

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 17960 of Lucia and Claudio Rosan, pursuant to 11 DCMR 3103.2, for a variance to allow four rooms of an existing rooming house to be used for daily occupancy, in conjunction with the daily occupancy of the other eight rooms in the building, under subsection 2002.3, in the R-5-D District at premises 2005 Columbia Road, N.W. (Square 2536, Lot 150).

HEARING DATES: September 15, 2009, October 27, 2009
DECISION DATE: November 17, 2009

DECISION AND ORDER

This application was submitted on April 15, 2009 by Claudio and Lucia Rosan, (“Applicants”) the owners of the property that is the subject of this application (“subject property”). The application requests a use variance to increase the number of guest rooms from eight to 12 in a nonconforming daily-occupancy rooming house.

The Board of Zoning Adjustment (“BZA” or “Board”) held a public hearing on the application on September 15, 2009, which continued and was completed on October 27, 2009. The Board scheduled the decision on the application for November 17, 2009, at which time it decided to grant the application by a vote of 3-1-1.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 20, 2009, the Office of Zoning (“OZ”) sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 1C, the ANC within which the subject property is located, Single Member District 1C02, and the Councilmember for Ward 1. Pursuant to 11 DCMR 3113.13, OZ published notice of the hearing on the application in the *D.C. Register*, and on June 16, 2009, sent such notice to the Applicant, ANC 1C, and all owners of property within 200 feet of the subject property.

Request for Party Status. ANC 1C was automatically a party to this application, and appeared in opposition. The Condominium Association of the Oakland Condominium, which is located across the street from the subject property, was granted opposition party status by the Board.

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Both the ANC and the party in opposition asserted that granting the application would exacerbate noise, trash, and traffic problems already allegedly caused by the operation of the Applicants' rooming house with only eight units. Both parties also alleged that there is no resident manager on the subject property, creating a potential safety hazard, particularly in the case of a fire or other emergency.

Applicants' Case. The Applicants testified concerning their history of purchasing and renovating the property, their dealings with D.C. government personnel, and their business operations. They also testified to the undue hardship they would encounter in retro-fitting four rooms to a use permitted in the R-5-D zone. The Applicants also presented the testimony of an expert in D.C. Building and Zoning Regulations who discussed the second and third prongs of the variance test. He described how, in his opinion, it would be prohibitively costly and perhaps impermissible under the Building Code to convert four rooms to apartment units. The expert also explained how granting the application would neither negatively impact the public good nor the Zone Plan. He testified that the 1969 Certificate of Occupancy ("C of O") for the property, and not the application leading to the issuance of that C of O, is the controlling document as to the use at the property, and that therefore, there should not be an eight-room limitation on that use.

Government Reports. OP filed a report with the Board on September 4, 2009, recommending denial of the application. Exhibit No. 34. OP found nothing extraordinary about the subject property, except, questionably, its zoning and regulatory history. OP further opined that the Applicants did not show the requisite undue hardship in that they failed to show that the property could not reasonably be adapted for, and used for, a use permitted in this R-5-D zone. Lastly, OP stated that, although granting the variance would likely not harm the public good, it would substantially impair the intent and integrity of the Zone Plan and the Zoning Regulations (also referred to as "the Regulations"). The OP Report made specific reference to Zoning Commission Order No. 614, issued in April, 1989, which attempted to "moderate the daily use character of rooming houses" and thereby mitigate their impacts on surrounding neighborhoods, by tightening the Regulations governing them. In OP's opinion, granting the instant use variance would be contrary to the intent of Z.C. Order No. 614, as well as the Zoning Regulations' discouragement of the enlargement of nonconforming uses.

ANC Report. ANC 1C made two filings with the Board, one of which (Exhibit No. 39) contained filings from the Applicants' 2003 case before the Board, Application No. 17044, which demonstrated that the ANC had opposed that case as well. The ANC's Report in opposition to the current application, Exhibit No. 35, states that at a regularly-scheduled, properly-noticed public meeting, with a quorum present, the ANC voted unanimously to oppose the Applicants' variance request.

The ANC Report sets forth a detailed history of the use of the subject property and then discusses the use variance request. The ANC finds nothing exceptional about the property itself and disagrees with the Applicants' contention that the first prong of the variance test is met by the somewhat unusual zoning history of the property. Instead, the ANC claims that the

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unfortunate history is largely due to the Applicants' failure to perform any due diligence concerning the prior operation of a transient rooming house at the property. The ANC next claims that any hardship the Applicants may suffer is self-imposed because of their alleged lack of due diligence and their failure to heed the several warnings over the years that the use of 12 units in their rooming house might not be allowed. As to the third prong of the variance test, the ANC opines that the public good and the Zone Plan would both be harmed by the granting of the variance, citing current problems with noise, trash, and traffic, and a negative effect on nearby real estate values, as well as a negative effect on the larger surrounding area due to the encroachment of non-residential uses in this residential zone district.

Persons in Opposition. Two nearby neighbors filed letters with the Board in opposition to the application. The Kalorama Citizens Association filed a letter in opposition, as did the Wyoming Condominium Association, representing the residents of the Wyoming Condominium, located directly across the street from the subject property.

FINDINGS OF FACT

The Property and the Surrounding Neighborhood

1. The subject property is located at address 2005 Columbia Road, N.W., in Square 2536, Lot 150, within an R-5-D zone district and the Kalorama Triangle Historic District.
2. The property is a 1,914 square-foot, generally rectangular interior lot, measuring 22 feet wide and 87 feet deep, and fronting on the west side of Columbia Road.
3. The property is improved with a four-story row dwelling built in 1898 which has been used as a rooming house since 1969.
4. The neighborhood surrounding the property contains a variety of residential and non-residential uses, including five to nine story multiple dwellings across Columbia Road, one-family row dwellings, flats, and embassy/chancery uses.

