Board of Zoning Adjustment
District of Columbia
CASE NO.16521
EXHIBIT NO.33A3

DISTRICT OF COLUMBIA
COURT OF APPEALS

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-AA-1280

PHIL MENDELSON, PETITIONER,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT.

MAUREEN FLANAGAN, INTERVENOR.

Petition for Review of a Decision of the
District of Columbia Board of Zoning Adjustment

(Argued February 9, 1995 Decided March 5 , 1996)

Before WAGNER, *Chief Judge*, TERRY, *Associate Judge*, and TIGNOR, *Associate Judge*, Superior Court of the District of Columbia*

MEMORANDUM OPINION AND JUDGMENT

Intervenor, Maureen Flanagan, sought an area variance after constructing an addition to her home eighteen inches closer to her property line than permitted by the applicable R-1-B zoning regulation. Finding that prerequisites of D.C. Code § 5-424 (g)(3) (1994) had been met, and that she had proceeded with construction in good faith, the District of Columbia Board of Zoning Adjustment (Board) granted the variance. Petitioner, Phil Mendelson, seeks review of the Board's order, his principal contention being that Intervenor's difficulties arise from her certification of an erroneous survey, and hence are self-created and, as a matter of law, insufficient to support a variance. Additionally, he contends the record does not support the Board's findings of uniqueness, hardship and non-impairment to the zone plan. Finding the Board's conclusions of fact and law substantially supported by the evidence, we affirm.

In July 1989, Intervenor purchased a home intending to construct an addition to the rear of the structure to accommodate a kitchen. Zoning regulations required that the side

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* Sitting by designation pursuant to D.C. Code § 11-707 (a) (1995).

yard adjacent the addition be at least five feet wide;[1] thus Intervenor was required to specify the proposed addition's proximity to her western property line before receiving a building permit.[2]

In early August, after discovering that the records maintained by the Office of the Surveyor of the District of Columbia did not specify the width of the side yard, Intervenor was advised by an employee of the permit office that it was permissible to use the measurements set forth in an existing private survey. At the time, she had two private surveys available to her: one, given to her by the previous owner, dated December 9, 1958, and the other dated June 14, 1989. Of the two, only the 1958 survey purported to quantify the dimensions of the property, specifying the side yard width as "5.3'" (five and three-tenths feet). It was signed by the surveyor, and its measurements appeared to be consistent with the June 14, 1989, scaled drawing and with the apparent distance between the house and a fence thought to mark the property line. (R. at 238).[3] Intervenor adopted the specifications of the 1958 survey by signing a plat representing the side yard width as "5.3'" and submitting it in support of her application for a building permit. Four months later it would become apparent that the actual side yard width was approximately 3.5 (rather than 5.3) feet.

On August 9, 1989, building and electrical permits were issued, and by October 27 "the foundation was laid . . . [t]he walls and the brick piers underneath the whole addition were complete . . . [t]he floor was laid . . .

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[1] 11 DCMR § 405.8 (1994) provides: "[I]n the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building; [P]rovided that the width of the existing side yard shall not be decreased; and [P]rovided further, that the width of the existing side yard shall be a minimum of five feet (5 ft.)."

[2] D.C. Code § 5-426 prohibits issuance of a building permit unless plans for the proposed construction comply with applicable zoning regulations.

[3] "R." refers to the record on appeal.

[t]he framing was in . . . [t]he addition was under roof." (R. at 224). In late October or early November a neighbor expressed concern regarding the width of the side yard, and on November 21, 1989, a survey conducted by the Surveyor's office found that indeed the side yard was about eighteen inches narrower than required by regulation, varying in width from 3.44 feet to 3.5 feet. On December 4 a stop order was issued.

Appearing before the Board, Intervenor explained that, although in late October or early November she was aware of her neighbor's concern about construction, she believed this regarded the design of the addition and "had no idea that there was a survey problem" until she received the stop order on December 4. By then, ninety-nine percent of the $52,000.00 cost of the project had been expended and construction virtually completed. (R. at 227-230).

