BEFORE THE DISTRICT OF COLOMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF **26 T STREET NE**
IFEANYICHUKWU EGBUNIWE **ANC 5C**

STATEMENT OF THE APPLICANT

I. NATURE OF RELIEF SOUGHT

This statement is submitted on behalf of IfeanyiChukwu Egbuniwe (the "Applicant"), the owner of property located at 26 T Street NE, Lot 0039 in Square 3509S (the "Property") in support of her application for variance relief, pursuant to 11 DCMR §3103.2, regarding (i) the height and story requirement (§400.1) and (ii) the lot area requirement (§401.3) to allow the continued use of an existing four-story, three-unit apartment building in the R-4 District that does not comply with the Zoning Regulations.

II. JURISDICTION OF THE BOARD

The Board of Zoning Adjustment (the "Board" or "BZA") has jurisdiction to grant the variance relief requested herein pursuant to §3103.2 of the Zoning Regulations.

III. BACKGROUND

A. Background Information Regarding the Property

The Property, also known as Lot 39 in Square 3509S, contains approximately 1,750 square feet of land area. Square 3509S is bounded by Todd Place NE to the north, Lincoln Road NE to the east, T Street NE to the south, and North Capital Street to the west (see Baist Atlas plat, attached here to as Tab 8). Square 3509S is located in the R-4 District (see Zoning Map, attached hereto as Tab 9) and encompasses multi-story attached rowhouses, flats, and apartment buildings. The Property is located approximately 1.1 miles from the Rhode Island Metrorail entrance and 0.8 miles from the Shaw Metrorail entrance. The Property is presently improved with a four-story, three-unit apartment building that does

not conform to the Zoning Regulations. The Property has approximately 18.33 feet of frontage along T Street NE. The Property is not located within any historic district, and the existing building on the Property is not listed on the D.C. Inventory of Historic Properties.

B. Description of the Improvements in the Surrounding Area

The Property is located in a large R-4 District made up of multi-story attached rowhouses, flats, and apartment buildings, including The Indigo Apartments and The Summit at St. Martin's apartments. The Property is in the eastern portion of the Bloomingdale neighborhood near the border with Eckington. Langley Junior High School is located to the southeast and McKinley Technical High School is located to the east. North Capital Street is to the west and Rhode Island Avenue NE is to the north. Directly east across Lincoln Road NE are additional attached and semi-attached residences. Across Rhode Island Avenue NE is the Prospect Hill Cemetery and St. Mary's Catholic Cemetery.

C. Description of the Traffic Conditions and Mass Transit Options in the Surrounding Area

The Property is well serviced by a number of public transportation facilities and services along Rhode Island Avenue and North Capital Street including Metro, Metrobus, Capital Bikeshare, Zipcar, and Car2Go. The Property is located approximately 1.1 miles from the Rhode Island Metrorail entrance and 0.8 miles from the Shaw Metrorail entrance. Metrobus route 80 runs along North Capital Street and route G8 runs along Rhode Island Avenue. Three Capital Bikeshare stations are located within walking distance of the Property, including stations at the intersections of 1st Street and Rhode Island Avenue NW, Florida Avenue and R Street NW, and Eckington Place and Q Street NE. Zipcar spaces are located at Ledroit Park as well as the intersection of Harry Thompson Way & Eckington NE. Car2Go, which began in Washington DC in March 2012, provides additional vehicular options for those who live at the Property.

D. Relevant History of the Development of the Property

The Applicant recently purchased the Property on January 10, 2012 at which time all improvements and renovations had previously been completed. Six months after she closed on the Property, the Applicant became aware that the Property was in violation of the Zoning Regulations. Upon learning of the violation, the Applicant embarked on this process to rectify the current noncompliant aspects of the Property. The following history of the development of the Property, as ascertained from the DC Recorder of Deeds records, DCRA building permits, inspections and files and discussion with the seller, is relevant to this Application.

