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OFFICE OF ZONING
DISTRICT OF COLUMBIA

October 23, 1997

District of Columbia Board of Zoning Adjustment
441 4th Street, N.W.
Washington, D.C. 20001

RE: Opposition to BZA Application 16260--Application for Zoning Adjustment on Property of David M. Furchgott and Fetneh Askari Fleischmann located at:

3223 Klingle Road, N.W.
Washington, D.C. 20008
Square 2098, Lot 0016

Dear Chairperson Hinton, and Members of the Board:

The undersigned parties have reviewed the Advisory Neighborhood Commission opinion filed herein and the Applicants' submittals dated October 14, 1997. They also have reviewed the judicial opinion respecting the restrictive covenant governing the instant property Costell v. Ince, Civil Action 97 CA 1829; and the correspondence respecting that litigation that has been made a part of the record by attorney Richard B. Nettler, Esq., on behalf of his four clients. Additionally, they have reviewed title records at the Recorder of Deeds Office respecting the relevance of that covenant to the Applicants' property, where it is found in the chain of title.

As a result we respectfully reiterate our opposition to the Furchgott/Fleischmann variance request, for the reasons stated generally in our September 12, 1997 letter to the Board; and in our testimony and our attorney's statements at the hearing before the Board on September 17, 1997.

More particularly, and in response to the applicant's most recent submittals, it is our belief that neither Mr. Furchgott and Ms. Fleischmann nor their architect have presented

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substantial evidence to the effect that denial of their request for a variance would leave them subject to practical difficulties or undue hardships.

For these reasons, we respectfully ask this Board to deny the Applicants' variance request on the merits.

Further, we respectfully ask this Board to deny with Applicants' request for a continuance.

ISSUES

As we understand the issues before the Board, they are relatively familiar ones. Pursuant to 11 DCMR 3107.2, the Applicants are requesting a variance from paragraphs 2001.3 (a) and (b) of the zoning regulations to allow an addition to their existing non-conforming structure, which is located in a zone R-1-B area.

The property is non-conforming because it does not meet allowable occupancy requirement, and rear and side yard requirements.

The subject premise is non-conforming in use, as well as in area. The structure is a semi-detached single family dwelling (use code 13), and the Applicants's proposal requires a variance from paragraph 2002.5. That provision states that "A structure devoted to a non-conforming use shall not be enlarged, except if the enlargement is to be devoted to a conforming use." 11 DCMR Section 2002.5 (1995). Further, the standard for a use variance is more stringent that the standard for an area variance.[1]

The issues to be considered in making a determination are: (1) Whether there is a unique or exceptional condition relating to the Applicants' property that merits the granting of a variance; (2) Whether the Applicants are encountering or would encounter any peculiar practical difficulties or exceptional and undue hardship should the variance not be granted; and (3) Whether the variance can be granted without substantially impairing the intent, purpose, and integrity of the zone plan.

(1) Respecting the first issue, under Section 3107.2, the difficulties or hardships contemplated by the provision must be unique circumstances peculiar to the Applicants'

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[1] Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 541 (D.C. 1972)

property and not to the general conditions of the neighborhood. [2]

Respectfully, that situation does not truly exist here.

The subject lot is located in Square 2098, zoned R-1-B, with a minimum allowable lot size of 5000 square feet. The Survey Map and Real Estate Assessment Roll show 33 lots located in square 2098, of which 21 (64%) are non-conforming in are (i.e., smaller than 5000 square feet). Further, there are four lots in the Square smaller than the Applicants.

Additionally, 29 of the 33 lots in the Square are similarly non-conforming in use, being either semi-detached or row houses.

For a variance to be granted the conditions of the lot must be unique: here there is nothing so unique or exceptional as to warrant granting a variance.

(2) Respecting the second issue, the Applicants can cite no peculiar practical difficulties or exceptional or undue hardships that warrant granting of a variance by this Board.

The property has been used as a residence since it was built in 1923, and it has been designated a non-conforming structure since District of Columbia zoning regulations have been effective (1958). The Applicants purchased their property in 1991, and there have been no zoning changes since then that could have adversely affected their plans for the property.

The Applicants and their architect state that prior to purchase of the property they conducted a survey to identify and plan for repairs and renovations. They state that now, six years later, they are prepared to address those repairs, which include the demolition and rebuilding of a third story dormer addition that they say contributes to water leaks from their second story roof. The Applicants say as part of this proposal they intend to repair the roof, repair a heating system, add to their master bedroom suite, add to a bathroom and enhance their view of the National Cathedral.

Section 2002.4 of the zoning regulations allows the Applicants to make "ordinary repairs, alterations, or modernizations (which) may be made to a structure ... devoted to a non-conforming use" with no variance.

The Applicants have not shown why any or all of their claimed problems cannot be resolved without major enlargements to their premises and the granting of the variance that is a prerequisite for this work. They claim to have had literally a dozen experts examine their

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[2] Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 539 (D.C. 1972)

roof to determine how to repair its leaks, but they have not provided testimony or reports from any of them to support the conclusion that repair of the roof requires enlargement of the premises. They claim that they cannot be limited to the repair and reconstruction of a flat roof, but they have not explained why their property is unique or even different from every other property within their development, all of which are topped with either a fully or partially flat roof.

