

BOARD OF ZONING ADJUSTMENT
APPLICATION NO. 18610
Back Alley, LLC and Ellsworth T. Simpson Trust ("Applicant")

Area Variance Relief
From Section 931.2 for 1063R Wisconsin Avenue, NW

PRE-HEARING STATEMENT

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I. Introduction.

The Applicant is the owner of Lot 48 in Square 1199, located at an address known as 1063 Rear Wisconsin Avenue, NW (Square 1199, Lot 48). The Property is improved with two buildings constructed over 100 years ago (collectively, the "Buildings"). The first building (referred to herein as "Building A" or the "Carriage House") fronts on the alley between M Street and the C & O Canal, and abuts the Blues Alley Jazz Club. The Carriage House was originally constructed in 1903 as a 2-story brick "Livery & Stable." The second building on the Property (referred to herein as "Building B") borders the canal to the south and now serves as the kitchen and offices for Filomena Restaurant on Wisconsin Avenue. Building B was built in 1905. Ellsworth T. Simpson purchased the property in 1906. The Buildings were used as a carriage house, livery, stable, and feed and grain business until 1934, when Ellsworth T. Simpson passed away.

From 1934 – 1994, the Buildings were rented to various tenants. Some of the known uses were storage and warehouse use. The Carriage House has never had the necessary utilities to service its use beyond those uses or other temporary uses. From 1980 to the present, Building B was rented to Filomena Restaurant for use as kitchen and office space. Over the past thirty years, the Carriage House has been used sparingly for special permit activities, such as a film festival, occasional temporary storage, and construction staging. Over the past ten years, the owners of the Property have received a number of offers to rent or purchase the Carriage House, but efforts to establish a permanent productive use of the Carriage House have proven difficult as a result of its location, its

lack of utilities infrastructure, the expense necessary to establish it for modern-day use, and historic preservation restrictions against additions increasing the height of the Carriage House. The Applicant has now found a purchaser (the "Contract Purchaser") willing to purchase the Carriage House property only (and not the Building B property). The Contract Purchaser believes that it can establish a more stable, permanent use for the Carriage House as office or retail use or other such use permitted as a matter-of-right in the W-1 zone district, without the need for adding a third level or otherwise adding to the density of the Carriage House property.

The Property is located in the W-1 zone district, which provides for a maximum floor area ratio ("FAR") of 2.5, only 1.0 of which may be used for nonresidential purposes. The land area of the Property is 8,266 square feet. The gross floor area of Building A, currently vacant, is 5,488 square feet. The gross floor area of Building B is 5,582 square feet, all currently utilized for nonresidential use. The current total FAR for the Property is 1.33, consisting of the unused Building A (.66 FAR) and the fully utilized nonresidential Building B (.68 FAR). Establishing a permanent nonresidential use in the Carriage House use would increase the total nonresidential FAR on the Property to 1.33, or .33 over the maximum permitted nonresidential FAR of 1.0, but still well within the maximum permitted total FAR of 2.5.

II. Nature of Relief Sought.

The Applicant intends to subdivide the Property into two record lots and convey to the Contract Purchaser a portion of the Property consisting of Building A and the land underneath Building A ("New Lot A"). The Applicant will retain Building B and the remainder of the Property ("New Lot B") will continue to be used by Filomena restaurant as it has been for the past thirty years. Both newly subdivided record lots will have frontage on the alley, and the transaction will

include easements that provide for access through the open areas of the Property for the benefit of both property owners. The resulting FAR for New Lot B will be 1.16, or .16 over the maximum permitted FAR of 1.0. The resulting FAR for New Lot A will be 1.58, all of which the Applicant seeks approval to use for a matter-of-right permitted use in the W-1 zone.

So this Application requests relief from the maximum permitted nonresidential FAR requirements of 11 DCMR § 931.2, which limit the maximum FAR in the W-1 zone to 1.0. This Application is not proposing any additions to the Buildings, and merely wishes to use 100% of the existing space for any permitted nonresidential use. Currently, the Applicant is permitted to use 2,684 square feet of the Carriage House (about half of its total 5,488 sf) for nonresidential use. If the Board grants the requested relief, all of the Carriage House's gross floor area could be used for a nonresidential use permitted in the W-1 zone. Any addition of nonresidential space in the future would require additional relief from the BZA.

III. Proposed Project.

The establishment of a permanent, productive use in the Carriage House will require significant "infrastructure" work to bring utility service to that building and to outfit the Carriage House's interior for the requested use as office or retail space. The Carriage House's location adjacent to the Blues Alley Jazz Club and other restaurants and commercial uses, makes residential use in the Carriage House infeasible. In addition to its unfavorable location (for residential use), the Carriage House was built over 100 years ago as a carriage house and has only been used for this and other light industrial and commercial uses. To convert such a space for residential use would entail extraordinary expense not recoverable by the market value of such a residential use. The Contract Purchaser believes that establishing a permanent productive use of the Carriage House is possible if

the entire Carriage House can be used for a nonresidential use permitted in the W-1 zone. As noted above, the Contract Purchaser can currently use about half of the Carriage House's gross floor area for a permitted nonresidential use. This relief would grant the W-1 zone permitted nonresidential use for the rest of the gross floor area in the Carriage House.

