

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

**AREA VARIANCE APPLICATION
OF NORTH CAPITOL #2 LAND TRUST**

2026 NORTH CAPITOL ST, NW

PREHEARING STATEMENT

A. Introduction.

North Capitol #2 Land Trust (the “Applicant”) recently purchased and developed the property located at 2026 North Capitol Street, NW (the “Property”), located in the R-4 zone district. The Applicant has constructed an addition to the existing improvements thereon (the “Building”). As part of the construction approved in Building Permit No. 1408394 (the “Building Permit”), issued in August, 2014, for an addition to the Building, the Applicant received approval to rebuild the first floor deck, expand the existing second floor deck, and build a new third floor deck, as shown on the architectural plans attached to this Application.

In February, 2015, after all of the work approved under Building Permit No. 1408394 – including construction of the decks – was completed, the Zoning Administrator notified the Applicant that he intended to revoke the Building Permit and require that the Applicant remove the third-story deck and reduce the size of the second-story deck, as these two items are considered additions to a structure which is nonconforming as to lot occupancy. As support for this late action, the Zoning Administrator has relied on the fact that the applicable permit plans showing the subject decks were not stamped by the Zoning Division, even though the Applicant did receive the Building Permit and completed construction thereunder in reliance on that Building Permit.

In addition to the decks approved in the Building Permit, through a contractor's error, where, due to the configuration of the decks and the doorways to the decks, the contractor believed that a minor necessary reconfiguration was permitted, the Applicant constructed the second and third-floor decks slightly larger than what was actually approved in the Building Permit. Therefore, the Applicant is requesting area variance relief from Section 2001.3(a) in order to receive approval for the second and third-floor decks, as already constructed. There are two aspects of the deck area for which relief is being requested: (1) the area of the decks as represented in the approved Building Permit plans, and (2) the additional area of the decks beyond what was approved in the Building Permit plans, which was constructed in error, but nevertheless presents a practical difficulty in removing when considering the location of the doors from the units to the respective decks.

The Zoning Administrator has issued a temporary certificate of occupancy for the Property subject to the filing of this Application requesting relief to allow the now-constructed decks to remain.

B. Description of the Property.

The Property is located at 2026 North Capitol Street, NW. The Property is a rectangular lot with a land area of approximately 2,001 square feet. It is 20 feet wide by 100.5 feet long. The Property is improved with the Building, which has a lot occupancy of about 57.5%. The decks, as constructed, together with the Building, have a lot occupancy of about 65.5%. There is also a garage at the rear of the Property, which raises the total lot occupancy amount to 78%. The construction of the decks has not changed the pre-existing lot occupancy. The Property had a lot occupancy of 78% when the Applicant purchased the Property and before the Applicant began its work. The addition of the third-floor deck, and the expansion of the second-floor deck, are in the

footprint of the pre-existing first-floor deck. Therefore, there is no increase in the lot occupancy for the Property as part of the Applicant's construction.

Aside from the decks, the Building is a three-story building with a cellar level, used as a flat. The Building has a lower lot occupancy amount than the adjacent structure to the north, and a greater lot occupancy than the structure to the south. The subject decks extend to the rear line of the structure to the north – at 2028 North Capitol Street, NW – and then that building has decks extending past that building line.

The surrounding area is made up of row structures, mostly one-family dwellings or flats. Most of the properties on this block include garages, and therefore most properties safely exceed the maximum permitted lot occupancy of sixty percent (60%).

C. Burden of Proof.

The burden of proof for an area variance is well established. The Applicant must demonstrate three elements: (1) unique physical aspect or other extraordinary or exceptional situation or condition of the property; (2) resulting in practical difficulty in complying with a strict application of the Zoning Regulations; and (3) no harm to the public good or the zone plan. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). As set forth below, the Applicant meets the three-part test for the requested area variance.