D.C. Code § 5-424 (g)(3) empowers the Board to authorize an area variance

> where . . . by reason of . . . [the] extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any [zoning regulation] would result in peculiar and exceptional practical difficulties to . . . the owner . . . provided such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan . . . .

The Board's decision must be affirmed if its factual findings as to all material issues are substantially supported by the evidence and its legal conclusions "flow rationally" from its findings. *Levy v. District of Columbia Board of Zoning Adjustment,* 570 A.2d 739, 746 (D.C. 1990). "This court is not to substitute its judgment for that of the agency, and thus the decision of the [Board] will be upheld provided there is a rational basis for it." *Citizens Coalition v. District of Columbia Board of Zoning Adjustment,* 619 A.2d 940, 947 (D.C. 1993).

In finding an extraordinary or exceptional condition, the Board noted the property's narrow width, the siting of

the dwelling on the lot,[4] limitations attendant to accessing the garage, inconsistent information regarding side yard dimensions, and "the applicants' good faith reliance on the approvals given by officials of the District of Columbia during the renovation and construction process." (R. at 513). This confluence of factors was adequately supported by the evidence and fell within the range of considerations approved by this court to establish uniqueness of property. *Gilmartin v. District of Columbia Board of Zoning Adjustment,* 579 A.2d 1164 (D.C. 1990); *De Azcarate v. District of Columbia Board of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978).

Additionally, the Board found that a variance would not substantially impair the zone plan and that strict application of the zoning regulations would effectively prevent enlargement of a small kitchen, reduce the size of the addition to a useless corridor, and cause Intervenor to incur economic loss and temporarily unsafe living conditions. (R. at 513). These findings of practical difficulty and lack of substantial impairment to the zone plan are supported by the record and consistent with the case law. *Monaco v. District of Columbia Board of Zoning Adjustment,* 407 A.2d 1091 (D.C. 1979); *Beins v. District of Columbia Board of Zoning Adjustment,* 572 A.2d 122 (D.C. 1990). Petitioner's contentions to the contrary are, in our view, insubstantial.[5]

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[4] Variations in width dimensions among three surveys conducted by the Office of the Surveyor suggested that the dwelling was "askew" on the lot. (R. at 505).

[5] Petitioner contends, for example, that the record fails to support the Board's finding of practical difficulty because Intervenor failed to show an absence of alternatives. In support of this assertion Petitioner quotes Intervenor's statement "I have not considered alternative plans, hoping that this does not have to be torn down." Brief for Petitioner at 23. In context, however, the quoted passage makes clear that reasonable alternatives were patently unavailable, given attendant space limitations: "[Intervenor]: I have not considered alternative plans, hoping that this does not have to be torn down. To my knowledge there is no way to configure the kitchen such that there are other plans that could do. I told you I design and I don't know how to design it so that it is five feet in. As Andrea said, it would just be a corridor instead of a place for a table." (R. at 266).

Petitioner's primary assertion, that issuance of a variance was prohibited by the rule of self-created hardship, is flawed in two respects: (1) Assuming *arguendo* that the hardship herein was self-created, it does not necessarily follow that the variance should have been denied; (2) the rule of self-created hardship does not apply in this case.

An applicant's complicity in the circumstances creating a hardship may preclude altogether the granting of a use variance[6] and may be considered, along with other factors, in determining whether an area variance should issue. *Carliner v. District of Columbia Board of Zoning Adjustment,* 412 A.2d 52 (D.C. 1980); *A.L.W. v. District of Columbia Board of Zoning Adjustment,* 338 A.2d 428 (D.C. 1975). If hardship is self-created only in the sense that a landowner had knowledge of deficiencies in the property at time of purchase, this court has held that "self-created hardship is not a factor to be considered in an application for an area variance";[7] however, it may be considered as a factor weighing against an area variance when there has been "affirmative action of the applicant in making his property non-conforming." *Carliner, supra,* 412 A.2d at 54. Thus an applicant's affirmative participation in events causing hardship does not, by itself, preclude granting an area variance, particularly when the applicant has acted in good faith.[8] *De Azcarate v. District of Columbia Board of Zoning Adjustment, supra.*

The Board concluded, and substantial evidence supports:

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[6] *E.g., Salsbery v. District of Columbia Board of Zoning Adjustment,* 357 A.2d 402 (D.C. 1976).

