BOARD OF ZONING ADJUSTMENT

SPECIAL EXCEPTION APPLICATION

PREHEARING STATEMENT of

Newton Park Apartments Condominium Unit Owners Assn.

452 Newton Place, NW; Square 3036 Lot 89

I. INTRODUCTION AND NATURE OF RELIEF SOUGHT

Newton Park Apartments Condominium Unit Owners Assn. (the "Applicant") is the owner of the property located at 452 Newton Place, NW (Square 3036, Lot 89) (the "Subject Property"), which is zoned RF-1.

The Applicant purchased the Subject Property—originally a flat—in July 31, 2014 with the intent to convert it to at least three (3) residential units. The Applicant obtained minor flexibility approval from the Zoning Administrator[1] and a building permit from DCRA in order to do the proposed 3-unit conversion (the "Project"). However, DCRA later determined that it had issued the permit in error and moved to revoke the permit after construction had commenced and was 99% complete. As discussed more fully below, the impact of that belated action caused financial duress which led the Applicant to reapply for a building permit for only two (2) units. Because the Applicant had to combine two units, the larger unit has four bedrooms and four bathrooms.

The Applicant faced great difficulty in selling the large second unit. After negotiating with DCRA to issue a C of O for the units, as they were constructed in accordance with a validly issued permit, DCRA informed the Applicant the only choice was to obtain BZA relief. The Applicant is now seeking relief from the Board to effectively reinstate DCRA's first approval, which allowed a three-unit conversion and minor flexibility from the 900 square foot rule. Accordingly, the Applicant is requesting special exception approval for the conversion pursuant to Subtitle U § 320.2 and variance relief from Subtitle U § 320.2(d).

[1] The Subject Property is 40 ft. shy of the requirement that there be 900 square feet of land area per unit.

II. DESCRIPTION OF THE SUBJECT PROPERTY AND SURROUNDING AREA.

The Subject Property is located at 452 Newton Place, NW and is in the RF-1 zone district. It is a corner lot with 2,660 square feet of land area. Abutting the Subject Property to the north, west, and south, are Newton Place, Warder Street, and an improved public alley, respectively. Abutting the Subject Property to the east are other row dwellings. The Building was originally a flat (2-unit dwelling) and the Building footprint has not been expanded.

III. BACKGROUND

A. Purchase

The Applicant purchased the Subject Property on July 17, 2014. It was noted that the existing flat would be hard to sell because there were no comparable units of this size in this area. Accordingly, the project would only be feasible if the internal configuration were changed to at least three (3) units. The Applicant did not plan to construct an addition, only to update the Building and its internal configuration to make each unit more marketable than the original layout.

B. Permitting History

In October 2014, the Applicant submitted plans to DCRA and was subsequently informed that it would need a minor deviation from the 900 ft. rule in order to pursue the three-unit configuration. The Applicant requested the minor deviation from the Zoning Administrator on March 27, 2015. On April 6, 2015, the Applicant received an email from the Zoning Administrator approving the minor deviation request for the third unit (See Exhibit A). The Applicant was able to use that email for its zoning approval for the three-unit permit application. On June 8, 2015, the Zoning Commission voted to approve Z.C. Case No. 14-11 which eliminated conversions as a matter of right and eliminated minor deviation from the 900 ft. rule. That Order provided a vesting table which only allowed permits to be reviewed under the old regulations if the application had been submitted by July 17, 2014.

On October 22, 2015, DCRA officially issued a Building Permit- B1500315 for three units ("3-Unit Permit") (See Exhibit B). On December 13, 2015, a stop work order was issued claiming that the 3-Unit Permit was issued in error. DCRA asserted that the permit application had not been applied for by the vesting date and the minor deviation and conversion were no longer permitted

as a matter of right. By this point construction was 99% complete and the Applicant had spent approximately $525,000 on construction.

