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March 25, 2015

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: **<u>18 T Street NE (Square 3509S, Lot 43)</u>**
<u>Statement of the Applicant</u>

Honorable Members of the Board:

On behalf of Applicants Jonathan and Jessica Leonard, enclosed please find an application for variance relief from the limitation on height and stories in 11 DCMR § 400.1, the minimum lot area of § 401.2, and the maximum lot occupancy of § 403.1.

Thank you for your attention to this matter. We look forward to the Board's consideration of this matter.

Sincerely,
GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP

Kinley Bray MK
By: Kinley R. Bray

Enclosures:

Cc: Mr. Joel Lawson, Office of Planning (via email)
Jonathan and Jessica Leonard

BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPLICATION OF
JONATHAN AND JESSICA LEONARD

STATEMENT OF THE APPLICANT

I. NATURE OF RELIEF SOUGHT

This Statement is submitted on behalf of Jonathan and Jessica Leonard (collectively, the "Applicant"), the contract purchaser of property located at 18 T Street NE, Lot 0043 in Square 3509S (the "Property") in support of their application for area variance relief, pursuant to 11 DCMR 3103.2, regarding (i) the height and story requirement (§400.1), (ii) the lot area requirement (§401.3), and the maximum percentage of lot occupancy (§403.1) to allow the continued use of an existing four-story flat (two unit) 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 requested herein pursuant to §3103.2 of the Zoning Regulations.

III. EXHIBITS IN SUPPORT OF THE APPLICATION

EXHIBIT A: Building Permit 1, May 6, 2013

EXHIBIT B: Building Permit 2, June 6, 2013

EXHIBIT C: Plans

EXHIBIT D: Photographs

EXHIBIT E: BZA Order (Case No. 18406)

IV. BACKGROUND

The Property, also known as Lot 43 in Square 3509S, contains approximately 1,751 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 Capitol Street to the west. Square 3509S is located in the R-4 District and is characterized predominantly by multi-story attached rowhouses, flats, and apartment buildings. The Property is presently improved with a four-story, two-unit apartment building that does not conform to the Zoning Regulations. 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. Prior to May 2013, the Property was nonconforming as to minimum lot area (approximately 49 square feet less than the required minimum of 1,800 in the R-4 Zone District) and maximum percentage of lot occupancy (approximately 339 square feet, or 19% over the maximum permitted lot occupancy of 60%).

The structure was purchased by Edward and Donna Naybor on May 29, 2012. Between May 29, 2012 and December, 2014, the Naybors, via their contractor and pursuant to a building permit issued on May 6, 2013 ("Building Permit 1"), gutted the then two-story structure and added a third story. See Exhibit A, Building Permit 1, and Approved Plans at Exhibit C. Following substantial completion of work authorized by the Building Permit, the Naybors' contractor sought a second building permit, which was issued by the Department of Consumer and Regulatory Affairs on June 6, 2013 ("Building Permit 2" attached as Exhibit B), which authorized the following:

1. Demolition of existing floor slab at cellar level.
2. Removal of 8 inches of top floor to provide new concrete slab.
3. Removal of 4 inches of top floor and retaining wall to make space for a 9' x 19' parking space.
4. New entry door at basement level (as noted by zoning reviewer).

Following issuance of Building Permit 2, the Naybors' contractor removed the cellar level slab, renovated the cellar level, and excavated an existing berm to create a new basement entry in accordance with Building Permit 2. The excavation of the cellar level berm and installation of a new entry door effectively converted the cellar level as shown on the Building Permit plans to a basement, thus creating a fourth story in violation of the Zoning Regulations.

In addition, the contractor replaced an existing porch in the rear of the Property with a new deck of the same size on each level (See Plans at Exhibit C and Photographs at Exhibit D, accessed by a new six-foot diameter spiral staircase extending beyond the existing deck footprint. The addition of the new spiral staircase increased the already non-conforming lot occupancy in violation of 11 DCMR § 2100.3.

The Applicant entered into a contract to purchase the property from Mr. and Mrs. Naybor in late November 2014, with closing scheduled for December 11, 2014. Understanding that the renovation was ongoing at the time of entering into the contract to purchase, the Applicant believed in good faith that the renovation was authorized under the Zoning Regulations and a lawful structure in the R-4 Zone District. In reliance on the issued permits, continuing work, and projected closing date of December 11, 2014, the Applicants sold their nearby home and were required to vacate that property on or before December 15, 2014. The Applicants entered into an agreement with Mr. and Mrs. Naybor to occupy the Property beginning on December 10, 2014, with closing to occur on such date as a final Certificate of Occupancy was issued by the District of Columbia, whichever should occur first.

On December 3, 2014, an inspection by the Department of Consumer and Regulatory Affairs Illegal Construction Unit revealed that the Property was deemed to have an illegal fourth story and a Stop Work Order was issued. The Applicants could not move into the Property in accordance with their pre-settlement occupancy agreement, and closing was rescheduled to January 15, 2014. The Applicants have been residing in a hotel at a cost of $241 per night (plus applicable taxes) since December 16, 2014.