[7] *Association for Preservation of 1700 Block of N Street, N.W. v. District of Columbia Board of Zoning Adjustment,* 384 A.2d 674, 678 (D.C. 1978).

[8] Case authorities to the contrary cited in Petitioner's brief are from other jurisdictions. *E.g., Pollard v. Board of Zoning Appeals of the City of Norwalk,* 438 A.2d 1186 (Conn. 1982).

> The applicants were responsible to provide competent, accurate information, or to engage professional help to ensure the provision of reliable information in certifying the correct dimensions on the plat initially submitted for the building permit process. However, the same can be said for the officials who approved the plans and further conducted inspections of the site without themselves discovering a possible discrepancy. Therefore, the Board does not consider the applicants' reliance upon the approval of the building permit application to have been unjustified. While the facts offered do not seem to seek or to warrant the application of estoppel in this case, the actions of the officials of the government may be considered under variance law, which is designed to avoid harsh and unjust results in extraordinary situations. (R. at 513).

Thus, to the extent the Board was required to consider whether Intervenor's hardship was self-created, clearly it did so and reasonably concluded that an area variance should nevertheless be granted. Moreover, the difficulties incurred by Intervenor were not attributable to her "sole and affirmative acts" but were in part the result of her good faith reliance upon approval by public officials. As in *De Azcarate,* "the doctrine of self-created hardship, whatever its validity in this jurisdiction to area variances, is inapplicable on the facts of the present dispute." *De Azcarate,* 388 A.2d at 1239.

Accordingly, the Board's order granting the area variance is

Affirmed.

FOR THE COURT:

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 93-AA-90

HUGH J. BEINS, *et ux.*,
PETITIONERS,

v.

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT,
RESPONDENT,

and

ALLAN M. and HARRIETTE B. FOX,
INTERVENORS.



On Petition for Review of an Order of the
District of Columbia Board of Zoning Adjustment

(Argued April 15, 1994 Decided May 5, 1994)

Before FARRELL and KING, *Associate Judges*, and KERN, *Senior Judge.*

MEMORANDUM OPINION AND JUDGMENT

Hugh J. Beins and his wife ("the Beinses") challenge the District of Columbia Board of Zoning Adjustment's ("BZA") grant of a variance to the intervenors ("the Foxes"). Finding no error, we affirm.

I.

This case involves a dispute over an addition to their home and other improvements constructed by the Foxes, which the Beinses, who are neighbors, find objectionable. The facts underlying the dispute are set forth in the opinion issued in *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122 (D.C. 1990), when the matter was previously before us. There, we reversed BZA's determination that laches precluded the Beinses from challenging a decision of the Zoning Administrator. We observed, however, that "[t]he Foxes would not be precluded from applying for an area variance, and in consideration of that application, both their economic prejudice and the acts of the zoning officials giving rise to the estoppel decision would be relevant factors." *Id.* at 129 (citing *de Azcarate v. District of Columbia Bd. of Zoning Adjustment*, 388 A.2d 1233, 1239 (D.C. 1978)).

The Foxes applied for a variance, pursuant to 11 DCMR

§ 3107.2 (1991), and BZA granted their application. In its findings of facts, BZA determined that there was "an extraordinary or exceptional situation or condition," and that the Foxes "had acted in good faith relying on the actions of the government, that they made expensive, permanent improvements, and that the equities strongly favor [the Foxes]." *See de Azcarate, supra*, 388 A.2d at 1239. BZA also concluded that the construction done by the Foxes was consistent with the "purpose and intent of the R-1-B District and can be granted without substantial detriment to the public good."