The Need for the Variance

5. The Applicants are currently operating a 12-unit rooming house on the property, but their C of O permits only eight units. Exhibit No. 31, Attachment J.
6. The Applicants' rooming house is a nonconforming use under the Zoning Regulations, and, as such, is legally entitled to operate in a zone district where it would not be permitted if the use were to begin today. 11 DCMR § 199.1, Definition of "Use, Nonconforming," and See, 11 DCMR Chapter 20 "Nonconforming Uses and Structures."

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7. A nonconforming use is permitted to operate in the same manner in which it was operating at the time of the regulatory change which rendered it otherwise impermissible in a certain zone, subject to Chapter 20 of the Zoning Regulations. 11 DCMR § 2000.4.
8. Nonconforming uses, although permitted to continue to operate after a change in the Regulations would otherwise render them impermissible, are not allowed to expand. 11 DCMR §§ 2000.2, 2001.3(b)(2), 2002.3 & 2002.5.
9. In a letter dated February 9, 2009, the Zoning Administrator (“ZA”) admonished the Applicants that, since their rooming house is a nonconforming use, in order to expand its operation to 12 units, from eight, as permitted by their C of O, they required a variance from the Board.
10. This application, requesting the required variance, was then filed with OZ on April 15, 2009.

The Use Variance

Extraordinary Condition -- Background and Zoning History

11. Rooming house use at the subject property was established by issuance of C of O No. B71243 to Richard W. Bird on September 5, 1969. Exhibit No. 31, Attachment D.
12. Mr. Bird filed the application for the 1969 C of O on July 30, 1969, and listed the proposed use as a “Rooming House (8 units),” while also indicating that all floors and the basement of the subject dwelling would be put to this use and further indicating “(ap. 10 bedrooms).” Id.
13. Although Mr. Bird’s application proposed eight units, or perhaps 10, depending on its interpretation, C of O No. B71243 did not limit the number of units to be used for the rooming house use. The C of O stated that “All [floors] and Basement” of the subject dwelling could be used.
14. In 1969, rooming house use was a matter of right in R-4 and more dense residential zones, including the R-5-C zone that then included the subject property, without any limitation as to the number of units, the length of stay of guests, or whether a central dining area was provided for the guests.
15. On November 3, 1989, the Zoning Commission issued Z.C. Order No. 614, which amended the Regulations relating to rooming houses. They remained a matter-of-right use in R-4 and more dense residential zones, but only with several limitations, the relevant ones here being: guests have to stay at least 90 days, and neither advertisement as an “inn” or a “bed and breakfast,” nor a central dining or food preparation area for guests, is allowed. (Now codified at 11 DCMR § 330.6.)
16. The changes wrought by Z.C. Order No. 614 did not include a limitation on the permissible number of units in a rooming house.

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17. With the issuance of Z.C. Order No. 614, the rooming house as it existed at the subject property became a nonconforming use because its operation ran afoul of the conditions imposed by the Z.C. Order, primarily in that its guests did not stay at least 90 days.
18. Mr. Bird had a Business License issued by the Department of Consumer and Regulatory Affairs (“DCRA”) for a rooming house with 15 units on the subject property, which was valid through January 31, 2002. Exhibit No. 31, Attachment E.
19. Mr. Bird’s Business License would have been improperly issued for 15 units if C of O No. B71243 limited the rooming house use to eight units. D. C. Official Code § 47-2851.11(a)(1) (1981 ed., 2000 Repl.).
20. It appears that Mr. Bird operated the rooming house at the subject property and paid all the necessary business taxes, including daily occupancy taxes on a 15-unit rooming house, until his sudden death in April, 2002.
21. There was no evidence of any enforcement action taken against Mr. Bird, between 1969 and 2002, to make him decrease the number of units from 15 to eight, or 10, based on the unit number proposed in the 1969 C of O application.
22. In March, 2003, the Applicants purchased the subject property from Mr. Bird’s estate.
23. Mr. Bird’s C of O No. B71243 was hanging on the wall of the subject building when the Applicants purchased it, but the application for that C of O, showing the proposed eight or 10 rooms, was not among Mr. Bird’s possessions left at the subject property. September 15, 2009 Hearing Transcript at 195, lines 7-11.
24. When the Applicants purchased the property, all floors and the basement of the building were devoted to the rooming house use, and there appeared to be 15 daily-occupancy guest rooms, each of which, approximately one year after Mr. Bird’s death, was still furnished as an individual rooming unit.
25. On March 10, 2003, the Applicants applied as the new owners to DCRA for a C of O to operate an “Inn/Tourist House” with 15 rooms at the subject property, but were informed by DCRA personnel in an April 7, 2003 letter that an inn/tourist home was not a matter-of-right use in the R-5-D zone and that a use variance from the Board was required. Exhibit No. 38, Attachments Nos. 2 & 3.
26. Ten days later, on March 20, 2003, the Applicants again applied to DCRA for a C of O as the new owners, but this time for a rooming house use, and were instructed by DCRA personnel to note “8 rooming units” on the application.
27. That same day, March 20, 2003, DCRA issued the Applicants C of O No. 50899 for a rooming house on the subject property with an “occupancy load” of eight. The use of the basement and all four floors is permitted and the Description of Use states: “Rooming House

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(8) Rooming Units (Operating as Transient Accommodations).” Exhibit No. 31, Attachment J.

