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BEFORE THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

APPLICATION OF KENNETH AND ELLEN J. MARKS pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy (section 403), rear yard (section 404), and nonconforming structure (subsection 2001.3) requirements to allow the construction of an addition to an existing one-family row dwelling in the R-3 District at premises 2130 Bancroft Place, N.W.(Square 2532, Lot 802).	) BZA Case No. 18398

SUPPLEMENTAL INFORMATION FROM APPLICANTS FOR INTERVENTION
DEBORAH CARSTENS, NORMAN POZEZ AND MELINDA BIEBER,
MARIE DRISSEL AND CURTIS BRISTOL, M.D., AND
SHERIDAN-KALORAMA HISTORICAL ASSOCIATION

This memorandum will supplement the applications for intervenor status filed by the persons and organization listed above (the "Neighbors"), specifically, to respond to the applicants' recent decision to modify the previously submitted plans for this property with the result that the applicant is seeking only special exception relief instead of variance relief.

The individual Neighbors live adjacent to the subject property (Ms. Carstens at 2128 Bancroft Place; Mr. Pozez and Ms. Bieber at 2132 Bancroft Place) and across the street (Ms. Drissel and Dr. Bristol at 2135 Bancroft Place). The Sheridan-Kalorama Historical Association is a neighborhood preservation organization dedicated to preserving the character of the neighborhood and whose members live in and near the affected site.

The specific interest of these neighbors is more fully set forth in their earlier filings. If intervention is granted, these applicants, represented by undersigned counsel, will work together to present a unified presentation to the Board.

Factual background.

The subject property is characteristic of rowhouses in Sheridan-Kalorama, with several

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EXHIBIT NO. 46

stories at the front of the house, an open courtyard in the middle, and a garage in the rear. The original application sought variance relief so that the open space could be enclosed by a glass ceiling in order to create what was called a "conservatory" linking the front of the house with the garage. This conservatory was part of a broader plan to add an addition on the front of the house and an additional level above the garage.

The principal objection to the initial proposal was the elimination of open space by the proposed increase in lot occupancy to approximately 90 percent of the lot. Open space is at a premium in this neighborhood, and there was concern that variance relief being sought could set a bad precedent, as the "hardship" being claimed was the purported inability of the recent purchasers to "age in place" in a house that has been a private residence for 50 years. Given that each of us is aging, whether "in place"or otherwise, this rationale could have undermined the integrity of the Zoning Map if it could be used to eviscerate the lot occupancy and other limitations.

Several days ago the applicants circulated revised plans. They still propose an addition on top of the front of the house and the garage, but instead of connecting the two through an enclosed conservatory, they now propose a "breezeway" approximately six feet above the ground that would horizontally connect the main floor of the house (which is several steps above the grade at the front of the house) with the new second-floor addition over the garage, to be used as a master bedroom. (The property slopes downward from front to back, so the rear of the house is at a lower grade than the front of the house.)

This proposed breezeway will be at or close to the property line of Ms. Carstens' house at 2128 Bancroft Place. It has been tailored to increase the lot occupancy to 70 percent from the default maximum of 60%, thus qualifying the applicants' to seek a special exception under section 223 of the Zoning Regulations.

Discussion.

Special exceptions require that a project be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and that relief can be granted without adversely affecting neighboring properties. Section 223 asks the Board to focus on several factors, including–

• whether the "light and air available to neighboring properties shall not be unduly affected"; and

• whether the "privacy of use and enjoyment of neighboring properties shall not be unduly compromised."

The negative effects on the immediate neighbors occur as follows:

•Ms. Carstens will be staring at a 31-foot wall outside her windows on what is supposed to be open space.

•Mr. Pozez and Ms. Bieber are adversely affected because the breezeway is not a self-contained addition, nor is it a "bridge to nowhere." Its sole purpose is to connect the new, second story addition over the garage (the proposed master bedroom) to the main part of the house.

The Neighbors will provide evidence and elaborate on these points at the hearing.

These factors are sufficient to deny the requested relief under Section 223. There is another dimension to this case, however, that also argues for denying the requested zoning relief. Section 223 requires an applicant to show that the neighbors' "enjoyment" of their properties not be "unduly compromised." That cannot be said here because of a special set of conditions affecting this property, the adjacent properties and the other residences on Bancroft Place.