The Beinses now challenge BZA's grant of the variance to the Foxes, contending that BZA "abused its discretion by granting a variance in circumstances where there is . . . a blatant illegality [in] the addition of an 8 foot high deck and stairs abutting the alley with an 8 foot arbor on top of the deck; and . . . no uniqueness in the land or situation."[1]

The Foxes maintain that BZA's grant of variance relief was in accordance with applicable statutory and case law and was properly granted based on the evidence and testimony presented at the hearing.

II.

Our standard of review is well settled. We review BZA's findings of fact to determine whether there was substantial evidence in the record to support each finding. *Levy v. District of Columbia Bd. of Zoning Adjustment*, 570 A.2d 739, 746 (D.C. 1990) (citations omitted).

Under D.C. Code § 5-424 (g)(3) (1989), BZA may grant a variance if an applicant shows (1) that there is an extraordinary or exceptional situation or condition inherent in the property; (2) "that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant"; and (3) "that granting the variance will do no harm to the public good." *Capitol Hill Restoration Soc'y, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 939, 941 (D.C. 1987) (citations omitted). *See also Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167-72 (D.C. 1990).

In its findings, BZA set forth the procedural history of the construction by the Foxes and determined that there existed an

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[1] BZA found four illegalities and granted a variance for each; the Beins, however, only challenge two of the violations, i.e., the platform and stairs and the deck.

extraordinary and exceptional situation.[2] It further found that there were "practical difficulties as a result of the exceptional conditions [because] strict application of the Zoning Regulations would require demolition . . . at a substantial cost [and] would prevent the reconstruction of the prior addition." The Board also concluded that there would be no harm to the public good. *See Capitol Hill Restoration Soc'y, supra*, 534 A.2d at 941-42. BZA also determined that the "Beins' proposal to remove the deck and stairs is not a reasonable approach and would be inequitable [and the Advisory Neighborhood Commission] has rejected the proposal." BZA concluded that the privacy concerns of the Beinses, including their use and enjoyment of their house and yard, was not substantial and that "the existing addition is far more compatible with the adjacent properties than these or other matter-of-right alternatives." We hold that those findings are all supported by substantial evidence. *Id.*

Accordingly, we are satisfied that the record amply supports BZA's findings and that BZA did not err in granting the variance. Accordingly, it is

ORDERED and ADJUDGED that the judgment on appeal herein be and the same is hereby, affirmed.

FOR THE COURT

WILLIAM H. NG
CLERK

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[2] As we observed in this case when it was here previously, the Foxes' designer "reviewed the preliminary drawings with staff members of the Zoning Review Branch, Department of Consumer and Regulatory Affairs, for compliance with the zoning regulations. The designer was informed that the plan conformed with the applicable regulations. A second review of the plans by the Zoning Review Branch led to similar approval" and a building permit was issued. *Beins, supra*, 572 A.2d at 123.

After the Deputy Zoning Administrator reviewed the plans, and realized "there was a potential problem of compliance with the rear yard requirement, he instructed the chief of the Construction Inspection Branch to issue a stop work order on the premises "until issues relative to the rear yard are resolved." The Foxes and the designer then met with Zoning Administrator James Fahey and Assistant Corporation Counsel Jonathan Farmer. "Farmer advised Fahey that, given the work already performed, the District of Columbia would be estopped from revoking the Foxes' permit. At the conclusion of the meeting, therefore, Fahey ordered the stop work order rescinded and allowed the construction to continue." *Id.* at 124.

No. 93-AA-90

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 15540 of Allen M. and Harriett B. Fox, pursuant to 11 DCMR 3107.2, for a variance to allow an addition to a nonconforming structure that now exceeds the minimum rear yard and side requirements [Paragraphs 2001.3 (b) and (c)], a variance from the rear yard requirements (Subsection 404.1), and a variance from the side yard requirements (Subsection 405.9) for an addition to a nonconforming single-family structure in an R-1-B District at premises 3813 Jocelyn Street, N.W., (Square 1856, Lot 54).

HEARING DATE: November 13, 1991
DECISION DATE: December 4, 1991

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. The subject site is located on the north side of Jocelyn Street, N.W. between 38th and 39th Streets and is known as premises 3813 Jocelyn Street, N.W. The site is in an R-1-B District.