On January 11, 2006, Robin P. Lancaster purchased the Property from 26 T Street, LLC. Lancaster gutted the existing two-story structure, excavated a full basement, and raised the ceiling on the third story.[1] On February 10, 2006, a permit was issued (#B89564) for the demolition of the existing walls, plumbing, electrical, HVAC, and flooring. That permit issuance included a zoning review. On May 25, 2007, a permit was issued for demolition of select interior walls, removal of the old HVAC, plumbing, electrical lines and to install new exterior doors and windows. On April 8, 2008 a permit was issued (#B109591) for "Updating all electrical, plumbing, HVAC and interior fixtures. Renovating lower unit completely excavating front yard to create new patio in the front and parking pad in the rear." On April 8, 2008, permits were issued (#B117325 and #B117326) for alterations and repairs to the first, second, and third floors as well as alterations to include new kitchens, bathrooms, lighting, mechanical zones, and upgrading the plumbing systems.

Upon reviewing plans found at the Property by the Property's prior owner, we believe Mr. Lancaster did not build in accordance with the plans submitted to DCRA and permits issued. Architectural plans left at the Property by Lancaster show three units (identified as A, B and C), three kitchens, and three separate entrances creating a three-unit building. At some point during the

[1] The third floor's ceiling was raised by approximately seven feet four inches. The addition on this top floor is not a new floor but rather just a taller ceiling.

construction process, Lancaster defaulted on his loan and Aurora Loan Services LLC obtained the Property through foreclosure on May 20, 2009.

On October 26, 2009, Equilibrium Fund Prop 4, LLC ("EFP") purchased the Property from Aurora Loan Service, LLC. At the time EFP purchased the Property, it was three stories and significantly complete in connection with the plans found on site. EFP provided photographic documentation showing the condition of the Property in 2009. EFP continued to complete the renovation in conformity with the plans found on site. EFP extended building permits B117325 and B117326 on February 26, 2010 and continued work. On April 12, 2010, a building permit was issued to EFP (#B1004867) for renovation to "an existing 3 story, basement row house" for additional work and plumbing. EFP asserts that all work was done in good faith and with the belief that the Property was lawfully a three-unit, as shown on the plans created by Lancaster.

EFP desired to provide a more accessible lower level. To achieve this goal, EFP applied for a permit to excavate the front yard. On June 18, 2010, DCRA issued a permit (#B1007161) to excavate the front yard and install a concrete slab patio. In order to obtain that permit, EFP submitted drawings reflecting the existing structure (see Architectural Plans, attached hereto as Tab 10). That building permit indicated that the existing structure had three dwelling units. Furthermore, the plans submitted clearly showed that the existing three-story structure, upon excavation pursuant to the permit issued, would become a four-story structure as a result of the change to the front grade. At the time of the excavation, EFP was unaware that the excavation approved by DCRA would make the structure noncompliant with the zoning regulations with respect to the number of stories and height.

On August 30, 2010, second extensions to building permits B1003651 and B1003652, set to expire March 1, 2011, were issued (#B1009613 and #B1009614). During the inspection and review process for the numerous permits obtained by EFP, DCRA never issued a stop work order and never filed a letter notifying EFP of the zoning violations with the Property. On January 6, 2012, a Certificate of Occupancy was issued (#CO1200845) for an apartment building with three units. EFP listed the Property as a three-unit apartment building and entered into a contract with the Applicant.

On January 10, 2012, the Applicant, IfeanyiChukwuo Egbuniwe, purchased the Property from EFP. The Applicant had no reason to know the Property was in violation of the Zoning Regulations. Following acquisition of the Property, EFP applied to register the change of ownership for the issuance of a new Certificate of Occupancy on behalf of the Applicant in connection with qualifying the Property as a housing accommodation. The change of ownership was registered and a new Certificate of Occupancy was issued on February 16, 2012, #CO1201201, for an apartment building with three units (see Certificate of Occupancy, attached hereto as Tab 11). The Applicant complied with all DCRA business licensing requirements and rented two of the three units.

A notice to revoke the certificate of occupancy was issued on April 20, 2012 from Chief Building Officer Rabbiah Sabbakhan, of DCRA's Inspection and Compliance Administration (see Notice to Revoke Certificate of Occupancy, attached hereto as Tab 12).[2] The Applicant received a subsequent letter from Matthew LeGrant, the Zoning Administrator, on June 1, 2012 citing that the structure was renovated in violation of the Zoning Regulations, specifically (1) having more than the permitted height and stories, and (2) constructing the top story without a building permit (see Letter from Zoning Administrator, attached hereto as Tab 13).