28. In April, 2003, the Applicants applied to the Board for a use variance to establish an inn/tourist home with 15 units, later reduced to 12, at the subject property. (BZA Case No. 17044.)
29. The Applicants were without counsel and appeared not to have understood why (or whether) they needed to appear before the Board, the nature of the proceedings, or the burden of proof required of them. See, e.g., September 15, 2009 Hearing Transcript at 170, lines 17-19.
30. At this point, in the spring of 2003, the Applicants proceeded to renovate the subject building.
31. On April 29, 2003, DCRA issued the Applicants Building Permit No. B450808, which allowed interior demolition of partitions, plumbing fixtures, and heating systems in the subject building. Exhibit No. 31, Attachment K.
32. On June 2, 2003, DCRA issued the Applicants Building Permit No. B451801, which permitted renovations to the subject building to be undertaken to convert it from 15 units to 12 units. Exhibit No. 31, Attachment K.
33. The plans submitted and approved for the Building Permits show 12 units.
34. Relying on the issuance of the Building Permits, the Applicants applied on August 11, 2003, for a new C of O for a 12-unit rooming house. This application was preliminarily approved by DCRA. Exhibit No. 31, Attachment M.
35. Construction proceeded per the Building Permits, and was approximately 70% complete, at a cost to the Applicants of over \$300,000, when, on August 27, 2003, DCRA contacted the Applicants requesting that they change the number of units on the approved permit drawings from 12 to eight.
36. The Applicants chose to rely on the issuance of the Building Permits for 12 units and declined to change the drawings, or the building itself, to only eight units.
37. DCRA took no enforcement action at this time.
38. On September 14, 2003, the Board voted to deny the use variance application filed by the Applicants in April, 2003. Before a written order was issued in Case No. 17044, the Applicants withdrew their application.
39. The renovation work was completed and all final building inspection approvals, based on the plans for 12 units, were issued by DCRA during late 2003 and early 2004. Exhibit No. 31, Attachment N, and Exhibit No. 52.

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40. At this point, in approximately December, 2004, the Applicants began to operate the rooming house with 12 units, and continued to do so with no particular incident, until they received a letter from the ZA more than four years later. That letter, dated October 15, 2008, informed them that DCRA was going to revoke their C of O No. 50899 for the rooming house use because it appeared that they were operating beyond the scope of the C of O. Exhibit No. 11.
41. At about this same time, on October 28, 2008, DCRA issued the Applicants a Basic Business License permitting them to operate the rooming house with eight units. Exhibit No. 9.
42. The ZA rescinded the October 15, 2008 letter in a letter dated February 27, 2009, wherein he recognizes that the Applicants' use of the rooming house constitutes a nonconforming use, and that therefore they "may continue to use it as a bed and breakfast with rentals of less than thirty days."¹ Exhibit No. 5.
43. The ZA's February 27, 2009 letter, however, limits the Applicants' rooming house use to only eight units, based on the ZA's conclusion that "at the time of the April 10, 1989 [Z.C.] Order [No. 614], the approved occupancy load of the Property was eight rooms." Id.
44. As a courtesy, the ZA attached to the February 27, 2009 letter a new, revised C of O, No. 0901353, for the Applicants' rooming house use which denotes allowance of rentals of less than thirty days, but limits the unit number to eight. Id.
45. The ZA's February 27, 2009 letter notes that the continued rental of 12 units by the Applicants would constitute operating beyond the scope of the revised C of O, and could lead to enforcement action against the Applicants. Id.
46. In order to avoid violating the revised C of O and having enforcement action taken against them, the Applicants filed this application on April 15, 2009, requesting a use variance to permit the use of 12 guest rooms at the subject property.
47. Since they began operating the rooming house in 2004, and throughout these proceedings, the Applicants have paid all necessary business taxes, including daily occupancy taxes, on a 12-unit rooming house.

Undue Hardship

48. Relying on the empirical evidence of use, the 1969 C of O, Mr. Bird's Business License for 15 rooms, and the Building Permits issued by DCRA in April and June, 2003, the Applicants invested approximately \$1.1 million to purchase the subject property, renovate the building, and properly equip and furnish it for a 12-room daily occupancy rooming house.

¹The ZA's February 27, 2009 letter references "thirty days" because he is making clear that the Applicants' rooming house use, as a nonconforming use, is not subject to either the more-than-90-day stay limitation imposed by § 330.6 or the "monthly or longer" stay limitation imposed by the definition of "Rooming house" as set forth in 11 DCMR § 199.1.

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49. The subject row dwelling is divided into 12 rooming units, with eight two-person guest rooms and four one-person guest rooms. None of the rooms have kitchens and no cooking is allowed by guests.
50. Since at least 1969, the subject building has not been used as a one-family dwelling, but has been divided into separate rooming units and used as a rooming house.
51. The average daily rate charged by the Applicants for a room is \$155.00 per night.
52. Reducing the number of units from 12 to eight would mean a reduction in income of approximately \$620.00 every day.
53. Reducing the number of units from 12 to eight would mean that four rooms would be (1) unused, (2) combined with the other eight rooms, (3) still used as separate rooming units, but subject to the conditions in § 330.6, or (4) used for a different use permitted in this R-5-D zone.
54. Leaving four rooms unused is a waste, potentially hazard-causing, and results in at least the reduction of income cited in Finding of Fact No. 52.
55. Combining the rooms in such a way to result in a total of eight, such as by providing a door from one room to an adjacent room, is impractical and inefficient. It also results in a reduction of income because, due to the connection between the rooms, they constitute one room, for which the Applicants can charge approximately \$155.00 per night. Doubling the floor area a guest can use by connecting two rooms does not permit the Applicant to double the rate to \$310.00 per night and remain competitive.
56. It would be impractical, if not impossible, to continue to use these four rooms as rooming units subject to the conditions in § 330.6, while the other eight units were not so subject.
57. These four rooms are not equipped for, nor large enough, to accommodate a guest(s) for more than 90 days. 11 DCMR § 330.6(a).
58. The website advertising the Applicants' rooming house refers to it as a "bed and breakfast," and there is no way to reasonably limit this, or similar, advertising to make it applicable to eight rooms, but not to the other four rooms. 11 DCMR § 330.6(c).
59. The Applicants provide breakfast for their guests in a central dining area, and it would be difficult, if not impossible, let alone poor business practice, to prevent those staying in the four rooms subject to § 330.6 from joining the other guests for breakfast. 11 DCMR § 330.6(e).
60. The Applicants' average rate of \$155 per night for 91-days' worth of stay would amount to a ridiculous and highly non-competitive charge (\$14,105), which no reasonable traveler would

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pay. Any reduction in the rate charged would, again, result in a significant loss of income to the Applicants.