2. The site is rectangular in shape with 64 feet of frontage on Jocelyn Street and a depth of 79 feet. The site has a lot area of 5,056 square feet. A 15-foot wide building restriction line runs along the Jocelyn Street frontage and a 12-foot wide public alley abuts the site at the rear. The site is improved with a two-story plus basement, nonconforming, detached, single-family dwelling that was constructed in 1912.

3. The area surrounding the site is primarily residential and is characterized by single-family dwellings in the R-1-B District and the R-2 District north of Military Road and two blocks north of the site. Connecticut Avenue is located two blocks to the east of the site.

4. The R-1-B District permits matter-of-right development of single-family residential uses for detached dwellings with a minimum lot area of 5,000 square feet, a minimum lot width of 50 feet, a maximum lot occupancy of 40 percent, a minimum height of three stories/40 feet, a minimum side yard of eight feet, and a minimum rear yard of 25 feet.

5. The applicants are requesting area variances from the rear and side yard requirements to allow an addition to a nonconforming structure. The western side yard measures 7.37 feet and requires a variance of 0.63 feet or 7.8 percent. The eastern side yard measures 11.78 feet and is in excess of the eight-foot minimum required. No rear yard is provided, requiring a 100 percent variance from the 25-foot requirement. The structure,

including the additions, has a lot occupancy of 1,743.87 square feet, 2,022.4 square feet of coverage is allowed. The site exceeds the minimum lot area and lot width for the R-1-B District.

6. This property is also the subject of BZA Appeal No. 14093, Appeal of Hugh J. Beins, challenging the issuance of a building permit on August 23, 1983 and rescinding a Stop Work Order on October 27, 1983, for construction of an addition. To date, the Board has issued four final orders with respect to that Appeal (May 29, 1984; November 8, 1988; January 15, 1991 and March 29, 1991) and there have been three proceedings in the Court of Appeals (Beins v. District of Columbia Board of Zoning Adjustment, No. 84-745, remanded "for further administrative proceedings", December 13, 1984; Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122 (1990); and Fox v. District of Columbia Board of Zoning Adjustment, No. 91-135, Petition for Review of the March 29, 1991 Order. Proceedings have been stayed pending a decision in this case.

7. At the public hearing, the applicants moved to incorporate the entire record of BZA Appeal No. 14093 into the subject application by reference, because the facts of that case are relevant to the variance issues in this proceeding. The Board granted the motion.

8. The testimony and evidence of record reflect that the applicants purchased their house in 1979. At that time, the rear of the house was improved with a garage and family room addition. The garage was at the basement level, and the family room was at the first floor level. This addition was perpendicular to the main part of the house and extended to within seven feet of the rear lot line. An L-shaped deck also ran along the rear of the house and the side of the addition at the first floor level.

9. In 1983, the applicants decided to make certain improvements to their house. They hired a designer in March 1983 to develop the details of the desired improvements and to prepare the necessary plans. The improvements consisted of replacing the existing family room with a slightly wider remodelled family room, replacing the existing deck with a slightly larger deck, extending the rear wall of the kitchen at the first floor level by four feet, remodeling the kitchen, connecting the main floor of the house at the deck level to the ground level patio by a circular stairway, and extensive landscaping of the ground level patio area at the base of the new deck. The walls of the garage addition were retained and reinforced to serve as the foundation for the replacement family room. The new family room does not come any closer to the rear property line than did the old family room.

10. The applicants testified that the project was a major investment. Accordingly, in order to detect and solve problems before they happened, on May 6, 1983, the applicants' designer reviewed the preliminary drawings with staff of the Zoning Review Branch for compliance with the Zoning Regulations. On May 10, 1983, the designer and the applicants again reviewed the design with the District's zoning technicians. On each occasion, the zoning technicians gave preliminary approval to the plans. The construction drawings submitted to the record in this case were stamped as approved for zoning purposes on August 19, and final approval was given by the Zoning Review Branch on August 22, 1983, when Building Permit No. B-297556 was issued.

