GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

July 30, 1998

BZA
CASE No. 16297
EXHIBIT No. 21

Ms. Lorena Checa
3509 Northampton Street, N.W.
Washington, D.C. 20015

Re: ***BZA Application No. 16297 of Eddie Becker and Phillip Gedring***
1844 Mintwood Place, N.W.

Dear Ms. Checa:

This letter is in response to your inquiry about the next steps that should be taken to proceed with the matter described above. I have reviewed the transcript of the January 7, 1998 public hearing in this case and I am writing to provide you with the options available to you and to discuss the issues related to each option.

Option #1: Do not amend the application by removing the F.A.R. variance. Leave the zoning relief requested as it is and try to think of a unique or exceptional condition related to the property, other than the lease with the day care center. Address the standards for variance relief (§ 3107.2) in writing and at the continued hearing.

Option #2: Ask the Zoning Administrator's Office for a new memorandum eliminating the F.A.R. variance. Address the standards for the remaining variance under subsection 2001.3 in writing and at the continued hearing.

Option #3: Ask the Zoning Administrator's Office to change the relief to Section 223-Additions to One-Family Dwellings or Flats, addressing special exception relief for additions to single-family houses. File a new application for the special exception relief and withdraw the current application.

Option #4: Terminate the lease with the day care center, use the first floor as residential space and withdraw the application.

With regard to **Option #1**, there may be some other aspect of the property (aside from the fact that there is a day care center on the first floor) that is unique or exceptional and creates a practical difficulty for the owners in their efforts to comply with the Zoning Regulations. At the hearing, the lease with the day care center was stated as the reason that there is insufficient room for residential living. The Board appeared to be leaning in the direction of denying your case because your clients

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have control over the fact that the day care center has a lease for a portion of the property, thereby depriving them of use of it.

The Board viewed this lease as a self-created hardship and unrelated to the property itself. "Self-created hardship may be applied by the courts differently in area variance cases (like yours) as opposed to use variance cases. In use variance cases, if there is a self-created hardship, the variance must be denied. You may want to research the court cases to determine if self-created hardship is a concept applicable in area variance cases. I am not sure that there are any cases addressing self-created hardship in area variance cases but I will provide you with the citations of two cases that involve use variances. Perhaps these cases can shed some light on the subject for you (or you may seek counsel for more up-to-date decisions). The citations are: Foxhall Citizens Association v. BZA, 524 A.2d 759 (D.C. 1987) and Clerics of St. Viator, Inc., 320 A.2d 291 (D.C. 1979). To be successful in this application, you will need to find something about the property itself that deprives the owners of the space they need.

Option #2 was discussed at the hearing where you indicated that your application involved two areas of relief: a variance to allow an addition to a structure that exceeds the allowable lot occupancy and a variance from the maximum allowable floor area ratio (F.A.R.) for the R-5-B District. You also indicated that there was possibly an error in the Zoning Administrator's calculations when he included the basement in the gross floor area (and consequently in the F.A.R.) for the building. You did not have evidence of the calculations for the basement as it relates to the finished grade and the Board continued the hearing to give you an opportunity to resolve the question of whether a variance is needed for the floor area ratio. They stated that to eliminate the floor area ratio variance, you would need a revised memorandum from the Zoning Administrator eliminating this area of relief or a memorandum stating that this variance would not be needed.

While the F.A.R. variance could be eliminated, the problem is that the variance test still has to be addressed with regard to the remaining variance. And the **first test** dealing with **uniquess and exceptional circumstances related to the property itself which create a practical difficulty for the owners**, was where you were having problems at the hearing. This same test must be dealt with for the variance related to expanding a nonconforming property. Therefore, eliminating the F.A.R. variance may not help you if you still cannot provide a legally sound response to the uniqueness issue for the variance under subsection 2001.3.

