Application No. 16260 of David M. Furchgott & Fetneh A. Fleishmann, pursuant to 11 DCMR § 3103.2, for a variance from Subsection 2001.3(a), for the enlargement of a dormer in a R-1-B district at 3223 Klingle Road, N.W., Lot 0016, Square 2098.

HEARING DATE: September 17, 1997

DECISION DATE: January 7, 1998

PROPOSED DECISION AND ORDER

PRELIMINARY MATTERS

Applicants. The applicants in this case are David M. Furchgott and Fetneh A. Fleishmann, the owners of the property that is the subject of the application. Both owners were present at the hearing on this matter.

Application. The application was filed with the Board of Zoning Adjustment on April 15, 1997, pursuant to 11 DCMR § 3103.2, for a variance from subsection 2001.3(a) of the Zoning Regulations, enlargement or additions to non-conforming structures. The applicants sought permission to re-construct and enlarge an existing dormer, in the rear of the third floor, in a R-1-B district at 3223 Klingle Road, N.W., Lot 0016, Square 2098.

An application for building permits for the subject project was rejected in December, 1997. A memorandum to the Board from the Department of Consumer and Regulatory Affairs, dated March 24, 1997, states that the applicant needed a variance from 11 DCMR 2001.3(a).

The Board received from the Applicants a supplement to the application on August 25, 1997. The Board also received from the Applicants front, side, and rear view pictures of the existing dormer. On September 16, 1997, the Board received a letter from the Applicants supplementing their earlier statements.

On October 16, the Board received a letter from the Applicants' architect addressing the opposition's design concerns. Attached to that letter was a request by the Applicants for a delay of the decision.

On December 16, 1997, the Board received revised plans from the Applicants.

Notice of Application and Notice of Hearing. By memoranda dated May 20, 1997, the Office of Zoning advised the Applicants, and the ANC 3C (the ANC for the area within which the subject property is located) of the application.

Board scheduled a public hearing on the application for September 17, 1997. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed the Applicants, the owners of all property within 200 feet of the subject property, and ANC 3C a letter dated July 24, 1997, providing notice of hearing. The Applicants' affidavit of posting indicates that a zoning poster was placed in the window of the subject property on September 1, 1997.

BZA
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Exhibit No. 41

Board of Zoning Adjustment
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EXHIBIT NO.41

On November 7, 1997, the Board sent notice to the Applicants, the opposition, and the ANC that the record would be reopened until December 16, 1997, to accept the applicant's revised plans and until December 26, 1997, to accept a response from the Applicant and/or the ANC.

Requests for Party Status. The Board received no written requests for party status.

Applicant's Case. Mr. Furchgott presented the Applicants' case.

Government Reports. The Office of Zoning, by memorandum dated September 10, 1997, stated that the previous additions to the Applicants' home, including the dormer itself, were constructed by previous owners pursuant to permits issued without the requisite grant of zoning relief. The report states that the failure to enforce zoning laws serves an exceptional situation justifying variance relief in this instance.

A memorandum from the Department of Consumer and Regulatory Affairs, dated March 24, 1997, stated that the Applicants needed a variance from subsection 2001.3(a).

ANC Reports. The first ANC 3C report, dated September 10, 1997, indicates that on August 25, 1997, the ANC adopted a resolution stating that it had no objection to the granting of the application, provided that the neighbors as 3225 Klingle Road reached agreement with the Applicants. The report also states that neighbors in question did not yet oppose the application. The ANC noted that the lot occupancy, side yard, and rear yard will all be unchanged and that it was unaware of any neighborhood opposition to the variance.

The second ANC report, received on September 24, 1997, stated that at its September 22, 1997, meeting the ANC adopted a resolution to oppose the variance. The report also states that a vote to make postponement of the final decision the ANC's sole recommendation in the case failed 4-5. The ANC report and corresponding resolution nevertheless offer the ANC's support for a postponement of the final decision on the matter.

Persons in Support of the Application. The Board received a letter in support of the application from the following neighbors: Marika Aires, Elizabeth B. Graham, Mr. and Mrs. Gottdiener, Melchior F.R. Savorlese, and Jan W. Mares.

Testifying in support of the application at the hearing was Ellen Sudow, a neighbor across the alley from the Applicants' property.

Parties and Persons in Opposition to the Application. Richard B. Nettler, esq., of Robins, Kaplan, Miller & Ciresi, LLP, submitted a letter in opposition to the application on September 9, 1997. Mr. Nettler represents Ronald M. Costell, Marcha Swiss, and David and Ruth Robbins in an unrelated case in Superior Court regarding a restrictive covenant for the neighborhood in which the Applicants' house is located. He objected to the application insofar as it would permit the Applicants to build above their existing roof line, thereby violating the same restrictive covenant for the subject area. On October 14, 1997, the Board received a letter from Mr. Nettler

stating that David and Ruth Robbins wished to withdraw their participation regarding the application.