IV. Variance Relief.

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 conditions;
- (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 Columbia Board of Zoning Adjustment, 628 A.2d 1023, 1035 (D.C. 1995); see also, Capital Hill Restoration Society, Inc. v. District of Columbia Board of Zoning Adjustment, 534 A.2d 939 (D.C. 1987).

An applicant for area variance relief must demonstrate that, as a result of the exceptional situation or condition of the Property, it will encounter practical difficulties in strictly complying with the Zoning Regulations. See *Palmer v. District of Columbia 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 District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1170 (D.C. 1990).

As described herein, the three prongs of the area variance test are met by this Application.

A. The Property is Unique Because it is Affected by an Exceptional Situation or Condition.

The phrase “other extraordinary or 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. See *Clerics of St. Viator, Inc. v. D.C Board of Zoning Adjustment*, 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. *Gilmartin v. D.C Board of Zoning Adjustment*, 579A.2nd 1164, 1168 (D.C. 1990).

In this case, the exceptional conditions with the Property include (i) the fact that the Carriage House was originally built prior to 1958 as a carriage house, livery, and stable, and neither the Carriage House or Building B has ever been used for residential use; (ii) the Carriage House became a nonconforming structure upon establishment of the W-1 zone restriction of 1.0 nonresidential FAR and has not been used on any permanent basis since prior to that time; (iii) the Carriage House is located between restaurants and other commercial uses and the Blues Alley Jazz Club; (iv) the Carriage House is configured for nonresidential use, and establishing a residential use in the building would require extraordinary expense above and beyond what would be necessary for a basic office or retail use; and (v) current W-1 restrictions would permit the use of only about half

of the Carriage House for a nonresidential permitted use in this zone, leaving half of the Carriage House vacant.

B. Strict Application of the Zoning Regulations Would Result in a Practical Difficulty to the Owner.

As a result of the Property's extraordinary situations and conditions, including the Carriage House's history and location, converting the 100-year old Carriage House to residential, or partial residential use, would be a practical difficulty for the Applicant. The location sandwiched between restaurants, a jazz club, and other nonresidential uses, in a narrow alley, precludes the marketability of a residential space in the Carriage House. In addition, the Applicant would incur extraordinary expense in converting the Carriage House to a residential use, or partial residential use.

This is a typical situation that the BZA variance process was designed to address. The D.C. Court of Appeals has ruled that the variance procedure "is designed to provide relief from the strict letter or regulations, protect zoning legislation from constitutional attack, alleviate an unjust invasion of property rights and prevent usable land from remaining idle" *Palmer v D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541, (D.C. 1972)(emphasis added). The requested relief in this case will help achieve this objective by providing an opportunity for the Carriage House to finally be used for a productive purpose, and no longer remain idle.

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 relief. Granting relief would allow the long-vacant and seldom-used Carriage House to be restored to a productive use that

is compatible with the permitted uses in the W-1 zone and with the surrounding uses. No addition of gross floor area is requested and the total FAR for the Property would be 1.33, well below the maximum permitted 2.5 FAR.

This type of variance request – the expansion of a matter-of-right use beyond a building’s nonresidential FAR limit - has recently been determined by the Zoning Commission to be a matter of area variance relief, rather than use variance relief, pursuant to Z.C. Order No. 12-11, in which the Commission adopted a text amendment including § 3103.5(c), which provides that: “Examples of area variances are requests to deviate from” . (c) Limitations on the extent to which the gross floor area of a building may be occupied by a matter of right non-residential use;” of the Zoning Regulations. This text amendment became effective on June 14, 2013 (D.C. Register, Vol. 60, No. 26, June 14, 2013).

The Board has in the past few years granted several variance requests in mixed-use zones for expanded nonresidential uses within existing buildings (including 2805 M Street and 1328-1330 Wisconsin Avenue – which actually included an addition) where it found that the owner could not reasonably provide residential use on the second floor of those buildings. In this case (as a result of the recent text amendment), the burden of proof is considerably lower than in those cases. Rather than having to prove that strict compliance with the nonresidential FAR limit of 1.0 would be an undue hardship on the Applicant, the Applicant must merely show that compliance with the 1.0 nonresidential limit would be unnecessarily burdensome as a result of exceptional conditions or situations with the property.

V. Conclusion.

For these reasons provided above, the Application meets the requirements for area variance relief and the Applicant respectfully requests that the Board grant the requested relief

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Martin P. Sullivan", is written over a horizontal line.

Martin P Sullivan, Esq.
Sullivan & Barros, LLP

Date: 9/3/13