As noted, the 2100 block of Bancroft Place is part of the Sheridan-Kalorama Historic District. The consistency of applicants' proposal with the Historic District is, of course, a matter for the Historic Preservation Review Board, and we focus here solely on zoning issues. What is significant for the zoning issue of a neighbor's "enjoyment" being "unduly compromised" is the fact that the subject property, as well as the two adjacent properties and the house across the street, along with most of the 25 houses in this block are subject to "conservation easements" designed to protect the facade and open space.

Indeed, when the applicants bought 2130 Bancroft last year, they did so knowing that the property was subject to a "Scenic, Open Space and Architectural Facade Easement," the text portions of which are attached as Exhibit 1. This 2003 easement, which the prior owners entered into with the L'Enfant Trust, states that the purpose is to "assist in preserving a historically important land area or a certified historic structure and in *preserving open space for the scenic enjoyment of the general public*." Further, it is the "intent of the parties that the Facade, Building and Property (except for minor changes in landscaping) *remain essentially unchanged*," with ambiguities to be resolved according to photographs and descriptions attached to the easement. Exhibit 1, paragraphs I(C) and (E) (emphasis added). Provisions in part II of the easement deal with limiting changes to the facade and allowing changes to exterior extensions in the event of fire or other destructive acts.

The decision of most property owners in this block to sign such easements did not happen by chance, but resulted from mutual efforts by homeowners over the years to preserve the character of this block in what is an older, fully built-out neighborhood of the District of

Columbia. Questions about an owner's "enjoyment" of his or her property are obviously contextual and must be judged on the individual facts of each case. Here, that enjoyment would be "unduly compromised" if the requested zoning relief were to contradict self-imposed limitations on homeowners designed to prevent added density and reduced open space on the property.

This additional factor argues in favor of denying the requested exception relief. There is, however, a broader question that the Board may wish to ask, namely, Why is this case being heard, if the applicants know (and knew when they bought the property) that there is an easement preventing construction of the desired addition?

The Neighbors have been advised that the applicants have approached the L'Enfant Trust about modifying the terms of the easement or otherwise granting consent to the proposed breezeway and other changes. We understand that the L'Enfant Trust's position is that it will not consider any requests to change the easement until after this Board has heard and decided this case (and perhaps after proceedings before the Historic Preservation Review Board as well).

This approach puts the cart before the horse. It compels the Neighbors – and the Board – to expend limited resources on a public zoning hearing when the applicants have no legal right to build the proposed addition. The applicants bear the burden of proof in zoning cases, and the negative impact on adjacent neighbors here is clear. The legality of any construction under a *private* easement agreement is a matter to be resolved before the applicants ask the Board to devote *public* resources to decide what could be just a theoretical question.

Conclusion.

The Neighbors will develop these points more fully at the hearing, but for these reasons and those on which we will testify, the Neighbors respectfully submit that the application should be denied. Alternatively, we ask the Board to defer action until such time as the applicants can demonstrate that the proposal is consistent with the existing easement preserving the subject property.

Respectfully submitted,

Cornish F. Hitchcock

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Deborah Carstens, Norman Pozez and
Melinda Bieber, Marie Drissel and
Curtis Bristol, M.D., and Sheridan-
Kalorama Historical Association

24 October 2012

CERTIFICATE OF SERVICE

I hereby that on this 24th day of October, 2012, I caused this document to be served electronically and by first-class mail, postage prepaid, upon Allison C. Prince and Cary Kadlecek, Goulston & Storrs, 1999 K Street, NW Suite 500, Washington, DC 20006 and upon Advisory Neighborhood Commission 2D, 2122 California Street, NW, Washington, DC 20009.

Cornish F. Hitchcock

CONSERVATION EASEMENT DEED OF GIFT

THIS IS A DEED of a Scenic, Open Space and Architectural Façade Easement, made on the 1st day of December 2003 by George J. Palladino and Jerrold St. George ("Grantor," the term being used collectively if there is more than one owner of the Property)to The L'Enfant Trust ("Grantee").

I.

A. The Grantee is a District of Columbia non-profit corporation chartered to promote a public aesthetic in land use planning, including the preservation of historically important properties, and is a "qualified organization" as defined in Section 170(h)(3) of the Internal Revenue Code.

B. The Grantee is authorized to accept and administer gifts of real and personal property, including easements for conservation purposes, in furtherance of its public purposes.

C. The Grantor is the owner in fee simple of improved real property, identified as 2130 Bancroft Place NW, Washington, DC 20008 and fully described in Exhibit "A" (LEGAL DESCRIPTION USED ON DEED OF PURCHASE FOR PROPERTY) attached hereto and incorporated herein by this reference (the "Property").