11. On August 5, 1983, amendments to the Zoning Regulations went into effect through Zoning Commission Order No. 403. The effect of the amendments was to no longer permit additions to nonconforming structures as a matter-of-right if the addition increased or extended a nonconforming aspect of the structure. Based upon the testimony and evidence, neither the applicants nor their designer were aware of the amendments. The evidence of record also indicates that District zoning officials were also apparently unaware of the amendments.

12. The evidence of record reflects that immediately upon issuance of the building permit, the applicants acted in reliance on that permit and incurred significant financial obligations. Construction started on October 24, 1983. The evidence also indicates that Hugh J. and Mary E. Beins, owners of property at 3812 Kanawha Street, across the 12-foot alley immediately behind the applicants' property, contacted District officials about the work and met with the Deputy Zoning Administrator on October 26, 1983.

13. On October 26, 1983, the District issued a Stop Work Order to the applicants. The evidence also reflects that at this point, demolition of the existing deck and family room had been virtually completed.

14. The record reflects that on October 27, 1983, the applicants and the designer met with the Zoning Administrator, Mr. James Fahey, and Assistant Corporation Counsel, Jonathan Farmer. At the conclusion of this meeting, Mr. Fahey directed that the Stop Work Order be rescinded. The applicants resumed construction immediately after the Stop Work Order was lifted. The evidence reflects that by November 28, 1983, all exterior construction work on the house had been substantially completed except the stairs and the ground floor patio which were substantially completed by December 29, 1983.

15. On November 28, 1983, one month after the Stop Work Order was lifted, and after the exterior work was substantially

completed, Hugh and Mary Beins filed Appeal No. 14093 with the Board, contesting the issuance of the building permit and rescission of the Stop Work Order. On January 30, 1984, the applicants intervened in the appeal and moved to dismiss it on the basis of estoppel and laches.

16. By order dated May 29, 1984, in Appeal No. 14093, the Board dismissed the Beins' appeal, finding that the District of Columbia was estopped from revoking the issued building permit. The Beinses appealed the Board's decision to the D.C. Court of Appeals.

17. On December 12, 1984, in Case No. 84-745, the D.C. Court of Appeals, on the motion of the Office of the Corporation Counsel, remanded the case "for further administrative proceedings". The position of the Office of the Corporation Counsel was that, notwithstanding estoppel against the District, the Board had not considered whether the Beinses, as opposed to the District, were estopped.

18. In a December 27, 1984 memorandum to this Board, the Office of the Corporation Counsel established the following as the scope of issues to be addressed on remand: 1) whether laches applied to the Beinses; and 2) if laches does not apply, whether there has been a violation of the Zoning Regulations. The memorandum concluded with the opinion that, should the completed improvements be found to violate the Zoning Regulations

> ...revocation [of the building permit] should be stayed for a reasonable time, however, to allow the Foxes to apply for an area variance. The economic hardship that would be imposed on the Foxes if the variance were denied should, of course, be a relevant factor in ruling on the application (citing de Azcarate v. BZA, 388 A.2d 1233 (D.C. 1978) and Monaco v. BZA, 461 A.2d 1049 (D.C. 1983)).

19. By order dated November 8, 1988, in Appeal No. 14093, the Board dismissed the Beins' appeal on the basis of laches. On April 28, 1989, the Beinses filed a second petition for review with the D.C. Court of Appeals. By decision dated March 30, 1990, the D.C. Court of Appeals reversed the decision of the Board and remanded the case for consideration of the merits of the appeal, Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122 (D.C. 1990). In its decision, the Court instructed this Board that:

> [E]ven if the alterations were found to be unlawful in one or more respects, this does not necessarily mean the improvements must be demolished. The Foxes would not be precluded from applying for an area variance, and in consideration of that application,

both their economic prejudice and the acts of the zoning officials giving rise to the estoppel decision would be relevant factors. Id. at 129.