On September 11, 2001, the neighbors immediately adjacent to the Applicants' house, Jack Turton and Karen Hansen-Turton ("Turtons"), represented by Brian Jenny, *esq.*, submitted a letter in opposition to the application. On September 17, 1997, the Turtons' submitted 6 pictures of the Applicants' property.

On October 27, 1997, the Board received the Turtons' response to the Applicants' supplemental architectural submission of October 16, 1997.

On December 29, the Board received the Turtons' response to the Applicants' submission of revised plans.

Hearing. A hearing was held on the application on September 16, 1997. Board members present at the hearing included: Susan Morgan, Laura Richards, Sheila Cross Reid, and Betty King. Testimony was received from the Applicants, the ANC 3C Chairman, Tracy Rose (from the Office of Zoning), Ellen Sudow, the Turtons, and Brian Jenny (attorney representing the Turtons). At the close of the hearing, the record was left open to accept further ANC comments any revised architectural plans, and any response by the Applicants to such revised plans.

Decision Meeting of November 5, 1997. The Board decided to postpone its decision and again reopen the record for 60 days to accept revised plans from the applicant. The Board also indicated that it would examine the revised plans and determine if a rehearing was necessary.

Decision Meeting of January 7, 1998. The Board decided to deny the application by a vote of 4 to 0.

Waiver of Rules. The Board waived its rules in order to accept into the record all late submissions regarding this application.

FINDINGS OF FACT

1. The Applicants' house was built in 1923, around the same time as the other houses in the neighborhood. (Stmt. of Applicants, 8/25/97).

2. The existing dormer that the Applicants seek to expand was added in October, 1968. (Stmt. of Applicants, 8/25/97).

3. The subject property, including its later additions, is nonconforming as to rear yard, side yard, and lot occupancy. (Office of Zoning Memorandum, 9/10/97).

4. All nonconforming additions to the Applicants' property, including the subject dormer itself, were constructed by previous owners pursuant to permits issued without the applicant being referred to the BZA to seek variance relief.

5. The plans the Applicants submitted to the Board maintained the existing set back and extended the existing dormer wall 91/2 feet to the rear and extended the existing roof height of the dormer 6 1/2 feet. The dormer roof would also be changed from flat to peaked. The addition would include oversize gutters. (Stmt. of Applicants, 8/25/97).

6. The 20 inch setback between the dormer and the immediately adjacent property would be maintained.

7. The Applicants proposes no changes to their current rear yard, side yard, or lot occupancy and will continue to use the house as a single family residence. (Stmt. of Applicants, 8/25/97).

8. Through the proposed reconstruction of the dormer, the Applicants seek to enlarge their bathroom, which they consider too small. (Ts. 31).

9. Water leakage problems have rendered several areas of the Applicants' house unusable. (Ts. 84). The Applicants claim that the leakage may come from the roof area that was formerly a deck, immediately adjacent to the existing dormer. (Ts. Pg. 36-37). The Applicants intend to eliminate water leakage problems by extending the dormer over the former deck area. (Stmt. of Applicant, 8/25/97; Ts. Pg. 37).

10. The Applicants provided no evidence that other methods of controlling the persistent leaky roof problem that did not involve increasing the size of the dormer were considered and rejected and proposed no alternative that did not involve the extension and enlargement of the existing nonconforming dormer.

11. The Office of Zoning testified that the relief requested is justified because: 1) the lot on which the Applicants' house sits is the smallest and shallowest in the square, such that any addition is nonconforming, and 2) the District acted in error with respect to issuance of a permit to construct the existing dormer. (Ts. Pg. 47).

12. By enlarging the dormer, the Applicants propose to extend the building line of its row house.

13. The architect's October 16, 1997, submission represented no significant departure from the plans as proposed at the September 17, 1997 hearing.

14. The revised plans submitted December 16, 1997, reduce the total area of the proposed dormer extension by 25% by creating a small diagonal deck in a section originally planned to accommodate a portion of the dormer expansion. The deck was to be located in the area nearest to the immediately adjacent property. The plans continue to represent an extension of the house's non-conforming features.

CONCLUSIONS OF LAW

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . ." D.C. Code § 5-424(g)(3), 11 DCMR § 3103.2. Where an applicant seeks an area variance, as here, the above standard of "practical difficulties" applies, with the "undue hardship" standard applying only to use variances. *Palmer v. Board of Zoning Adjustment*, A.2d 535 (D.C. App. 1972). To Additionally, variance relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map". *Id.*

The March 24, 1997, memorandum from the Department of Consumer and Regulatory Affairs stated that, in order to expand the dormer as proposed, the Applicants need a variance from subsection 2001.3(a), title 11 (Zoning Regulations). The Applicants themselves stated on their application form that they were applying for a variance from § 2001.3(a). That section provides that enlargements or additions made to a nonconforming structure "shall conform to percentage of lot occupancy requirements." Because the structure is already non-conforming as to percentage of lot occupancy, any addition will also not conform to lot occupancy. For the same reason, the Applicants also need a variance from § 2001.3(c), which provides that the addition or enlargement "shall not increase or extend any existing, nonconforming aspect of the structure…".