D. The Property constitutes an important element in the architectural ensemble of the Historic District in which it is located and the grant of the easement as set forth in this instrument will, *inter alia*, assist in preserving a historically important land area or a certified historic structure and in preserving open space for the scenic enjoyment of the general public.

E. Grantor desires to grant to the Grantee, and the Grantee desires to accept a scenic, open space and architectural facade easement on the Property, exclusively for conservation purposes.

F. The term "Facade" as used herein consists of all exterior surfaces of the improvements on the Property, including all walls, roofs, and chimneys (the existing improvements at the Property hereinafter sometimes referred to as the "Building"). Written descriptions and photographs of the Facade are "Exhibit B" hereto and are on file at the offices of the Grantee but are not appended hereto. It is the intent of the parties that the Facade, Building and Property (except for minor changes in landscaping) remain essentially unchanged, and in case of ambiguity, the photographs and descriptions constituting Exhibit B shall control.

II.

The Grantor does hereby grant and convey to the Grantee, TO HAVE AND TO HOLD, an easement in gross, in perpetuity, in, on, and to the Property, the Building and the Façade, being a scenic, open space and architectural facade easement on the Property, with the following rights:

A. Without the express written consent of the Grantee, which consent may be withheld, conditioned or delayed in the sole and absolute discretion of the Grantee, the Grantor will not undertake nor suffer nor permit to be undertaken:

1. any alteration, construction or remodeling of existing improvements on the Property, or the placement thereon or on the Building of signs or markers, which would materially alter or change the appearance of the Facade);

2. the exterior extension of existing improvements on the Property or the erection of any new or additional improvements on the Property or in the open space above or surrounding the existing improvements except for, subject to the consent of the Grantee which consent will not be unreasonably withheld, the erection of new improvements, including an architecturally consistent Facade, to replace existing improvements which have been wholly or partially destroyed (e.g., by fire); or

3. the painting or cleaning of the Facade in a manner incompatible with the protection and preservation of the Façade; provided, however, that the maintenance, reconstruction, repair and refinishing of presently existing elements of the Facade, damage to which has resulted from casualty loss, destruction or deterioration, is permitted so long as it is conducted in a manner which will maintain or recreate the essential appearance of the Facade as it exists at this date or as it existed at the time the improvements were first constructed; and provided, further, that dignified signs or markers may be placed on the Facade without consent of the Grantee so long as they (i) indicate no more than the street address and occupants of the premises; or (ii) are necessary to direct pedestrians or vehicular traffic; or (iii) commemorate the history of the Property or the grant of this easement.

B. The Grantor further undertakes periodically to clean the Facade, to keep the Grantee's marker polished and visible from the street, and to maintain the Property, Building and Facade in good repair and condition at all times.

C. Grantor agrees that any rehabilitation work or new construction work on the Façade, whether or not Grantee has given consent to undertake the same, will comply with the requirements of all applicable federal, state and local governmental laws and regulations. Without limiting the foregoing, Grantor's attention is directed to the Secretary of the Interior's Standards for Rehabilitating Historic Buildings, presently codified at 36 Code of Federal Regulations Part 67, and to the District of Columbia Landmarks Preservation Ordinance.

III.

The Grantee, in order to ensure the effective enforcement of this easement shall have, and the Grantor hereby grants it, the following rights:

1. at reasonable times and upon reasonable notice, the right to enter upon and inspect the Facade and any improvement thereon, but not including the inside of the Building;

2. the right (a) to place a marker on the Facade providing historical information and/or indicating the Grantee's ownership of this easement, and (b) to keep such marker clean and visible from the street;

3. in the event of a violation of this easement and upon reasonable notice to the Grantor:

(a) the right to institute legal proceedings to enjoin such violation by temporary, and/or permanent injunction, to require the restoration of the Property or the improvements thereon, including the Facade and open space, to its prior condition, to collect damages, to be reimbursed by Grantor for all reasonable costs and attorneys fees, and to avail itself of all other legal and equitable remedies, including the right to seek to place a lien against the property to secure payment of any of the monetary obligations of the Grantor;

(b) the right (i) to enter upon the Property and improvements thereon in order to correct such violation and (ii) to hold Grantor responsible for the cost thereof.

IV.

A. This easement is binding not only upon Grantor but also upon its successors, heirs and assigns and all other successors in interest to the Grantor, and shall continue as a servitude running in perpetuity with the land. This easement shall survive any termination of Grantor's or the Grantee's existence. The rights of the Grantee under this instrument shall run for the benefit of and may be exercised by its successors and assigns, or by its designees duly authorized in a deed of appointment.

