

July 21, 2015

Via IZIS Submission

Mr. Lloyd Jordan, Chairman
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

**Re: Additional Submission to BZA Application No. 19018 of North Capitol #2 Land Trust;
2026 North Capitol Street, NW, D.C.; Square 3117, Lot 834**

Dear Chairman Jordan and Members of the Board:

Please accept this additional submission from the Applicant. Attached with this cover letter are the following documents:

- 1) A copy of Building Permit No. B1408394, issued August 8, 2014.
- 2) A copy of the Permit Holder's set of permit plans underlying Permit No. B1408394, approved by the Office of the Zoning Administrator on July 28, 2014.
- 3) A copy of the DCRA "Permanent File" set of the same approved permit plans underlying Permit No. B1408394.
- 4) A copy of an e-mail from the Permit Holder's expediter, confirming that she ordered the copy referenced in Item #3 above from the DCRA Records Department staff.
- 5) A copy of a stamped approval page from the permit plans for Building Permit Application No. B1504334, for which approval of the Zoning Administrator's Office was granted on February 10, 2014, and subsequently revoked.
- 6) A copy of the PIVS Report for Building Permit Application No. B1408394, including a zoning approval on July 28, 2014.
- 7) A proposal from the Permit Holder's carpenter to remove the subject decks on the 2nd and 3rd Floor.
- 8) An authorization letter from the new owner of 2026 North Capitol Street, NW, Unit #2.

Applicant's counsel has been delayed in securing a copy of the Purchase Contract, as requested by the Board, and expects to submit this shortly after today's filing, either this evening or tomorrow morning. This documentation is being provided in support of the argument provided in the Applicant's previous filings

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regarding the exceptional condition and practical difficulty in removing the subject decks on the second and third floor of the building at 2026 North Capitol Street, NW (the “Building”).

Exceptional Situation or Condition

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 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.

The 2nd and 3rd floor decks were approved as part of Building Permit No. B1408394 (the “Building Permit”). Attached to this filing is a copy of the subject Building Permit, which was issued on August 8, 2014. The Building Permit authorized, among other things, the construction of the second and third story decks as illustrated on the second and third pages of the attached building permit plans (the “Permit Plans”) underlying the Building Permit. We have included two separate copies of the Permit Plans, including (i) the official copy held by the Owner and kept at the Property during the construction, and (ii) the “Permanent File” copy kept at DCRA in the Records Room, which the Applicant obtained a copy of recently for purposes of providing to the BZA. These are two separate copies of the same plans, and they prove that the Owner applied for and received permission to construct a second story deck and a third story deck, albeit at a width a few feet less than what was actually built. These Permit Plans are indeed stamped by the Office of the Zoning Administrator.

The stamps are difficult to make out, but it is clear that it is the stamp of the Zoning Administrator’s Office, by comparing it to the stamp for other plans (including a later approval discussed below). The stamps are included on both the cover page and on page 2 of the Permit Plans. Page 2 shows a drawing of the third-floor deck. Page 3 of the Permit Plans shows all of the rear decks.¹ The stamps are also accompanied by initials of the zoning staff reviewer with a notation of “R-4” and “7.28.14.” The “7.28.14” date notation corresponds exactly with (and only with) the zoning approval noted in the PIVS Report attached hereto, which shows “Zoning Review Approved” on 7/8/2014, with other disciplines being approved on other dates.

¹ The Applicant will provide full-sized copies of the Permit Plans at the BZA hearing.

It is important to note that the permit process for the Building Permit was a “file job” and not a “walk-through”, meaning that the Owner’s agent provided the Permit Plans to DCRA and then DCRA processed the application and plans through the different disciplines within DCRA.

These Permit Plans, and their zoning approval stamps, show that the Applicant acted in good faith in securing approval for the construction of the 2nd and 3rd story decks. The new decks did not increase the lot occupancy previously existing on the Property, and this is why the only relief required is under Section 2001.3(a), for additions to structures that currently exceed the maximum permitted lot occupancy. There is no expansion of lot occupancy considered and therefore no relief necessary from Section 2001.3(b) or from Section 403.

Practical Difficulty

It would be a significant expense for the Applicant to remove the third-floor deck and reduce the second floor deck. Attached with this filing is a proposal from Caroline Carpentry, LLC, for work required to remove the 2 rear decks and refinish the affected surfaces, at a cost of \$11,500. 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 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. The degree of variance requested is a factor that can be considered by the Board as part of its consideration of the practical difficulty. In this case, the Applicant asserts that the minor amount of relief requested corresponds sufficiently with the amount of the practical difficulty in removing the decks.

The new owner, Ms. Slattery, asserts also that not being able to have rear decks represents an unnecessary burdensome, in and of itself, separate and apart from the reliance argument. The Property is affected by the fact that the maximum permitted lot occupancy was exceeded because of the structures built on the Property well before 1958. The Property previously existed as a 2-unit flat, and the owner of the 2nd

and 3rd floors, now Ms. Slattery, has no outdoor living space to enjoy other than the pre-existing small 2nd floor deck. Because of the existence of the garage, and the location of the property along busy North Capitol Street, outdoor recreation space is very limited. The provision of the two decks provides such space, without increasing the existing lot occupancy and without substantially affecting neighboring properties.

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

The decks simply would not have a substantial detriment on any neighboring properties' light and air or privacy. The Office of Planning agrees with this assessment, pursuant to its report. 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. The Office of Planning's opinion that the integrity of the Zoning Regulations would be impacted is based on the belief that the Zoning Administrator did not approve the construction of the decks, which is not true, as has been shown by the documentation included in today's filing.

For the above reasons, and based on the additional documentation included herein, the Applicant respectfully requests that the Board grant the requested relief.

Sincerely,



Martin P. Sullivan

Enclosures

cc: ANC 5E
Karen Thomas, OP