C. Applicant's Solution

When the stop work order was issued in December of 2015 the Applicant had two choices: to forfeit the 3-Unit Permit voluntarily or to have DCRA revoke the permit. Accordingly, the Applicant forfeited the 3-Unit Permit and revised the plans for a two-unit configuration. Between February 8, 2016 and September 9, 2016, the Applicant worked to re-engineer the entire three-unit configuration to conform to a two-unit configuration by removing stairways and performing extensive kitchen remodels, adding significant additional costs to the total project. On December 16, 2015, the Applicant received a building permit for a two unit configuration ("2-Unit Permit"). After permit issuance, the Applicant received a Certificate of Occupancy for a flat on December 30, 2016. One of the units has two bedrooms and two bathrooms. The other unit has four bedrooms and four bathrooms. After great difficulty in selling the large second unit, the Applicant is now seeking relief from the Board to effectively reinstate DCRA's first approval, which allowed a 3-unit conversion.

IV. THE APPLICATION SATISFIES SPECIAL EXCEPTION REQUIREMENTS OF SUBTITLE U § 320.2.

A. Overview.

Pursuant to Subtitle X § 901.2 of the Zoning Regulations, the Board is authorized to grant special exception relief where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property, subject also, in this case, to the specific requirements for relief under Subtitle U § 320.2 of the Zoning Regulations.

In reviewing applications for a special exception under the Zoning Regulations, the Board's discretion is limited to determining whether the proposed exception satisfies the relevant zoning requirements. If the prerequisites are satisfied, the Board ordinarily must grant the application. See, e.g., *Nat'l Cathedral Neighborhood Ass'n. v. D.C. Board of Zoning Adjustment*, 753 A.2d 984, 986 (D.C. 2000).

B. Requirements of Subtitle X § 901.2.

The granting of a special exception in this case "will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps" and "will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps …" (11 DCMR Subtitle X § 901.2). Given the nature of the request, the proposed Project will be in harmony with the purpose and intent of the Zoning Regulations and Zoning Maps and will not adversely affect the neighboring properties to the north, south, or east, as they are separated from the Building by a Newton Place, Warder Street, and a public alley, respectively. The Project does not adversely impact the neighboring property to the west, as the Applicant is not proposing to change the existing Building footprint and is only proposing to add one (1) residential unit.

C. Requirements of Subtitle U § 320.2.

The proposal in this Application satisfies the requirements of 11 DCMR Subtitle U § 320.2(a) through 320.2(l) as follows:

> **Section 320.2(a)** **"***The maximum height of the residential building and any additions thereto shall not exceed thirty-five feet (35 ft.), except that the Board of Zoning Adjustment may grant a special exception from this limit to a maximum height of forty feet (40 ft.) provided the additional five feet (5 ft.) is consistent with Subtitle U §§ 320.2(f) through 320.2(i);*

The Building is twenty-eight feet (28 ft.) in height. The Applicant has submitted photographs of the Subject Property. (See Exhibit C).

Section 320.2(b) *The fourth (4th) dwelling unit and every additional even number dwelling unit thereafter shall be subject to the requirements of Subtitle C, Chapter 10, Inclusionary Zoning, including the set aside requirement set forth at Subtitle C § 1003.6;*

The number of units increased from two (2) units to three (3) units. Therefore, Inclusionary Zoning and the set aside requirements of Subtitle C § 1003.6 do not apply.

Section 320.2(c) *There must be an existing residential building on the property at the time of filing an application for a building permit;*

There is an existing residential structure on the Subject Property at the time of filing an application for a building permit.

Section 320.2(d) *There shall be a minimum of nine hundred square feet (900 sq. ft.) of land area per dwelling unit;*

The proposed structure includes three (3) units, requiring a minimum of 2,700 square feet of land. The Subject Property has 2,660 square feet of land area. Accordingly, the Applicant is requesting variance relief from this requirement.

Section 320.2(e) *An addition shall not extend further than ten feet (10 ft.) past the furthest rear wall of any principal residential building on the adjacent property;*

The Applicant is not proposing to construct an addition.

Section 320.2(f) *Any addition, including a roof structure or penthouse, shall not block or impede the functioning of a chimney or other external vent compliant with any District of Columbia municipal code on an adjacent property. A chimney or other external vent must be existing and operative at the date of the building permit application for the addition;*

The Applicant is not proposing to construct an addition.

Section 320.2(g) *Any addition, including a roof structure or penthouse, shall not significantly interfere with the operation of an existing solar energy system of at least 2kW on an adjacent property unless agreed to by the owner of the adjacent solar energy system*;

The Applicant is not proposing to construct an addition.