Application of the Zoning Regulations to prohibit the Applicants from extending and enlarging the existing nonconforming dormer would not create practical difficulties. The Applicants have alleged that they seek this expansion in order to solve their roof leakage problems and that the bathroom's size does not meet with their satisfaction. The Applicants have not convinced the Board, nor have they attempted to convince the Board, that the extension and enlargement of the dormer itself is the only means by which it can alleviate either of these problems. *See, Myrick v. District of Columbia Board of Zoning Adjustment*, 577 A.2d 757 (D.C. 1990) (court notes that applicant did not contend that alternatives were unavailable); *Cf. Association for Preservation of 1700 Block of N St., N.W., & Vicinity v. District of Columbia Bd. of Zoning Adjustment*, 384 A.2d 674 (D.C. 1978) (court upheld grant of area variance from off-street parking requirements because there was no feasible alternative that would have complied with the [zoning] regulations). If it is the dormer itself that is causing the leaks, the Applicant could instead merely demolish the existing non-conforming dormer and construct a dormer that matches the other dormers in the neighboring two houses. Such a renovation, constituting a reduction in a non-conforming structure, would not require a variance. *See* 3 Zeigler, *Rathkopf's The Law of Zoning and Planning* 51A-58 (2000) (a minor alteration that does not expand the area of a nonconforming use will generally not require a variance). Alternatively, if it is the area where the deck once stood that is the origin of the leaks, that area could simply be resurfaced. As for the bathroom, nothing in the record indicates that the bathroom is unusable. Mere inconvenience does not justify the grant of a variance.

From the record before the Board, it appears that the Applicants seek not to alleviate practical difficulties with their application, but to alter the construction of their house so as to make it a

more satisfying place in which to live. Unfortunately, because of the existing nonconformity of the house, such ambitious plans must be set aside in favor of more modest ones. Variances from the zoning laws are not granted lightly, particularly with respect to the expansion of nonconforming uses. While such uses are allowed to continue until they are abandoned or until they represent a threat to public health or safety, allowing their expansion would be inconsistent with the clear intent of the zoning regulations to eliminate nonconforming uses and buildings. *See Lenkin v. District of Columbia Board of Zoning Adjustment*, 428 A.2d 356 (D.C. 1981) (rejecting appeal of a denial of a variance to expand a structure devoted to nonconforming use, stating that that, while the Zoning Act and the Zoning Regulations "protect nonconforming uses from arbitrary termination, they do not mandate any action that perpetuates such uses"); *Sheridan –Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment*, 411 A.2d 959, 963 (1979) ("any interpretation of the [zoning] regulations which expands the prerogative of nonconforming users is undesirable").[1]

Section 10(d) of the District of Columbia Administrative Procedures Act, approved October 21, 1968 (82 Stat. 1208; D.C. Code 1-1509(d)) ("APA"), states that whenever a majority of those who are to render a decision in a contested case did not personally hear the evidence, no order or decision adverse to a party to the case shall me made until a proposed order or decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision. Persons making the decision shall personally consider such portions of the exclusive record as may be designated by any party. *Id.*

Because the composition of the Board has changed since the date of the hearing for this case, this order is being served on the Applicant and the record is reopened for 30 days from the date of service of this proposed order for the submission of any exceptions and the presentation of argument to the Board.

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[1] This decision is not intended as a grant of approval for the existing non-conforming dormer that was constructed without the requisite variance approval from this Board.

FIRST DECISION MEETING, January 7, 2001

VOTE: 4 – 0 (Betty King, Susan Morgan Hinton, Sheila Cross Reid, and Laura M. Richards, by absentee vote, to deny).

SPECIAL MEETING, [Insert Date]

VOTE _ - _ (_____, _____, _____, and _____, to issue the Proposed Decision and Order)

SECOND DECISION MEETING, [Insert date].

VOTE _ - _ (_____, _____, _____, and _____, to _____)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order and has authorized the undersigned to execute this Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

BZA APPLICATION NO. 16260

As Director of the Office of Zoning, I hereby certify and attest that on _____, a copy of the foregoing Decision and Order in BZA Application No. 16260 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who are listed below:

Advisory Neighborhood Commission 3-C
2737 Devonshire Place, N.W.
Washington, D.C. 20008

David M. Furchgott & Fetneh A. Fleishmann
3223 Klingle Road, N.W.
Washington, D.C. 20008

Jack Turton and Karen Hansen-Turton
3225 Klingle Road, N.W.
Washington, D.C. 20008

ATTESTED BY:_____
JERRILY R. KRESS, AIA
Director, Office of Zoning