61. It would be impractical, if not impossible, to convert these four rooms to a different use permitted in this R-5-D zone.
62. None of the non-dwelling uses permitted in the R-5-D zone, such as church or other place of worship, public or private school, community center, etc., are appropriate uses for four individual rooms within a rooming house, and some have their own requirements, such as for parking, which could not be met on the subject property.²
63. Putting these four rooms to a dwelling use permitted in this R-5-D zone, though less far-fetched, is prohibitively costly and impractical. It would mean that full-time residents would be sharing the building with a daily turn-over of transient guests, probably not an appealing prospect to the full-time residents, and therefore requiring a heavy discount to attract such residents.
64. Two apartment units created from these four rooms would provide no on-site parking, also making them less desirable and potentially resulting in parking on the street by their tenants.
65. Converting these four rooms into two apartment units would necessitate, at the least:
66. Approximately \$135,000 per apartment to renovate the space and provide code-compliant kitchens;
67. A new utility line at a cost of approximately \$25,000-\$30,000 to provide code-compliant sprinklering;
68. Construction of a second interior means of egress exiting onto a street; and
69. Potentially having to install fire walls between the two apartment units and the rest of the building.

No Substantial Detriment to Public Good or Impairment of Zone Plan

70. The rooming house use has been operating almost continually on the subject property since

²The non-dwelling uses permitted as a matter of right in an R-5-D zone are: greenhouse or horticultural nursery, hotel in existence as of May 16, 1980, residence for teachers or staff of private school, community-based residential facility, child/elderly development center, adult day treatment facility, fire department support facility, parking garage on an alley lot, hospital, sanitarium, or clinic, private club, lodge, fraternity or sorority house, dormitory (the last five listed uses cannot be run as a business), museum, community house existing on May 12, 1958, church or other place of worship, parsonage, vicarage, rectory, Sunday school building, transportation right-of-way, temporary building for construction industry, farm or truck garden, temporary use by fair, circus, or carnival, private garage, embassy, public school, mass transit facility, chancery existing on September 15, 1978, public recreation and community center, public library, police department facility, fire station, and certain types of antennas.

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1969, apparently first with 15 units, under Mr. Bird, and then with 12 units, under the Applicants.

71. Throughout its existence and today, the rooming house has been/is a matter-of-right use at the subject property. This matter-of-right status was without restriction until late 1989, when Z.C. Order No. 614 added certain conditions.
72. Z.C. Order No. 614 did not, however, change the status of a rooming house to a special exception, nor did it limit the number of guest rooms a rooming house could have. Therefore, if a rooming house which complied with the imposed conditions were newly-opened today, it could operate as a matter of right with no restriction on the number of rooming units it could contain.
73. With the four “extra” rooms in question here used as two apartments, the occupancy load of the building would be approximately the same as if these four rooms were used as daily occupancy guest rooms in the rooming house.
74. If the four “extra” rooms were used as two apartments, the tenants would not be subject to the same types/levels of control concerning noise, visitors, and other similar activities, as those to which the guests of the rooming house are subject. For example, rooming house clientele are not permitted to have visitors, while no such prohibition could be imposed on a tenant of an apartment.
75. One of the Applicants or their designee is “on duty” at all times, 24-hours a day, on-site at the property.
76. All guests at the rooming house must register in advance; “walk-ins” are generally not accepted.
77. Most guests arrive at the rooming house by public transportation or by taxi; very few drive, and those who do are told ahead of time of the lack of parking and directed to park at the nearby Hilton or Marriott Hotels.
78. The Applicants do not use a designated loading zone in the front of the property.³ Taxis arriving at the property pull over as close to the curb as possible in order to pick up or discharge guests, just as they do in front of the several other properties along Columbia Road.
79. Guests usually stay at the rooming house between two and seven days, and arrive and depart at differing hours.

³There was some confusion in the record as to the existence of a loading zone. Ms. Rosan testified that she was informed by DDOT that her rooming house did not qualify for one, but it appears that the D.C. government put up signs designating a loading zone in front of the property. The neighbors were apparently unhappy with the designation, but, in any event, the Applicants do not use it.

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80. Columbia Road is a busy thoroughfare connecting 19th Street, N.W., and Connecticut Avenue, N.W. It is flanked by several large apartment buildings which generate traffic, and traversed by several Metrobus routes.
81. The only noise apparently generated by the rooming house use comes from the occasional conversations held by the guests in the front of the building, particularly those guests who go outside to smoke, as it is not allowed in the building. These conversations are at an expected decibel level, include no shouting or other loud noises, and are often inaudible over other ambient noise, such as the passing of Metrobuses.
82. Trash generated by the rooming house use is stored in D.C. government-provided trash receptacles behind a wrought iron gate between the subject building and the adjacent building at 2003 Columbia Road. A commercial trash hauler comes and takes the trash away.
83. No unpleasant odors or other objectionable external effects are produced by the rooming house use.