The Applicant attended a meeting with Zoning Administrator Matthew LeGrant, other DCRA officials, and Jay Sarabian from the Office of the Attorney General, to better understand the issues and determine how these violations could be resolved. Based upon the information obtained at the meeting, this Application has been submitted to address zoning relief required as to the height and story requirement and conversion from a flat to a three unit apartment building.

[2] The notice to revoke the certificate of occupancy was mistakenly sent to the wrong address and was not received by the Applicant in a timely manner.

IV. NATURE OF RELIEF SOUGHT AND STANDARD OF REVIEW

Area variances are required from (i) the story and height requirement (§400.1) and (ii) the lot area requirement (§401.3). 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; and

(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.

See French v. District of Colombia Board of Zoning Adjustment, 658 A.2d 1023, 1035 (D.C. 1995) (*quoting Roumel v. District of Colombia Board of Zoning Adjustment*, 417 A.2d 405, 408 (D.C. 1980)); *see also, Capitol Hill Restoration Society, Inc. v. District of Colombia Board of Zoning Adjustment*, 534 A.2d 939 (D.C. 1987).

Applicants for an area variance need to demonstrate that they will encounter "practical difficulties" in the development of the property if the variance is not granted. *See Palmer v. D.C. Bd. Of Zoning Adjustment*, 287 A.2d 535, 540-41 (D.C. 1972)(noting that "area variances have been allowed on proof of practical difficulties only while use variances require proof of hardship, a somewhat greater burden"). An applicant experiences practical difficulties when compliance with the Zoning Regulations would be "unnecessarily burdensome." *See Gilmartin v. D.C. Bd. Of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990). As discussed below, and as will be further explained at the public hearing, all three prongs of the area variance test are met in this Application.

V. THE APPLICANT MEETS THE BURDEN OF PROOF FOR VARIANCE RELIEF

A. The Property is Unusual Because of it is Affected by an Exception Situation or Condition

The phrase "exceptional situation or condition" in the above-quoted variance test applies not only to the land, but also to the existence and history behind the configuration of a building and other subsequent events extraneous to the land itself. *See Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment*, 22 A.3d 748 (D.C. 2011) (Holding that an exceptional situation existed because an applicant before the Board of Zoning Adjustment seeking a variance from the zoning code demonstrated good faith, detrimental reliance on actions the actions of city officials, namely the issuance of a building permit by the Department of Consumer and Regulatory Affairs ("DCRA"), in believing that they were acting in accordance with the zoning regulations); *See also Clerics of St. Viator, Inc. v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974)(Holding that an exceptional situation existed because of the failure of a seminary to remain a viable institution). This Court, regarding the phrase "extraordinary or exceptional situation or condition," has found that "that term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases . . . ." *DeAzcarate v. District of Columbia Bd. Of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978); *Monaco v. District of Columbia Bd. Of Zoning Adjustment*, 407 A.2d 1091, 1097 (D.C. 1979). Moreover, the unique or exceptional situation may arise from a confluence of factors which affect a single property. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990).

While exceptional circumstances more commonly arise from the physical features of a Property, such as shape, size or topography, the prior zoning history of a Property can also be considered. *Monaco*, 407 A.2d at 1100 ("This case, like *DeAzcarate*, illustrates that extraordinary circumstances can encompass the past zoning history, as well as the physical features, of the property."). The Court has upheld BZA decisions that an exceptional situation arose from a good faith, detrimental reliance on the actions of city officials in purchasing property or investing in its renovation. *Oakland Condominium v.*

District of Columbia Bd. of Zoning Adjustment, 22 A.3d 748 (D.C. 2011); *DeAzcarate v. District of Columbia Bd. Of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978); *Monaco v. District of Columbia Bd. Of Zoning Adjustment*, 407 A.2d 1091 (D.C. 1979). This action by city officials has included the erroneous issuance of building permits by DCRA based on the notion that the building permit reflects a zoning decision. *Oakland Condominium*, 22 A.3d at 753 (citing *Basken,* 946 A.2d at 364 ("[T]he building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations.")).