The Applicants' plans as they are presented constitute an amenity or a convenience, not a remedy of a practical difficulty or hardship.

This is not a reason to grant a zoning variance.

(3) Respecting the third issue, the Applicants have not shown that the grant of their request for a variance will not substantially impair the intent, purpose and integrity of the one plan, within the context of our legal framework.

A significant function of zoning regulations is to establish and to maintain separate districts in which certain uses are deemed appropriate for the designated area or location. Non-conforming uses are not favored, and are to be regulated strictly, so as not to undercut the goals of the districting schemes established by the Zoning Commission[3].

Granting a variance like the one here, that would allow the enlargement of a non-conforming use structure merely because the Applicants find it convenient, substantially impairs the intent, purpose, and integrity of the zone plan.[4]

CONCLUSIONS RESPECTING THE VARIANCE

The Applicants seek a variance to allow the enlargement of a non-conforming use structure for reasons unrelated to repair or maintenance, and based clearly on desire and amenity.

The granting of a variance requires that the Applicants show through substantial evidence exceptional and undue hardship arising out of some unique or exceptional

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[3] C& P Bldg. Ltd. Partnership v. District of Columbia Board of Zoning Adjustment. App D.C., 442 A.2d 129 (1982)

[4] See BZA Application No. 15981. D.C. Register at 5134 (Sept. 5, 1997)

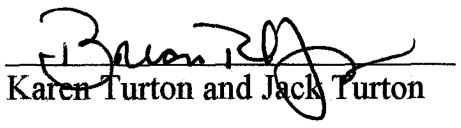
condition of the property, such as exceptional narrowness, shape, or topographical conditions. The Applicants must also show, and the Board must find, that the grant of the variance will not substantially impair the intent, purpose, and integrity of the zone.

We believe the Applicants have not met their burden. The Applicants have failed to show how complying with the Zoning Regulation will cause them undue hardship. There is no evidence presented that the Applicants' situation is exceptional or extraordinary in its difference from many of the lots in the neighborhood.

We believe the granting of the variance as a matter of convenience will impair the intent, purpose, and integrity of the zone plan.

We respectfully ask the Board to deny the application.

Respectfully submitted,



Karen Turton and Jack Turton

by Brian Paul Jenny, DC Bar 243238
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, D.C. 20015-2030
(202) 362-2165

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ADDENDUM--RESPONSE TO APPLICANTS' ADDITIONAL MATERIALS

The Applicants in their additional materials make a number of allegations respecting this proceeding, including, *inter alia*, that there has been a lack of cooperation and dialogue among the parties; that the ANC made its decision on the basis of a misunderstanding of the significance and relevance of Costell v. Ince; that an unnamed party has been spreading false rumors about the effect of this proceeding on similar third floor additions to buildings on their block.

There is no substantiation proffered for any of these comments, and to the extent the Applicants' allegations may be directed towards us, they are categorically not true.

To the extent that Costell v. Ince has relevance to this proceeding, we note that the Court found specifically that the addition at 3243 Klingle Road does indeed disturb the flow of light and air to adjacent properties. Moreover, the 3243 Klingle addition is smaller and less intrusive than the addition proposed by the Applicants.

Even so, the Applicants and their architect ignore the Court's determinations in Ince, and argue in the face of them that " there are no known problems" for adjacent homes from the 3243 Klingle Road structure, suggesting that the dormer there is precedent for their proposed expansion here.

The Applicants present false information from their architect also to the effect that our property will not be affected by the Applicants' addition, because one of our windows is not a window, but just a louver.

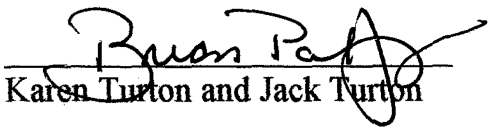
One of our two dormer windows is covered by a louver. It is covered in the same manner as another window might be covered by a closed shutter. It is nonetheless a windowed dormer, and the function of the structure, like all dormers, is to provide light and air access to the top floor.

We wish to preserve our access to light and air and vistas to the same degree that we wish to protect any of our various rights in our property.

Finally, the Chair of this Board asked the Applicants to have their Architect address the possibility of how their roof can be repaired without the granting of a variance.

The Applicants and their architect have chosen not to do that. As a result, they have presented no probative evidence, and they have not met their burden of going forward in this proceeding.

Respectfully submitted,



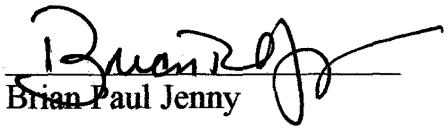
Karen Turton and Jack Turton

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CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the forgoing Opposition and Addendum, dated October 23, 1997, to the parties listed below this October 23, 1997, by prepaid first class postage.

D. Furchgott
F. Fleischmann
3223 Klingle Road, NW
Washington, D.C. 20008



Brian Paul Jenny