CONCLUSIONS OF LAW

Use Variance Standard

The Board is authorized to grant variances from the strict application of the Zoning Regulations to relieve difficulties or hardship where “by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition” of the property, the strict application of the Zoning Regulations would “result in particular and exceptional practical difficulties to or exceptional or undue hardship upon the owner of the property....” D.C. Official Code § 6-641.07(g)(3) (2008 Repl.), 11 DCMR § 3103.2. Relief can be granted only “without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the Zone Plan as embodied in the Zoning Regulations and Map.” D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2.

A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship,” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicants in this case are requesting a use variance, therefore, they had to demonstrate an exceptional situation or condition of the property and that such exceptional condition results in an “undue hardship” to the Applicants. Lastly, the Applicants had to show that the granting of the variance will not impair the public good or the intent or integrity of the Zone Plan and Regulations.

Exceptional Situation or Condition

The District of Columbia Court of Appeals (“DCCA”) has recognized that the “exceptional situation or condition” of a property necessary to satisfy the first prong of the variance test, whether area or use variance, can arise out of the structures existing on the property itself. *Clerics of St. Viator v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974). Moreover, the exceptional situation or condition “need not be inherent in the land, but can be caused by subsequent events extraneous to the land.” *De Azcarate v. D. C. Bd. of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978). The zoning history of a property, including past actions of governmental authorities, can constitute the “events extraneous to the land” which create the requisite exceptional situation or condition. *Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979). In *Monaco*, a zoning history which implicitly approved a use and thereby gave rise to good-faith, detrimental reliance by the property owner, helped to establish the necessary exceptional situation.

A similar situation exists here. The Applicants purchased a building which had been openly and continuously used as a 15-unit rooming house for over 30 years, the C of O for which was publicly visible hanging on the wall. That C of O clearly stated that all floors and the basement of the building could be used for a rooming house. It set forth no limitations on the number of rooms or square footage, and had no expiration date. At the time the C of O was issued, on September 5, 1969, the rooming house was an unrestricted matter-of-right use in what was noted on the C of O as an R-5-C zone district.

Z.C. Order No. 614, issued in 1989, did not change the matter-of-right status of a rooming house use in this now R-5-D zone district. The Order merely added a series of conditions that had to be met by a new rooming house opening in R-4 and more dense residential districts. The conditions set forth in Z.C. Order 614, now codified at 11 DCMR § 330.6, could not apply to the operation of the rooming house at the subject property because, with the issuance of the Order, the use became nonconforming. A nonconforming use is permitted to remain operating in the same manner as it was operating prior to the change in the Zoning Regulations which renders it no longer a permissible use in a particular zone. 11 DCMR § 2000.4. Therefore, the rooming house use was, in common parlance, “grandfathered” and allowed to continue to operate in the same way it had always operated, as long as it was not discontinued, which is not contended here. See, 11 DCMR § 2005.

When purchasing the building, the Applicants had no immediate reason to question the use of 15 units in the rooming house, as that was the number of rooms that Mr. Bird had been licensed to operate. Further, inspection of the premises revealed 15 locked rooms, each furnished as an independent rooming unit.

The question as to how many rooms could be used as guest rooms, arises only when the application for the 1969 C of O is inspected. The 1969 application states the allowed use as “Rooming House,” and adds, parenthetically, “(8 units).” It then states that all the floors and the

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basement will be put to the use and appears to state “(ap. 10 bedrooms).” The 1969 application proposes 8 units, or, arguably, 10, but it was not on the premises when the Applicants purchased the subject building, and, even if it were, the controlling document as to use and “load” was the unambiguous C of O with no restrictions hanging on the wall.

In 2003, the Applicants applied for a C of O for the “wrong” use, *i.e.*, for an “Inn/Tourist House” – a use not allowed in this R-5-D zone. When informed that this use was not allowed, the Applicants re-applied for a C of O for a rooming house. At this point, it appears that the Applicants may well have been entitled to a C of O for a rooming house with no restriction on the number of rooms, exactly as Mr. Bird had had. Instead, the Applicants were instructed to limit their request to eight rooms, and their C of O therefore reflected an eight-room limitation.

The Applicants did not appeal the imposition of the 8-room limitation and the limitation was apparently overlooked by DCRA in its issuance of two building permits in 2003 permitting the renovation of the building for 12 rooming units. When DCRA asked the Applicants to change their plans from 12 to eight units, they declined to do so.

DCRA took no enforcement action at this time and the renovations were completed for 12 units.

After operating for approximately four years, the Applicants received a letter from the ZA in October, 2008, stating that he would be revoking their C of O. That letter was then superseded by a February, 2009 letter from the ZA, which, while recognizing the validity of the rooming house use, refused to recognize the use for any more than eight units.

This unfortunate and unusual chain of events presents an exceptional situation unique to this property. As in *Monaco*, past actions of zoning and permitting authorities gave rise to the Applicants’ good faith, detrimental reliance, leading them to believe they were entitled to operate a 12-unit rooming house. These actions include the issuance of the unrestricted 1969 C of O, the issuance of the license to Mr. Bird for 15 units, and the issuance, to the Applicants themselves, of two building permits, and all necessary final inspections, on a 12-unit building. The first two cited actions occurred before the change in the Zoning Regulations brought about by Z.C. Order No. 614, but the latter two actions occurred after this change. Even after DCRA asked the Applicants to change their plans from 12 rooms to eight, it was never explained to the Applicants why this was necessary, and, when the Applicants refused, DCRA appeared to drop the request. Along with these actions, the on-site empirical evidence was reasonably interpreted by the Applicants to demonstrate the existence of a rooming house with 15 units operating until Mr. Bird’s death in April, 2002, 12 years after the change in the Zoning Regulations.

The Applicants were directed to, and did, request eight units on their 2003 C of O application, and were on notice that there was a possible eight-unit limitation on the rooming house use. Ms. Rosan testified convincingly, however, that she and her husband did not understand why this was so and that they could not get a satisfactory answer from DCRA personnel. *See, e.g.*, September 15, 2009 Hearing Transcript at 171, lines 1-22; 173-174; 176, lines 11-15; & 181, lines 13-21.