In *Oakland Condominium*, the Court found reasonable reliance when a property owner spent $300,000 renovating a twelve-room bed and breakfast after securing building permits from DCRA for demolition, plumbing, heating, and renovation of the property on the basis of approved plans for a twelve-room housing operation. 22 A.3d at 751. After the renovations were completed, the Zoning Administrator advised the property owner that they must obtain a use variance to have more than eight rooms or an occupancy length of less than 90 days. *Id* at 750-51. Because the property owner completed renovations based on DCRA's issuance of the required building permits, the Court affirmed the BZA's conclusion that the property owner acted based on reasonable reliance. *Oakland Condominium,* 22 A.3d at 753 (citing *Basken*, 946 A.2d at 364).

In *Monaco*, the Court affirmed the BZA's granting of an area variance to the Republic National Committee ("RNC") seeking to expand the RNC's offices in an R-4 District bordering the Capitol Grounds. 407 A.2d at 1103. After condemnation of their property to construct the Madison Library, the RNC acquired another suitable property and received assurance of the Zoning Commission that the project would "proceed by means of a series of area variances." *Id* at 1095. The Court agreed with the BZA that an exceptional situation existed because of these unique historical circumstances, namely the RNC's "good faith, detrimental reliance on the zoning authorities' 'informal assurances.'" *Id* at 1101.

The Board of Zoning Adjustment in Appeal No. 18181 of AMM Holdings, Inc., a case decided March 29, 2011, the BZA rescinded a Stop Work Order to prevent the final stages of construction of a three-unit apartment building in an R-4 District where only a flat or a conversion to an apartment building, but not new construction of an apartment building, are permitted as a matter of right. While appealing a Stop Work Order on the basis of an estoppel argument, a similar good faith, reasonable reliance argument was accepted by the BZA. The BZA found reasonable reliance on a building permit from DCRA, issued in error, to construct a new three-unit apartment in an R-4 District. Relying on the building permit and all the approvals that led up to its issuance, the owner constructed the vast majority of the structure expending $350,000 in construction costs.

In this case, the Property is affected by an exceptional situation that arose from good faith, detrimental reliance. The Applicant was not involved in the renovation or unlawful conversion of the two-unit flat to a three-unit apartment building. The Applicant believed, in good faith, that the building, as constructed, marketed and sold, was in compliance with all regulations and requirements. The Applicant is not a developer, contractor, or real estate investor. Rather, she is a young single female with no prior development experience. She purchased the Property with the intention of renting out two of the three units and residing in the third unit as her primary residence. She was unaware of the zoning violations at the time she purchased the Property. The Applicant detrimentally relied on the actions of city officials in purchasing the nonconforming property, namely DCRA's prior issuance, in error, of building permits and subsequent certificate of occupancy for the Property.

B. <u>Strict Application of Zoning Regulations Would Result in Practical Difficulty to the Owner</u>

1. <u>Strict Application of the Zoning Regulations</u>

Strict Application of the Zoning Regulations would cause the Applicant to suffer a practical difficulty because compliance would be "unnecessarily burdensome." *See Gilmartin*, 579 A.2d at 1170. In *Gilmartin*, the Court held that "at some point economic harm becomes sufficient, at least when coupled

with a significant limitation on the utility of the structure." 579 A.2d 1164, 1171 (D.C. 1990). In Appeal No. 18181 of AMM Holdings, Inc., the BZA found that demolishing all or a significant part of the structure to make it a flat would be a waste and changing the structure to a two-unit building would result in significant financial losses, constitute a default of the owner's bank loan, and reduce the anticipated sales price. In this case, strict application of the Zoning Regulations with respect to (1) the number of stories and height and (2) lot area would result in a practical difficulty to the Applicant.

i. Height and Story Requirement (§400.1)