Unique Condition

In order to prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.2d 1091, 1096 (D.C. 1979). A

property's uniqueness is not limited to physical aspects of the land and may be determined by "some difficulty not shared by the entire neighborhood." *Id.* at 1098.

The Court of Appeals held in *Clerics of St. Viator v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974) that the exceptional situation or condition standard goes to the property, not just the land; and that "...property generally includes the permanent structures existing on the land." *Id.* at 293-94. The Court held that the exceptional situation standard of the variance test may be met where the required hardship is inherent in the improvements on the land (*i.e.*, the building or structure) and not just the land itself.

Furthermore, the Court of Appeals held in *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition of the property. Rather, it may arise from a "confluence of factors."

The "exceptional situation or condition" of a property can arise out of "events extraneous to the land," including the zoning history of the property. See, *e.g.*, *De Azcarate v. Board of Zoning Adjustment*, 388 A.2d 1233, 1237 (D.C. 1978), and see *Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091, 1097, and 1098 (D.C. 1979). See also *Application No. 17264 of Michael and Jill Murphy* (2005) and *Application No. 18725 of Rafael Romeu* (2014).

In at least two previous variance applications for construction of rear decks, the BZA has followed the *Monaco* ruling. In Case No. 17264, the BZA granted variance relief after the applicant constructed its deck without a permit and then subsequently got a permit (that claimed interior renovations only) which was later revoked. In Case No. 18725, the BZA granted variance relief for construction of a rear deck at 1536 T Street NW based on that applicant's reliance on a fully issued building permit which was later revoked. This case, in contrast to the

Murphy case and the *Romeu* case, requests relief for a much smaller deck, and one that was mostly in the footprint of an existing first floor deck.

Furthermore, the Applicant received and reasonably relied on approval from DCRA in the form of a Building Permit which permitted construction of the expanded second-floor deck and third-floor deck, albeit to an area smaller than what was mistakenly built. The Property is currently at 78% lot occupancy, which consists of the legally nonconforming structure as well as an accessory garage which is below the main level of the Building. The Applicant constructed the decks because it had received approval of same by the Building Permit approval and had no reason to believe that such construction was not approved. Now, to its detriment, the Applicant is being required to remove the third-story deck and reduce the size of the second-story deck. It is the Applicant's good faith and detrimental reliance on the Building Permit, and the configuration of the decks and doorways that necessitated slightly larger decks, that constitutes the exceptional situation for which the Applicant is seeking relief.

Practical Difficulty

It would be a significant expense for the Applicant to remove the third-floor deck and reduce the second floor deck. The Property has been sold to a purchaser, and the Applicant will submit an authorization letter and a request to amend the Applicant name shortly. It would be unnecessarily burdensome for the Applicant to have to remove or reduce the decks. In addition, the request could be considered a *de minimus* request, as the Zoning Administrator has allowed the 8' x 20' first-floor deck, as well as the second-floor deck as it previously existed, and the second and third floor decks do not expand or increase the existing lot occupancy.

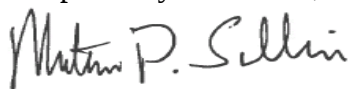
No Substantial Detriment to the Public Good or Integrity of the Zoning Regulations.

The decks have no impact on neighboring properties' light and air or privacy. To the north, the rear line of the decks match the rear building line of 2028 North Capitol Street. To the south, the existing Building already extends past 2024 North Capitol Street, and because the Property is on the other side of the sun's direction, there is no impact on that Property's light and air. The request is a small request, and does not increase the lot occupancy percentage of the Property. In addition, it is well established that the permitting history of a property can be a unique condition warranting area variance relief, thereby insuring the integrity of the Zoning Regulations.

D. Conclusion.

For the reasons outlined in this Prehearing Statement, the Applicant respectfully requests the relief as detailed above.

Respectfully Submitted,

A handwritten signature in black ink that reads "Martin P. Sullivan". The signature is written in a cursive, slightly slanted style.

Martin P. Sullivan
Sullivan & Barros, LLP
June 9, 2015