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Although business owners, the Applicants were new to owning a business in the District of Columbia, and appeared uncertain as to the procedures to follow to properly initiate their business operations. The lack of clarity in the actions of DCRA personnel served to heighten that uncertainty.

Looking at all the facts, including the history of rooming house use at the property and its long, troubled regulatory history, the Board concludes that they constitute the exceptional situation necessary to meet the first prong of the use variance test. Next, the Board must determine whether this exceptional situation causes the Applicants an undue hardship in using the property in compliance with the Zoning Regulations.

Undue Hardship

The DCCA has interpreted “undue hardship” to mean that a property cannot be put to any zoning-compliant use for which it can be reasonably adapted. *See, Palmer v. D.C. Bd. of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. 1972). (“A use variance cannot be granted unless a situation arises where reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations.”) *See also, Bernstein v. D.C. Bd. of Zoning Adjustment*, 376 A.2d 816, 819-820 (D.C. 1977) (“[I]t must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may be reasonably adapted.”) In this case, there are no other permitted uses for which the four “extra” units can be “reasonably” adapted.⁴

The Applicants have shown that that they cannot reasonably adapt the four “extra” rooming units in any way to comply with the Zoning Regulations without suffering an undue hardship. As explained in the record and set forth in Findings of Fact Nos. 48-69, they have explored other options, but found none that would not result in an undue hardship. The Board readily agrees that it would be unreasonable to attempt to adapt these four rooms for one of the *non-dwelling uses* allowed in an R-5-D zone, such as a church, private school, or community center. Though perhaps less obviously so, attempting to adapt the four rooms for a permissible *dwelling use* would be unreasonable as well, causing the Applicants an undue hardship.

Based on the contorted zoning and permitting history set forth above, the Applicants have invested a large sum of money, approximately \$1.1 million, in the subject property. This investment would be severely undermined if the Applicants were now made to shut down the use of four rooms – one-quarter of their operations. If the four rooms were used for more-than-90-day stays, combined, or converted to apartment use, the Applicants would still be faced with an undue economic hardship. Converting the four rooms to apartment use would not only be expensive, but the Board also notes that the prospect of an apartment unit within a daily-

⁴As the Board made clear at the hearing, adapting the entire building to a use permitted in the zone, such as a one-family dwelling, was not before it. The Board, and this Order, address only the possibility of adapting the four “extra” rooms to a permissible use because the other eight rooms are already permitted. *See, e.g.*, October 27, 2009 Hearing Transcript at 172-175.

occupancy rooming house may not be very appealing to prospective tenants, making it difficult to market and fill. Converting four rooms to be used for a more-than-90-day stay is not only expensive, but these rooms would also be subject to the other restrictions listed in § 330.6, such as no central dining area for guests. It is difficult to see how this restriction could be adhered to – either the central dining facility that now exists would have to be eliminated, clearly negatively impacting the use of the permitted eight rooms, or the roomers in the four affected rooms would have to be prevented from using the central dining area – a scenario which strikes the Board as unreasonable. The economic harm to the Applicants, coupled with the significant limitations on the utility of the building which could arise with the use of only eight units, or, with the use of the “extra” four units in a differing manner, constitutes the undue hardship necessary to satisfy the second prong of the use variance test. *See, Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170-1171 (D.C. 1990).

In *Gilmartin*, the DCCA discusses at some length the inclusion of economic considerations in a use variance analysis. *Id.*, at 1170-1171. Although the variance on appeal in *Gilmartin* was an area variance, the Court states that the economic use of property, and, logically flowing from that, a claim of economic harm, is more appropriate to a use variance analysis. The Court then compares and contrasts two cases which centered on questions of economic harm coupled with reduced utility of the structure involved. The first case, *Barbour v. D.C. Bd. of Zoning Adjustment*, 358 A.2d 326 (D.C. 1976), upheld the Board’s denial of an area variance where alternative methods of building expansion were available, albeit at significantly greater expense and/or with a reduction in living space. The Court then discusses *Ass’n. for Preservation of 1700 Block of N Street, N.W., and Vicinity v. D.C. Bd. of Zoning Adjustment*, 338 A.2d 428 (D.C. 1975), in which it upheld the Board’s granting of an off-street parking variance to a YMCA because providing the requisite parking would have been prohibitively costly and would have prevented the YMCA from providing all of its planned programs.

The Court explains the contrasting outcomes in *Barbour* and *1700 Block* by reasoning that in *1700 Block* “the costs were far larger and the restrictions upon use were far greater” and concludes that “at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the structure.” *Gilmartin* at 1170 & 1171. The Court also points out that, in *1700 Block*, there was no feasible alternative available that would comply with the Zoning Regulations.

The Court’s conclusions in *Gilmartin* concerning the outcome in *1700 Block* apply to the instant variance request. The loss to the Applicants due to the non-use of four daily-occupancy rooms, or, alternatively, the cost of retro-fitting these four rooms for a use permitted in this R-5-D zone, would be great. The building functions successfully as a daily-occupancy rooming house, and has done so for over 40 years. Reducing the number of guest rooms, or imposing restrictions on one-quarter of them, would significantly affect not only the economics of the rooming house, but its efficiency, and therefore the utility of the structure for this matter-of-right use. Because there is no zoning-compliant alternative available without serious economic loss and significant

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limitations on the utility of the structure, the Board concludes that the Applicants have met their burden of establishing an undue hardship.