The Naybors and their contractor assert that, except for the spiral staircase, all work was done in conformance with the two building permits issued by DCRA after a zoning review. DCRA's inspections unit later determined that the work performed under the issued permits resulted in a structure that was noncompliant as to height and stories. If not for DCRA's issuance of the permit # B1307184, which DCRA's own records show was approved by Zoning on June 4, 2013 and authorized a new basement entry (front), the Naybors would not have caused the front of the Property to be excavated creating the height and story noncompliance. Said work was done pursuant to a validly issued building permit that was issued improperly by DCRA.

The Applicants are innocent parties here, having signed a contract to purchase the Property without knowledge of any improprieties in the permit or construction process. Upon learning of the violation, the Applicants caused their representative to meet with the Zoning Administrator, who agreed to issue a temporary certificate of occupancy to allow the Applicants to occupy the Property upon filing of this application before the BZA. If the temporary certificate of occupancy is issued, the Applicants will occupy the property pursuant to a pre-settlement occupancy agreement with Mr. and Mrs. Naybor, and closing will occur upon the issuance of a permanent certificate of occupancy.

V. APPLICANT MEETS BURDEN OF PROOF FOR VARIANCE RELIEF

The Board is authorized to grant an area variance where it finds: (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 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)); *see also*, *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 at the public hearing, all three prongs of the area variance test are met in this application.

A. The Property is Unusual Because of its Size, Shape or Topography and is Affected by an Exceptional 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).

In this case, the exceptional situation stems from a confluence of factors, none of which were caused by the Applicant.

First, the Property consists of a structure that already exists. Between 2012 and 2014, the structure was excavated, pursuant to a proper permit, in a manner that increased the number of stories from two to four and increased the height to greater than 40 feet.

Second, at the time the Applicants entered into a contract to purchase the Property (and subsequently entered into a contract to sell their previous home), there was no reasonable basis for the Applicant to know that the structure violated the Zoning Regulations. The construction rendering the Property noncompliant with respect to lot area and height requirements was **not** the result of any actions taken by the Applicant. The Applicant was not involved in the renovation. The Applicant believed, in good faith, that the building, as constructed, marketed and sold, was in compliance with all regulations and requirements. The Applicants are not developers, contractors, or real estate investors. They purchased the Property with the intent to use it as their primary residence, renting out the additional unit.

B. Strict Application of the Zoning Regulations would Result in Practical Difficulty

Converting the Property back into a structure that complies with the Zoning Regulations would result in significant financial hardship on the seller and on the Applicants, who are at this time contractually bound to purchase the property. Should the requested area variances not be granted, the Applicant would have to expend a considerable amount of money to reconfigure the building, including removing a full floor that was properly permitted and/or removing a basement entry that was similarly permitted after a zoning review at DCRA. At the end of the extensive expenditures necessary to bring the structure into compliance, the resulting structure would be less valuable than the existing structure. These costs would be in addition to the extensive obligations and expenses that the Applicant has already incurred in connection with the Property, including their deposit, and most importantly, the cost of living temporarily in a hotel prior to being able to occupy the structure, to the tune of over $250 per day. The Applicants would have no reasonable expectation of a financial return if required to convert the Property back into a structure that complies with the Zoning Regulations.

In BZA Case No. 18406, pursuant to an Order issued October 17, 2012, the Board approved an application for a variance from the building on alley lot provisions to allow the continued use of three residential apartments in a three-unit apartment building located on alley lots in the DD/R-5-B District (attached hereto as Exhibit E). Except for use as a one-family dwelling, a structure is not to be constructed or altered for human habitation on an alley lot. In 2008, the structure was converted to residential use without the necessary zoning approval and building permits. The application was submitted by the present owners, all of whom purchased their units subsequent to the conversion to residential use, after DCRA issued letters indicating the zoning and permitting violations. The Board granted the variance application, by summary order, based on the unique history of the property and good faith purchase without knowledge of any wrongdoing on the part of the Applicants. The Board was careful to make clear that each case is to be assessed on a case-by-case basis and that the precedential value of the decision was limited to the unique facts of the case before it.

We contend that the Applicant in this case faces a unique circumstance and that the precedential value of approval of this application would be equally limited to the individual facts of this case. In this instance, the facts are highly unique due to (1) the good faith, detrimental reliance of the Applicant, (2) the quick and timely effort to correct any preexisting violations on the part of the Applicant, (3) the substantial cost and hardship the Applicant is currently enduring because neither they nor the Naybors are able to perform their contractual obligations to one another, and (4) the significant costs associated with remedying the noncompliance. As stated, the Applicant had no knowledge of the noncompliance and was in no way responsible for the noncompliance that took place. Moreover, compliance with the height and story requirement would require demolishing the top level (estimated to cost $35,000 to $40,000) or backfilling the lower level (estimated to $30,000 to $35,000) which would not only be costly but would decrease the value of the structure and reduce rental income, which the Applicants were dependent upon in purchasing the two-unit Property.

C. No Detriment to Public Good or Inconsistency with Zone Plan

The continued use of the existing structure will not cause detriment to the public good or be inconsistent with the Zoning Regulations. The current residential use and structure is consistent and compatible with the residential uses and structures immediately surrounding the Property. The existing residential use does not generate excessive traffic, noise, or other nuisance.

VI. CONCLUSION

For the reasons stated above, we hereby submit that the application meets the requirements for area variance relief.

Sincerely,
GRIFFIN & MURPHY, LLP

Kinley Bray MK
By: Kinley R. Bray