Section 320.2(h) *A roof top architectural element original to the house such as a turret, tower, or dormers shall not be removed or significantly altered, including changing its shape or increasing its height, elevation, or size;*

The Applicant is not proposing to construct an addition.

Section 320.2(i) Any *addition shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular:*

(1) The light and air available to neighboring properties shall not be unduly affected;

The light and air available to neighboring properties will not be unduly affected. The Applicant is not proposing to construct an addition.

(2) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and

The privacy of use and enjoyment of neighboring properties shall not be unduly compromised. The Applicant is not proposing to construct an addition.

(3) The conversion and any associated additions, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale, and pattern of houses along the subject street or alley;

The conversion and any associated additions, as viewed from the street, shall not substantially visually intrude upon the character, scale, and pattern of houses along the subject street. The Applicant is not proposing to construct an addition.

Section 320.2(j) *In demonstrating compliance with Subtitle U § 320.2(i) the applicant shall use graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the conversion and any associated addition to adjacent buildings and views from public ways;*

The Applicant is not proposing to construct an addition.

Section 320.2(k) *The Board of Zoning Adjustment may require special treatment in the way of design, screening, exterior or interior lighting, building materials, or other features for the protection of adjacent or nearby properties, or to maintain the general character of a block;*

No special treatment is necessary because the Applicant is not proposing to construct an addition.

Section 320.2(l) *The Board of Zoning Adjustment may modify or waive not more than three (3) of the requirements specified in Subtitle U §§ 320.2(e) through § 320.2(h) provided, that any modification or waiver granted pursuant to this section shall not be in conflict with Subtitle U § 320.2(i).*"

The Applicant is not requesting any waivers.

V. AREA VARIANCE RELIEF

The burden of proof for an area variance is well established. The Board of Zoning Adjustment may grant an area variance if it finds that "(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and

integrity of the zone plan." *Dupont Circle Citizens Ass'n v. D.C. Bd. of Zoning Adjustment*, No. 16-AA-932, 2018 WL 1748313, at *2 (D.C. Apr. 12, 2018); *Ait–Ghezala v. District of Columbia Bd. of Zoning Adjustment*, 148 A.3d 1211, 1216 (D.C. 2016) (quoting W*ashington Canoe Club v. District of Columbia Zoning Comm'n*, 889 A.2d 995, 1000 (D.C. 2005)) (internal quotation marks omitted).

A. <u>Extraordinary or Exceptional Condition Affecting the Property.</u>

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), *Monaco v. Board of Zoning Adjustment*, 407 A.2d 1091, 1097, and 1098 (D.C. 1979) (In *Monaco*, a zoning history which implicitly approved a use and thereby gave rise to a good-faith, detrimental reliance by the property owner, helped to establish the necessary exceptional condition). See also *Application No. 17264 of Michael and Jill Murphy* (2005); *Application No. 18570 of North Cap. St. NE LLC (*2013) *Application No. 18725 of Rafael Romeu* (2014); and *Application No. 19366 of Residence Panache Condo Unit Owners Ass'n* (2016).

The Subject Property is unique due to its location, size, and permitting history. The Subject Property is the only property of its size in this square, measuring 2,660 square feet—just forty feet (40 ft.) shy of the 2,700 square feet required to provide three (3) units (See Exhibit D-Map). It is unique because it is at the corner lot of a block of row dwellings where all nine (9) lots to the east are uniform in width and measure 2,043 square feet in land area.

The exceptional situation also arises out of the permitting history, described above in Section II, B. In *Monaco v. DC Board of Zoning Adjustment*, the Court of Appeals held that the zoning history of a property could be considered in making a determination of uniqueness. BZA Case No. 17264 followed the Monaco ruling, and was supported by the Office of Planning and approved by the BZA—that ruling was similar to this Application. In that case, the applicant constructed a deck without a permit and then subsequently received a permit (which claimed interior renovations only) which was later revoked.

Eight (8) years later, in BZA Case No. 18570 the Board affirmed that reliance on permit issuance can be considered as part of the variance argument. In that case, DCRA issued a

building permit to renovate a building into three (3) units, and later rescinded that approval when the owner applied for the certificate of occupancy, after completing the work under the approved building permit. The Board granted relief under an estoppel argument with a similar rationale as put forth by the Applicant in this case.