No Harm to Public Good or Impairment of Zone Plan

The last prong of the variance test requires that the granting of the variance cause no substantial detriment to the public good or impairment of the Zone Plan. As for the latter, OP opined that granting the variance would be contrary to Z.C. Order No. 614, but the Board disagrees. The Board concludes that the intent of Z.C. Order No. 614, and now, § 330.6, was/is to control the proliferation of *new* daily-occupancy rooming houses in the City. The non-proliferation intent of Z.C. Order No. 614 is not undermined by the continued use of this rooming house because it is not a new use, but pre-dates Z.C. Order No. 614, and is entitled to operate as a nonconforming use with or without the variance for the four “extra” rooms.

Nor will the granting of the variance cause a substantial detriment to the public good. The rooming house has been operating at the subject property since 1969, and even at 12 rooms, will be operating at a lesser level of intensity than the previous level of 15 rooms. The rooming house does not provide parking and is careful to tell those few guests who drive not to park on the residential streets. The Applicants direct guests who drive to use the parking garages of other local establishments. Most guests arrive by public transportation, which causes no particular impact to the neighborhood, or by taxi. Taxis stop in front of the building and load/unload, but guests arrive and depart at various times, and there is no taxi queue. Columbia Road is a busy thoroughfare and there is a significant amount of vehicular traffic which is not associated with the rooming house, including taxi drop-offs and pick-ups from in front of the several large apartment houses on the street. It appears that there will be little difference between the external traffic effects produced by 12 rooms and those produced by eight. In fact, the OP representative testified at the hearing that, when discussing this application with DDOT personnel, the DDOT representative stated that the application “would not have much impact.” October 27, 2009 Hearing Transcript at 309, lines 9-10.

No other objectionable effects will be caused by permitting the use of all 12 guest rooms. A person testifying in opposition at the hearing complained of noise, specifically of guests congregating in front of the subject building and conversing. When asked on cross-examination, however, he admitted that many pedestrians converse on the sidewalks, not only rooming house guests, and that the conversations of the rooming house guests were often inaudible over the ambient noise, such as that produced by passing buses. October 27, 2009 Hearing Transcript at 254-255. The normal-decibel-level conversation of individuals in front of the guest house is not a detriment to the public good, and no other noise complaints were noted in the record.

The rooming house has an employee on site every day, 24 hours a day. Its trash is stored out of the way and picked up by a commercial hauling company. It does not produce odors or have any other deleterious effects on the neighborhood and will not cause a substantial detriment to the public good.

Great Weight

The Board is required to give “great weight” to issues and concerns raised by the affected ANC and to the recommendations made by OP. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). Great weight means acknowledgement of the issues and concerns of these two entities and an explanation of why the Board did or did not find their views persuasive.

OP recommended denial of the application, Exhibit No. 34. As to the first prong of the variance test, the OP Report states that OP “has been *unable to determine* whether the property’s zoning and regulatory history establishes an exceptional situation.” (Emphasis added.) This of course leaves open the possibility that such a determination could be made, as the Board in fact did. As to the second prong, the OP Report states that “the applicant had not provided sufficient information” to establish the requisite undue hardship. Since the OP Report was issued prior to the hearing on this case, OP did not have the advantage of the record that has since been created and which contains such proof, as explained earlier in these conclusions of law.

Concerning the third prong of the test, OP’s Report opines that granting the application will not substantially harm the public good, but definitively states that granting the application “would have a substantial impact on the zoning regulations.” In OP’s opinion, allowing the use of the “extra” four rooms would be inconsistent with the Zoning Regulations’ policy of not allowing the expansion of nonconforming uses and with the direction set by Z.C. Order No. 614. As explained earlier, the Board disagrees with OP’s fears concerning Z.C. Order No. 614, and whether or not this is truly an expansion of the nonconforming use is a question. The Applicants have consistently operated it with 12 rooms, and have consistently urged that they always had the right to do so, and in any event, even at 12 rooms, the use is actually reduced from the previous 15 unit use. Finally, all variances are by nature somewhat inconsistent with zoning, the question is whether the degree of the variance is so great as to conflict with the intent of the Zoning Regulations. The effect of this variance is purely internal. It will not change the number of units that can lawfully be operated within this rooming house, but only the length of the stay of the guests who will stay in those rooms. Although this is not facially consistent with the Regulation, it does no harm to the essential fabric of the Regulations as a whole.

ANC 1C also filed a report in opposition to the application, opining that the Applicants failed to meet their burden of proof. The ANC asserts that the Applicants have not satisfied the first two prongs of the use variance test primarily because they did not, in the ANC’s words, “perform any due diligence concerning the operation of a transient rooming establishment prior to their purchase of subject property.” Exhibit No. 35. The ANC therefore concludes that the Applicants failed to demonstrate an exceptional situation and that any undue hardship is self-imposed.

The ANC quotes from the 2003 BZA transcript and faults the Applicants primarily for three things: relying on the advice of their real estate agent that they could continue Mr. Bird’s business, not retaining legal counsel to confirm this advice, and not making their purchase

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contract contingent on the ability to continue the business. It may be true that the Applicants relied on their realtor's advice, did not retain counsel, and did not arrange a contingent contract, but in all likelihood they did not see the need to do otherwise because they were shown a valid C of O with no restrictions and a business license valid for 15 units through January of 2002, and were surrounded by physical evidence of a 15-unit rooming house use. See, September 15, 2009 Hearing Transcript at 172, lines 7-22 & at 173, lines 1-2.

The ANC states in its written submission that Mr. Bird's 1969 C of O authorized an eight-unit rooming house. Exhibit No. 35, at 2. In a footnote, the submission then clarifies that the C of O "does not state the number of authorized rooms," but that the application for the C of O "contains a notation for eight rooms." *Id.*, at n.6. The C of O, and not the application for it, is the controlling document as to use and "load," i.e., unit number. The number of units proposed in the application - eight - was not carried over and set forth in the C of O. Therefore, the proposed number does not control. The governing document is the C of O, which, with no unit number specified, authorized a rooming house with no stated unit maximum.