With respect to the number of stories and height in an R-4 District, up to three stories and 40 feet of height are permitted as a matter of right. The existing property is four stories and 46'-10''. Here, the Applicant is in a unique position that the existing building already has been completed and her request for relief would be retroactive. Requiring that the Applicant comply with the Zoning Regulations would mean the Applicant must either tear down the top floor of the building or backfill the lower level of the Property with dirt, both of which would require significant reconfiguration. To do so would require significant investment, greatly reduce the value of the Property for which she currently has a mortgage, and present additional difficulties related to the rental of the two units. In sum, both options for resolving the height and story requirement would create a practical difficulty for the Applicant because the steps necessary for either option would constitute an unnecessarily burdensome financial hardship.

ii. Lot Area Requirement (§ 401.3)

With respect to the lot area for conversion to an apartment building in an R-4 District, 900 square feet of lot are required for each unit. The lot area of the Property is 1750 square feet. In light of the prior Certificate of Occupancy, and letter from the Zoning Administrator, two units are permitted on the Property. Strict application of the Zoning Regulations with regard to the lot area requirement would require reconfiguring the existing structure to accommodate only two units.

2. Practical Difficulty

If relief is not granted to permit the fourth floor and three units, dramatic steps would be necessary to comply with the zoning requirements resulting in a practical difficulty to the Applicant. The steps necessary to comply include the demolition of the top level; removing the floating stair leading to the top level; disconnecting the electrical and plumbing to the top level; moving or removing the HVAC system out of the top level; framing the stair area; enclosing, drying walling, and finishing repair for all of the affected areas; and installing a new rubber membrane roof. The estimated cost of the work is $35,000 to $40,000. This cost does not include relocating during the construction period and the dramatic reduction in value of the Property.

Backfilling the lower level, which would remove the lower level door and access, would require completely reconfiguring the units and adding internal stairs. The steps necessary to comply through backfilling include bricking the existing door; backfilling the front area; moving the gas and electric meters; demolishing the existing kitchen as well as reframing, dry walling, and finishing that area; and installing internal stairs to allow access to the basement through the first floor. The estimated cost of backfilling is $30,000 to $35,000.

Neither of the two options is financially feasible. It is highly unlikely that a bank will loan the cost of these renovations because the work will reduce the equity in the home, not increase it. Thus, in addition to the costs associated with bringing the property into compliance with the height and story requirement discussed above, the structure would then need to be converted from a three-unit structure to a two-unit structure. Bringing the structure into compliance with the lot area requirement would require reconfiguring the existing structure to accommodate only two units. The Applicant currently resides in one of the units paying a monthly mortgage of $5743.52. The two other units on the second level and lower level have rents of $2400 and $2200 respectively. Rents do not include gas, trash, WASA payments, or other maintenance and repairs costing between $300 and $500 each month. With rents from

only one unit instead of two the arrangement simply will not be a viable financial option, particularly considering the substantial costs associated with bringing the property into compliance through either option described above. Thus, strict application of the zoning requirements with respect to lot would result in a practical difficulty due to the unnecessarily burdensome financial hardship it would cause.

The self-created hardship doctrine does not apply in area variance cases, only use variance cases. *Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. Board of Zoning Adjustment*, D.C. App. 384 A.2d 674, 678 (1978). Under the self-created hardship rule, a property owner's own affirmative acts, or those of a predecessor in title preclude a basis for granting the use variance relief sought. However, because the variance requested is an area variance, the self-created hardship rule is not applicable. And even if it were applicable, the Applicant was not involved in the renovation or illegal conversion of the two-unit flat to a three-unit apartment building.

C. No Substantial Detriment to the Public Good Nor Substantial Impairment to the Intent, Purpose and Integrity of the Zoning 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 approving the zoning relief. The structure is utilized exclusively for residential purposes permitted as a matter of right in an R-4 zone. The variances requested are exclusively area variances. The proposed project adequately balances the zoning regulations goals of protecting neighboring properties and modernizing a property to a more desirable use.

VI. CONCLUSION

For the reasons stated above, the requested relief meets the applicable standards for variance relief under the Zoning Regulations. Accordingly, the Applicant respectfully requests that the Board grant the application.

Respectfully submitted
Griffin & Murphy, LLP

By: _____

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