Option #3 refers you to Section 223, a new section of the Zoning Regulations that recently went into effect. The burden of proof is set forth in the subsections 223.2 through 223.4. It is a far easier burden to address than the variance test. I have provided you with a copy for your review. As you can see in subsection 223.1 this provision applies to structures that do not meet the minimum lot dimensions, the minimum court dimensions or the requirements for side yard and rear yard setbacks. It also applies to properties that exceed the F.A.R. and lot occupancy restrictions. I am not sure if the Zoning Administrator would interpret it to apply to properties (such as yours) where the addition is being made to an existing nonconforming structure – as opposed to a structure that now conforms but will not conform once the addition is done. You can ask, and if the Zoning Administrator agrees to amend the relief, you can get a new Zoning Administrator's memorandum citing Section 223. Then you would need to file a special exception application, pay the fee, and withdraw the current application.

Option #4, terminating the lease, would obviate the need for a variance because the owners would be able to use the portion of the structure now being used by the day care center. If you decide to take this option, you would need to withdraw the application.

When we spoke last, you indicated that you had the approval of the Historic Preservation Review Board. This is a positive step, however, the first test (uniqueness/practical difficulty) must be met before the approval of the HPRB becomes relevant.

Please review your application and inform us of the option that you select. If you will be proceeding to another hearing, our office will need to send out notice letters to the neighboring property owners 10 days in advance of the hearing if it is a continued hearing, 40 days in advance if it is a new hearing. Once you receive notice from us of the hearing date, please come in to get your orange posters and affidavit of posting.

If you have any questions, please contact me on (202) 727-6311. If I am not available, please speak with the Interim Director, Sheri Pruitt-Williams. I hope this information has been helpful.

Sincerely,

Tracey N. Rose

Tracey Witten Rose
Acting Secretary to the Board

Enclosure

1. Add a new Section 223 as follows:

223 ADDITIONS TO ONE-FAMILY DWELLINGS OR FLATS (R-1)

223.1 An addition to a one-family dwelling or flat, in those residential districts where a flat is permitted, that does not comply with all of the requirements of sections 401, 403, 404, 405 or 406 of this title shall be permitted if approved by the Board of Zoning Adjustment in accordance with the conditions specified in Section 3108 of Chapter 31 of this title, subject to the provisions of this section.

223.2 The addition shall not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property; in particular:

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

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

(c) The addition, together with the original building, 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 frontage; and

(d) In demonstrating compliance with paragraphs (a), (b) and (c) of this subsection, the applicant shall use graphical representations such as plans, photographs or elevation and section drawings sufficient to represent the relationship of the proposed addition to adjacent buildings and views from public ways.

223.3 The lot occupancy of the dwelling or flat, together with the addition, shall not exceed fifty percent (50%) in the R-1 and R-2 districts or seventy percent (70%) in the R-3, R-4 and R-5 districts.

223.4 The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials or other features for the protection of adjacent and nearby properties.

2. Add a new Section 407 as follows:

407 MINOR FLEXIBILITY BY ZONING ADMINISTRATOR'S RULING

407.1 The Zoning Administrator is authorized to permit a deviation not to exceed two percent (2%) of the area requirements of sections 401 and

403 of this chapter; a deviation not to exceed ten percent (10%) of the linear requirements of sections 404 and 405 of this chapter; and a deviation of the requirements of section 406 of this chapter, not to exceed **either** two percent (2%) of the area standard **or** ten percent (10%) of the width standard; Provided, that:

(a) A building shall be allowed to deviate from the requirements of no more than two (2) of the sections identified in this subsection; and

(b) The deviation or deviations shall be deemed by the Zoning Administrator not to impair the purpose of the otherwise applicable regulations.

Vote of the Zoning Commission taken at its regular meeting on September 15, 1997: 4-0 (John G. Parsons, Herbert M. Franklin and Maybelle Taylor Bennett to approve; Jerrily R. Kress to approve by absentee vote).

This order was adopted by the Zoning Commission at its special public meeting on February 23, 1998 by a vote of 3-0 (John G. Parsons, Herbert M. Franklin and Maybelle Taylor Bennett to approve; Jerrily R. Kress not present, not voting).

In accordance with 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is on MAR 13 1998.

MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission

MADELIENE H. DOBBINS
Director
Office of Zoning

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