners also believe Director Canavan erred in his assessment of the one issue he did mention specifically in his letter, that being subsection 330.5 of the Zoning Regulations and how they apply to 1636 Irving.

Third, we believe the DCRA and the BZA both have a long and easily demonstrated history of handing down enforcement actions after projects are finished. In such cases, any potential economic hardship facing the developer should be weighed against the degree to which the developer knew or should have known the law and made a calculated attempt to evade it. Public records show that many homeowners across the city have been forced to tear down already-built porches and other structures deemed to be out of code by city inspectors after their completion.

We believe a developer such as 1636 Irving should be held to the same standards, particularly given that they have told other neighbors that they expect the sales of the seven condominiums to net them at least $1 million after the costs of building purchase and renovations are taken into account. Another developer with experience in this area has estimated the additional value of the seven units, beyond the amount the developers would have realized if they had adhered to the three-unit limit required by city law, to be approximately $800,000. We feel these figures begin to approximate the loss of value to our neighboring properties, as well as demonstrate the incentives for violating city laws.

The seriousness with which the city takes such illegal development in other cases was highlighted in a June 27, 2005 front-page story in the Washington

Post, headlined, ``A Washington D.C. Battling Boom in Illegal Work on Homes.''

That article by staff writer Yolanda Woodlee disclosed that, ``Using tips largely supplied by neighbors,'' the D.C. Department of Consumer and Regulatory Affairs issued more than 1,400 stop-work orders for illegal construction during a recent 17-month period and has fined the violators nearly $1 million. It documented how permits must be posted at building sites, and how city inspectors frequently ``place the bright red stop-work orders on properties where approvals have not been obtained.''

The petitioners have and will provide upon request the repeated communications to the DCRA and Councilman Graham by other residents in the area who—independently of the petitioners—sought stop-work orders on 1636 Irving. Those requests specifically cited how the publicly posted building permits at 1636 Irving said they were based on zoning approvals that had neither been sought nor granted. Ultimately, one stop-work order was issued, but quickly rescinded without cause or explanation. Any and all investigations into how 1636 Irving was allowed to proceed to completion without the required city approvals should include an extensive inquiry into why no such stop-work order was sustained given the building's clearly illegal status and the city's knowledge of such violations, and why no fines were issued for those violations even though they were identical to those that have resulted in fines in other cases.

The Washington Post story quotes Director Patrick Canavan himself as saying that enforcing such laws is critically important in preventing scofflaws from illegally enlarging properties and then reselling them for profit. Canavan told the newspaper that as a recent appointee heading a department with a long history of problems, he would make it a top priority to crack down on tolerate property owners and contractors who flagrantly violate building codes. "When we catch you . . . we're going to nail you,'' Canavan told the newspaper.

In that regard, 1636 Irving would appear to be a case study in the kind of illegal project against which Canavan has publicly vowed to seek aggressive enforcement action, particularly given the long history of complaints by the petitioners.

The petitioners believe that we — and the other neighbors of 1636 Irving and the public at large — have the right to know why 1636 Irving Street has not been subject to the kind of scrutiny and enforcement actions promised by Director Canavan. We believe the public has the right to a full and public accounting of the full facts of how this building came to be built, without the required prior approval, despite our repeated protests to the city and the developers themselves. And we ask that these facts should be made known – and made public – before the developers allow people to buy or rent the seven units and subject the city to even more financial liability if subsequent enforcement actions are ordered. We believe that such an investigation is warranted particularly because of the very real possibility that misfeasance or malfeasance by city officials may have resulted in the issuance of these permits, and that all pertinent facts be made available to the BZA when making their decision on whether to uphold petitioners' appeal.

Petitioners, upon filing this appeal, will also seek such an investigation through any and all other appropriate channels of government, including the district's Office of Inspector General, Office of Administrative Hearings and Administrative Review Board, as well as the federal government's civil and criminal investigative agencies with oversight of DCRA.

Such concerns have been publicly expressed by Director Canavan, Councilman Graham and other city officials and workers at the job site -- both publicly and in private conversations with the petitioners. One supervisor at the 1636 Irving job site communicated to the petitioners that a predecessor left the project and fled the country out of concern that he might face prosecution for improper and ostensibly illegal payments he made to city officials in order to obtain permits. Petitioners can provide more details upon request and at the time of hearing.

In a July 13 letter addressed to Councilman Graham, Director Canavan described the removal of two DCRA officials. Separately, we have been told by Graham that DCRA officials who have lost their jobs as a result of this case include Toye Bello, the city's top zoning official.

Despite those letters and the admissions of the city's top regulatory official, the DCRA still has refused to explain to us, the petitioners, how this project was allowed to be built, what exact violations it sees, who was responsible for them and why. And it has refused to take any remedial action, including

but not limited to ordering the developers to bring the building into compliance with district building codes and laws.

Once it has such a full accounting of the facts in hand, we ask the BZA to order whatever action is necessary to bring this building into compliance with city zoning laws, up to and including its entire removal. As best we can tell, the building alone exceeds the 60 percent lot coverage limit, and possibly crosses into our neighboring yard at 1638 Irving St. NW. The building also does not appear to have the required six-foot setback on the eastern border, as required by law and as stipulated in the building plan submitted by the developers and approved by the city. DCRA has not responded to repeated requests for its measurements on these points, or to respond to our requests for documentation that it had taken such measurements prior to the issuance of the certificate of occupancy for seven units.

The structure also has blatantly illegal windows facing our property, despite petitioners' repeated complaints about them as well.