B. Grantee covenants and agrees that it will not transfer, assign or otherwise convey its rights under this conservation easement except to another "qualified organization" described in Section 170(h)(3) of the Internal Revenue Code of 1986 and controlling Treasury regulations, and Grantee further agrees that it will not transfer this easement unless the transferee first agrees to continue to carry out the conservation purposes for which this easement was created, provided, however, that nothing herein contained shall be construed to limit the Grantee's right to give its consent (e.g., to changes in a Façade) or to abandon some or all of its rights hereunder.

C. In the event this easement is ever extinguished, whether through condemnation, judicial decree or otherwise, Grantor agrees on behalf of itself, its heirs, successors and assigns, that Grantee, or its successors and assigns, will be entitled to receive upon the subsequent sale, exchange or involuntary conversion of the Property, a portion of the proceeds from such sale, exchange or conversion equal to the same proportion that the value of the initial easement donation bore to the entire value of the property at the time of donation, unless controlling state law provides that the Grantor is entitled to the full proceeds in such situations, without regard to the easement. Grantee agrees to use any proceeds so realized in a manner consistent with the conservation purposes of the original contribution.

IN WITNESS WHEREOF, the Grantor has executed this Conservation Easement Deed on the date first written above.

Jerold H. Dep

Grantor

[illegible]

Grantor

Accepted:
The L'Enfant Trust

By: Carol B Goldman

Date: 12/1/03

Loan # 942418L60.1

Consent of Lienholder

Marriott Employees' Federal CU ("Lienholder"), hereby consents to the grant of the foregoing Façade Conservation Easement by George J Palladino and Jerrold St. George to The L'Enfant Trust, and joins in the execution hereof solely as Lienholder and hereby does agree that in the event of the foreclosure of said mortgage, or other sale of said property described in said mortgage under judicial or non-judicial proceedings, the same shall be sold subject to said Easement Deed of Gift.

SIGNED AND EXECUTED this **24th** day of **November** 2003.

By: JOYCE D. PARKER

Title: **SENIOR VICE PRESIDENT**

STATE of Maryland

COUNTY of MONTGOMERY

BEFORE ME, the undersigned authority, on this day personally appeared **Joyce D. Parker**, **Senior Vice President** of Marriott Employees' Federal Credit Union, known to me to be the person and Officer whose name is subscribed to the foregoing instrument and who acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, as the act and deed of the said compotation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS **24** day of **November** 2003.

Notary Public

My commission expires: June 26, 2004

JOCELYN B. CLARK
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires June 26, 2004

Loan #:591-4694087

Consent of Lienholder

Wells Fargo Home Mortgage, Inc., a California Corporation ("Lienholder"), hereby consents to the grant of the foregoing Conservation Easement Deed of Gift by George J. Palladino and Jerrold St. George to The L'Enfant Trust, and, joins in the execution hereof solely as Lienholder and hereby does agree that in the event of the foreclosure of said mortgage, or other sale of said property described in said mortgage under judicial or non-judicial proceedings, the same shall be sold subject to said Conservation Easement Deed of Gift.

SIGNED AND EXECUTED this 20th day of NOVEMBER, 2003.

Wells Fargo Home Mortgage, Inc.

By: Lorna L Slaughter
Lorna L. Slaughter
Vice President Loan Documentation

STATE of MARYLAND

COUNTY of FREDERICK

BEFORE ME, the undersigned authority, on this day personally appeared Lorna L. Slaughter, Vice President Loan Documentation, of Wells Fargo Home Mortgage, Inc., a California corporation, known to me to be the person and Officer whose name is subscribed to the foregoing instrument and who acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, as the act and deed of the said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE THIS 20th day of NOVEMBER, 2003.

Nanette S. Francella
Notary Public

My commission expires: 3-01-2007

NANETTE S. FRANCELLA
NOTARY PUBLIC STATE OF MARYLAND
County of Frederick
My Commission Expires March 1, 2007

Notary Form for Individual Donors

______________________________)
SS:
______________________________)

I, DAVID BROOKS, a notary public in and for the state and county aforesaid, do hereby certify that George Palcaoino + Jerold St. George, the Grantor in the foregoing Deed bearing the date on the 23 day of November, 2003 and hereto annexed, personally appeared before me in said jurisdiction the said ________________________, being personally well-known to me as the persons who executed the said Deed, and acknowledged the same to be his/her/their act and deed.

Given under my hand and official seal this ____ day of __________, 2____.

____
Notary Public

[SEAL]
My Commission Expires: 8/31/03