The Board, however, understands the ANC's assertion that the claimed undue hardship is self-imposed. There was some question as to the number of units ultimately permissible at the property. In the context of an area variance, the idea of a self-imposed practical difficulty likely requires an affirmative act on the part of the applicant which results in the practical difficulty. *Carliner v. D.C. Bd. of Zoning Adjustment*, 412 A.2d 52, 54 (D.C. 1980). Cf. *De Azcarate v. D.C. Bd. of Zoning Adjustment*, 388 A.2d 1233, 1239 (D.C. 1978). This affirmative act would be a factor in an area variance analysis. In the realm of use variances, the threshold is lower, and knowledge that a particular use would violate the Zoning Regulations is enough to raise the specter of a finding of self-imposed hardship, which would defeat a use variance request. See, e.g., *Foxhall Community Citizen's Ass'n. v. D.C. Bd. of Zoning Adjustment*, 524 A.2d 759, 761-762 (D.C. 1987) (and cases cited therein); *A.L.W., Inc. v. D.C. Bd. of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975); *Taylor v. D.C. Bd. of Zoning Adjustment*, 308 A.2d 230, 236 (D.C. 1973).

The Applicants here are requesting a use variance, but the Board does not find that they had the requisite knowledge that the use of the subject property for a 12-unit rooming house would violate the Zoning Regulations. In fact, the evidence in the record demonstrates the opposite – that the Applicants did not "know" that they could not operate a 12-unit facility. The Applicants have steadfastly urged, all along, that they were entitled to 12 units. They never evidenced a knowledge or clear intent to put the property to a use they knew violated the Zoning Regulations because they were certain that they were "grandfathered" for 12 (or 15) units. September 15, 2009 Hearing Transcript at 171, lines 10-22; 173, lines 15-17; 176, lines 8-15, & 180, lines 12-13.

Although the Applicants did decide to go forward with their renovation for 12 units when they had a C of O showing an occupancy load of eight units, the Board declines to find this created a self-imposed hardship. The Applicants could not have renovated the building for 12 units

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without the implicit agreement and permission of the District government in issuing the building permits and building inspection approvals. This “implicit permission” continued for the next four years, with no enforcement action taken until the ZA’s October 15, 2008 letter. Indeed, any enforcement action attempted pursuant to that letter would likely be barred by the affirmative defense of *laches*.

The Applicants, although business people, do not, from the record, appear to be particularly sophisticated, and Ms. Rosan testified that they relied on DCRA personnel, but never received a clear answer as to why they would be limited to only eight units. *See, generally*, September 15, 2009 Hearing Transcript at 171-181. The Applicants were operating under the reasonable assumption that they were permitted to operate a 12-unit rooming house and the assumption was founded on a good faith reliance on actions (and inactions) of the District government. Unemotionally scrutinizing the entire history of this property, and balancing all the factors which ultimately resulted in the undue hardship claimed by the Applicants, the Board concludes that the Applicants never demonstrated the knowledge necessary to a finding of self-imposed hardship.

The ANC also opines that granting the variance would harm the public good and that it seeks to limit non-residential uses in this residential zone. But, the daily-occupancy non-residential use of the subject building is allowed at eight units, whether or not this variance is granted.

The ANC also complains of taxis dropping off guests, trash in front of the building and noise. It appears from the record in the case that guests are dropped off by taxi, but no more so than is done for tenants/visitors of the nearby apartment buildings, which house many more people than lodge at the subject rooming house. Complaints of trash and noise were not borne out at the hearing, where it was shown that the Applicants store their trash behind a wrought iron gate between two buildings and that the origin of trash in front of the subject building was often not known, and, likely not the rooming house. *See, e.g.*, September 15, 2009 Hearing Transcript at 149, lines 4-17 and October 27, 2009 Hearing Transcript, generally, at 320-327. As to noise, the ANC does not elaborate, but the Board reiterates that normal conversational voices are not a detriment to the public good.

Lastly, the ANC expresses concerns that there is no constant on-site manager of the property. There is no requirement in the Zoning Regulations that the Applicants reside in the subject building (as opposed to a bed and breakfast, which is considered a “home occupation” requiring residence on the property by the proprietor -- 11 DCMR § 203.8(g)) and the evidence at the hearing established that either one of the Applicants or their designee is always on the property. *See*, September 15, 2009 Hearing Transcript at 149, lines 2-3, & at 191-192, and October 27, 2009 Hearing Transcript at 338. Moreover, the District of Columbia Court of Appeals has admonished the Board for imposing conditions that “micromanage” the operations of an applicant, finding that such conditions “go far beyond the proper concerns and expertise of the BZA.” *President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 63 (D.C. 2003)

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For all the reasons above, the Board concludes that the Applicants have satisfied the burden of proof for a use variance pursuant to 11 DCMR § 3103.2 to allow a maximum of 12 guest units for daily occupancy in the rooming house at 2005 Columbia Road, under subsection 2002.3 of the Zoning Regulations. Accordingly, it is **ORDERED** that the application is hereby **GRANTED**.

VOTE: **3-1-1** (Marc D. Loud, Shane L. Dettman, and Meridith H. Moldenhauer to Approve; Anthony J. Hood to Deny; No fifth Board Member participating or voting)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

A majority of Board members has approved the issuance of this order.

ATTESTED BY:


JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: APR 08 2010

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE §§ 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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As Director of the Office of Zoning, I hereby certify and attest that on **April 9, 2010**, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party who appeared and participated in the public hearing concerning the matter and to each public agency listed below:

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ATTESTED BY:

A handwritten signature in dark ink, appearing to read "Jamison L. Weinbaum", is written over a horizontal line.

JAMISON L. WEINBAUM
Director, Office of Zoning

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