In Case No. 18725, the Board once again determined that zoning history for a property, specifically an Applicant's reliance in good faith on actions of DCRA officials, can be considered an exceptional situation. (See BZA Order No. 18725, p. 7). This argument has been accepted by the Board as recently as 2016 in BZA Case No. 19366, where the Board determined that reliance on permit issuance can be a "compelling" part of the variance argument.[2]

The Applicant's case is similar to the above-referenced cases, as it would not be in this position—requesting variance relief for a third unit— had it not received preliminary approvals and a permit to construct a third unit. The Applicant had every reason to proceed with the permitted conversion in good faith without fear of interruption or modification. At the time of purchase in July 2014, conversions and minor flexibility from the 900 ft. rule were both permitted under the zoning regulations. The Office of Planning did not approve Case No. 14-11 until June 8, 2015 at which point it retroactively applied the rule to all permit applications that had not been submitted by October of 2014. The first report in the case file for 14-11 was not even filed until June 24, 2014—after the Applicant formed the LLC in order to purchase the Subject Property.

The Applicant acted in good faith by constructing exactly what was approved in the 3-Unit Permit. Even after the Applicant was issued the Second Stop Work Order on December 13, 2015, DCRA lifted the fines because the Applicant demonstrated at the hearing that it built according to what was approved in the 3-Unit Permit. On numerous occasions, DCRA encouraged the Applicant to move forward with the three-unit configuration and 3-Unit Permit Application. The Zoning Administrator again encouraged the submittal of the three-unit configuration in his email on April 6, 2015, granting minor deviation from the 900 ft. rule (Exhibit A). Most importantly, the Applicant was issued a permit for the three-unit configuration

[2] "And I would just note, the aspect that I found compelling in the argument here was the zoning history, that that contributed to the practical difficulty, just for the record." BZA Case No. 19366, Transcript, p. 297 (November 30, 2016).

on October 22, 2015 which permitted the conversion from a flat to a three-unit building. The Applicant had been working with DCRA to issue the permit since at least April 6, 2015. By the time the Stop Work Order was issued in December 2015, 99% of the work had been complete, for a total of $525,000 in construction fees.

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

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. In reviewing the standard for practical difficulty, the Court of Appeals stated in *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. App. 1972), that "[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case." In area variances, applicants are not required to show "undue hardship" but must satisfy only "the lower 'practical difficulty' standards." *Tyler v. D.C. Bd. of Zoning Adjustment*, 606 A.2w 1362, 1365 (D.C. 1992) (citing *Gilmartin v. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

As discussed above, the Zoning Administrator granted minor deviation for the three-unit configuration in April 2015 and based on this initial zoning approval, the Applicant spent significant money on architectural design, preparation of plans for a building permit application, and pursuing the application. Then, DCRA issued a permit for the three-unit configuration in October 2015, and the Applicant performed costly renovations based on the issuance of the 3-Unit Permit. These circumstances lead to a practical difficulty because the Applicant has lost a significant amount of money and time based on its reliance on assurances by DCRA and a validly issued permit. When the 3-Unit Permit was revoked in December 2015, 99% of construction had been completed and the Applicant had spent $525,000. If the Applicant was forced to sell only one large unit (4 bedroom and 4 bath) instead of splitting it up into two smaller units (for a total of three units), it would be impossible to recoup the original investment and the Applicant would face a significant financial loss—in addition to what has already been lost.

C. <u>Relief Can be Granted without Substantial Detriment to the Public Good and without Impairing the Intent, Purpose, and Integrity of the Zone Plan</u>.

Relief can be granted without substantial detriment to the public good and can be granted without impairing the intent, purpose and integrity of the Zone Plan. The next nine properties to the east are identical, whereas the Subject Property is unique, a corner lot just 40 feet shy of the requisite 900 square feet. Moreover, the permitting history is unique in that the Applicant is only requesting relief because it detrimentally relied on assurances by DCRA and spent a significant amount of money as a result. The degree of relief is minimal, only a 1.5% deviation—only 40 square feet—and the Applicant would sustain a significant financial loss after relying on the validly issued 3-Unit Permit.

VI. <u>CONCLUSION</u>.

For the reasons stated above, this Application meets the requirements for special exception relief and area variance relief, and the Applicant respectfully requests that the Board grant the requested relief.

Respectfully submitted,

Martin P Sullivan

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Date: May 31, 2018