The petitioners would also like to address in this appeal the issue of the building's completion, and why we believe that should not be a factor in the BZA's decision. As stated above, we and other neighbors have repeatedly telephoned DCRA officials during the construction process, expressing concerns about all of these apparent zoning violations at 1636 Irving and were told that DCRA would do a thorough inspection at the completion of instruction and remedy any violations and problems at that time. Those assurances were given by Toye Bello and other DCRA officials. The DCRA now contends that the very existence of the building, after the fact, provides its own justification for allowing it to remain in its current state. That is an insufficient and spurious argument given the DCRA all along had been telling us it would wait until the completion of the project before making final determinations on its legality. It also flies in the face of DCRA's own building permits, which clearly state that the permits were issued pending a zoning variance that was neither sought nor received.

Even if the interior of the building was somehow brought back into compliance with the measurements described in the preceding paragraphs, its size and scope still remains excessive for the neighborhood. The exterior of the expanded and illegal structure was intentionally built as close as possible to the legal size limits (we believe it exceeds them) with the

intention of creating a multiple-unit condominium complex. After that, large porches were added that we believe make the project even more out of compliance based on the percentage of the lot.

In their defense, the developers have claimed to the petitioners that they did not have to seek BZA approval for any of this. They have not, however, provided any documentation from the city as to who gave such assurances and why, given their clear violation of the letter and spirit of the city laws. The developers have refused to provide such documentation not only to the petitioners but also to the neighborhood's legally recognized advisory body, the ANC, despite its requests for such documentation.

Furthermore, in several conversations with the petitioners, senior city officials have said no developer would be exempt from seeking BZA approval for such a conversion of such an existing structure into seven condominiums, even if the building had been built before the 1958 change in city law used as rental units. Some of those senior city officials have told the petitioners that they believe the BZA would deny such an application to expand 1636 Irving into seven condominium units, given the precedent that would be set by such a sharp departure from the residential environment of the neighborhood as specified under the R-4 zoning ordinances, the additional parking and congestion it would create and other issues.

The developers contend that they made their investments in a project worth more than $2 million solely on the basis of those alleged verbal assurances by DCRA officials who they have not named. Yet neither the developers nor the DCRA have provided any documentation that would demonstrate the past level of experience in handling such cases in an R-4 zone of either the developers or the participating DCRA officials. Even if mistakes made with regard to 1636 Irving Street were the result of inexperience by the developers or city officials, the petitioners argue that the BZA should uphold their appeal because ignorance is not a legally accepted excuse for violating the law. And given the experience of the developers in question and the city officials involved, the facts cast great uncertainty over any claim that this was a series of mistakes—all in the developers' favor—rather than an intentional attempt by unidentified parties to subvert the law.

The developers in particular gave repeated and emphatic assurances to the petitioners during construction that this expansion was fully allowed under city zoning laws. But they have not provided the documentation needed to

uphold that assertion or contest it before the DCRA. Graham's office also gave such assurances, even as late as May 4, when Graham constituent services coordinator Jeffrey Jennings visited the site following a formal complaint by the petitioners and responded to us with an email saying that all the permits appeared to be in order and personally reviewed and approved by Toye Bello.

The local ANC unanimously approved a resolution on May 23 in which it expressed its opposition to this expansion, saying that if the city allows this seven-unit condominium complex, it "would eliminate the very foundation of an R-4 District" because of the violation of the 900-square-foot rule. Other neighbors have expressed outrage over the project—at the developers for building it without BZA approval, the DCRA for ignoring the complaints of neighborhood residents' about its potential violations and the city at large for failing to rectify what it has stated repeatedly is a grossly illegal situation that degrades the quality of life for those living nearby.

This has a series of negative consequences for us, as abutters, in particular, because the large structure looms over our back yards, creates additional noise and congestion and competition for parking spaces, and we believe it significantly lowers our quality of life here and our overall property values relative to what those values would have been if the developers of 1636 Irving had complied with the law.

Our appeal concerns the issuance of the certificate of occupancy on June 10, as well as the issuance of all building permits for this project. The building permit issued on Dec. 12 is also not beyond the statutory time limits for an appeal because it states that the conversion to a seven-unit building is granted "subject to zoning approval of number of units in zone." That approval was never granted, and the developers to this date have not requested that zoning approval through the BZA as required by law.

In addition to the aforementioned applicable statutes, we have included below some of the relevant statutes that we believe — backed up by the statements by DCRA Director Canavan — have been violated by 1636 Irving St. NW:

101.5 -- No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title.

330.3 -- The R-4 District shall not be an apartment house district as contemplated under the General Residence (R-5) Districts, since the conversion of existing structures shall be controlled by a minimum lot area per family requirement.

330.4 -- Except as provided in chapters 20 through 25 of Ibis title, in an R-4 District, no building or premises shall be used and no building shall be erected or altered that is arranged, intended, or designed to be used except for one (1) or more of the uses listed in 5 330 through 349.

401.3 -- Except as prescribed in the other provisions of this chapter, the minimum dimensions of a lot in Residents District shall be as set forth in the following table: R-4: Conversion to apartment house -- 900 square feet

403.2 -- No structure, including its accessory building, shall occupy its lot in excess of the percentage of lot occupancy set forth in the following table: R4 -- Row dwelling – 60 percent.

405.6 -- Except as provided in $9 405.1 and 405.2, a side yard shall not be required in an R-3, R-4, R-5-B, 1R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3 in.) wide per foot of height of building, but not less than eight feet (8 ft.) wide.

Please call or write to us if you have any additional questions or require more information or documentation.

Thank you very much,

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