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**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

This statement is submitted on behalf of Erin Murphy and Johanna Sears, (the "Applicants"), who own two condominium units on Square 514, Lots 2214 (Murphy) and 2215 (Sears), also knows as Lots 48 through 50 and taxed as Lot 827 (the "Property"). The Applicants seek a variance from Section 2507.1 of the Zoning Regulations in order to permit the continued use of their dwellings on the Property, which are alley lots.

Pursuant to Section 3113.8 of the Zoning Regulations, the Applicant will file its prehearing statement with the Board no fewer than 14 days prior to the public hearing date. In that statement, and at the public hearing, the Applicant will provide testimony and additional evidence to meet its burden of proof to obtain the Board's approval of the requested relief.

I. Background Information Regarding the Site

The Property is located to the rear of the premises located at 1131 5th Street, N.W. near the southeast corner of the intersection of 5th and M Streets, N.W., in the Mount Vernon neighborhood. The Property, which is zoned DD/R-5-B, consists of approximately 1,993 square feet and is located on an alley in the interior of the Square. It is improved with a three-unit apartment building, two of which are separately owned by the Applicants.[1]

II. Description of Proposal and Zoning Relief

The Applicants seek a variance from Section 2507.1 of the Zoning Regulations, which states that "Except for use as a on-family dwelling, a structure shall not be erected, constructed, converted, altered, remodeled, restored, or repaired for human habitation on an alley lot." An

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[1] According to the Office of Tax and Revenue website, the third unit (Lot 2216) is owned by Kondaur Capital Corporation.

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alley lot is defined as a lot facing or abutting an alley and at no point facing or abutting a street. 11 DCMR 199.1

The subject apartment building was completed in 2008. The developer, John Denning, converted an existing building into three condominium units and recorded a plat of condominium with the Recorder of Deeds on March 31, 2008, the condo plat and the other documents attached as Exhibit A, make it clear that the Property was to be used for three apartment units and two parking spaces.

The Applicants purchased their units from the developer in 2009, but have since come to discover that the District had not issued a Certificate of Occupancy for the use of the premises as an apartment house. By letter dated June 30, 2010, a copy of which is attached as Exhibit B, the Department of Consumer and Regulatory Affairs ("DCRA") notified the Applicants that the apartment building is in violation of the current Zoning Regulations, citing Section 2507.1. We have researched the records of DCRA and the Office of Tax and Revenue ("OTR"), but have been unable to find any records of permits issued before our clients acquired their units.

In light of this circumstance, the Applicants seek the Board's approval of a variance of Section 2507.1 in order to permit the continued use of the Property as a three unit apartment building.

III. Burden of Proof for Area Variances

Under D.C. Code §6-641.07(g)(3) and 11 DCMR §3103.2, the Board is authorized to grant an area variance where it finds that three conditions exist:

(1) the property is affected by exceptional size, shape or topography or other extraordinary or exceptional situation or condition;

(2) the owner would encounter practical difficulties if the zoning regulations were strictly applied or exceptional and undue hardship;

(3) the variance would not cause substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan as embodied in the Zoning Regulations and Map.

<u>See</u> *French v. District of Columbia Board of Zoning Adjustment*, 658 A.2d 1023, 1035 (D.C. 1995) (*quoting Roumel v. District of Columbia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *<u>see</u> <u>also</u>, Capitol Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987). As discussed below, and as will be further explained in the prehearing statement at the public hearing, all three prongs of the area variance test are met in this Application.

A. <u>The Property Affected by an Exceptional Situation or Condition.</u>

The phrase "exceptional situation or condition" in the above-quoted variance test applies not only to the land, but also to the existence and configuration of a building on the land. <u>See</u> <u>Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment</u>, 320 A.2nd 291, 294 (D.C. 1974). Moreover, the unique or exceptional situation or condition may arise from a confluence of factors which affect a single property. <u>Gilmartin v. D.C. Board of Zoning Adjustment</u>, 579 A.2nd 1164, 1168 (D.C. 1990).

In this case, the existence of the apartment building on the Property is an exceptional situation or condition. Notwithstanding Section 2507.1 of the Zoning Regulations, the Developer was able to construct the subject apartment building on the Property. We are unable to find any record of building permits for the existing building, however, the District has recognized the use of the Property as a three unit apartment building in the following ways:

- The Developer recorded a plat of condominium with the Recorder of Deeds on March 31, 2008, prior to the Applicant's purchase of their respective units. The condo plat and documents attached as <u>Exhibit A</u>, make it clear that the Property was going to be used for three apartment units and two parking spaces.

- Since early 2008, as reflected in the second half of Tax Year 2008, through the current period, the District has assessed the Property as residential use (Use Code 16 - residential condo horizontal) and rendered tax bills considering the Property to be in Tax Class 1 (residential). The Applicant is current in their tax payment to the District. Copies of old tax bills and most recent assessment information from OTR are attached as Exhibit C.

- An electrical permit No. E0904074, dated April 20, 2009, was issued to a contractor, where the existing use is specified as an "apartment house" and the proposed use is an apartment house." A copy of that permit is attached as Exhibit D.

Based on our understanding of the assessment process, the only way in which the District would have know to reassess the Property in 2008 would have been for OTR to have seen permit drawings of the work in order to establish the use or through physical inspection of the Property. In either event, this would have occurred prior to the Applicants' purchase of their units. If a violation notice had been sent, the Applicants would not have purchased the units in 2009.

B. Strict Application Would Result in an Exceptional and Undue Hardship to the Property Owner

The strict application of Section 2507.1 would result in an exceptional and undue hardship on the Applicants because it means that the Property could no longer be used for residential purposes. The units are distinctly designed and suited for residential purposes and the Applicants purchased their respective condominium units for such purposes. According to OTR's records, Ms. Murphy purchased her unit for $255,000.00 and Ms. Sears purchased her unit for $265,000.00. If the Board denies their variance request, the Applicants would be forced to move from their residences. The structure would be limited to the storage of wares and goods, parking lot, parking garage, or public storage (11 DCMR §333), resulting in the loss of the Applicant's investment in their home and significant financial hardship to the Applicants.

C. No Substantial Detriment to the Public Good Nor Substantial Impairment to the Intent, Purpose and Integrity of the Zone Plan

There will be no substantial detriment to the public good and no substantial impairment to the intent, purpose and integrity of the zone plan, by granting the requested use variance.

First, the Property is in the DD/R-5-B District. R-5 Districts are intended to permit all types of urban residential development. Second, the existing three-unit apartment building is surrounded by residential uses and is, therefore, compatible with the surrounding area. We submit that the apartment building is more in keeping with the character of the area than the aforementioned non-residential uses that are permitted on the property. Third, the existing three-unit apartment building does not generate excessive traffic, noise or other nuisance to the surrounding residential uses. Finally, the Property is accessible to/from 5th and M Streets via a convenient public alley network.

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