20. This Board conducted a further hearing in October, 1990 on the merits of the appeal. By order dated January 15, 1991, in Appeal No. 14093 the Board determined that the improvements completed in accordance with the issued building permit did not meet the Zoning Regulations in effect on the date of permit issuance. Therefore, the Board granted the Beins' appeal and reversed the decision of the Zoning Administrator in approving the building permit and rescinding the Stop Work Order.

21. The applicants herein sought review of the Board's January 15, 1991 Order in the D.C. Court of Appeals (Fox v. BZA, No. 91-135). By motion dated February 15, 1991, the applicants herein requested that the Board stay the effect of the January 15, 1991 order and enforcement pending disposition of the subject application for variance relief. By order dated March 29, 1991, in Appeal No. 14093, the Board stayed the effect of the January 15, 1991 order. In Fox v. BZA, the D.C. Court of Appeals also granted the motion of the applicants herein and entered an order staying the proceedings pending the determination of the variance application.

22. At the public hearing in the instant application, the applicants, through counsel, cited de Azcarate v. D.C. Board of Zoning Adjustment, 388 A.2d 1233 (D.C. 1978) and other cases for the proposition that "the extraordinary or exceptional situation or condition of a property giving rise to variance relief need not be inherent in the land, but rather can be caused by subsequent events extraneous to the land." The Court in de Azcarate found the history of zoning approvals in that case, and the good faith reliance by the intervenors on those zoning approvals, which were later found to be in error, to constitute an exceptional situation or condition justifying variance relief. The Court in Beins instructed this Board that the economic prejudice of the applicants herein and the acts of the zoning officials giving rise to the estoppel decision would be relevant factors (citing de Azcarate).

23. The applicants' architect testified as an expert at the public hearing. The architect testified and the record reflects that the prior family room was approximately 2.5 feet narrower, had a lower ceiling, but was otherwise of the same footprint as the currently existing family room addition. The architect also testified that the former nonconforming garage addition could not be reused as a garage. The record indicates that with the removal of the family room, including the roof, walls and floor, the former garage would have no roof. The addition of the roof would make the garage area a "building" which would be in the rear yard. Also, the former garage had to be extensively fortified to support

the new addition, with the addition of a new cinder block wall inside the old wall on both sides. Thus, he testified that the garage is now too narrow to accommodate a car. The architect also testified that the heating system for the house is partially located in this area, and would have to be relocated. Moreover, the former nonconforming deck could not be rebuilt. The former deck, which extended out four feet from the rear face of the house, and six feet from the side of the old family room, was in the area which now counts as rear yard. Finally, the kitchen would have to be reconfigured, and a new rear wall of the house would need to be constructed. The architect testified that the kitchen layout was totally changed, with new cabinets and fixtures, when the four-foot extension was added. The loss of the addition would require the kitchen to again be reconfigured to either its former configuration or to a different layout which would work for the needs of the family. In either event, changes to the plumbing, electrical and heating systems would be required, as would the relocation of cabinets and counter tops.

24. The architect testified that these changes would result in the loss of one of the main living spaces in the house, since there is no other area of the house which could be reconfigured or redeveloped to serve as a family room. He stated that there could be no deck at the main floor level of the house. A deck could be built as a matter-of-right only if it extended no more than four feet above grade, which is approximately four to five feet below the main floor level of the house. In addition, stairs would need to be built from the back door down to the patio, and the patio area beneath the present deck would need to be repaved and reland-landscaped, with the footings and deck supports removed.

25. The architect testified that the demolition work alone would cost on the order of $20,000. The renovation and repair work to enclose and weatherproof the house, reconfigure the kitchen, restore the systems, repave and re-landscape the patio area and connect the main level to the patio with a stair, would cost at least $95,000. The architect testified, however, that to execute the renovation and repair work in the high-quality style of the existing house, would add an additional $90,000 to the costs. He stated that these estimates do not even address the loss of the family room and the loss in property values.

26. The applicants testified that the reconfigured house would no longer serve their needs and that they would be forced to sell the house at a lower price and move, resulting in a tremendous loss.

27. The applicants testified that, had they been advised by the City in 1983 that the building permit could not be issued except by way of variance relief, they would have chosen to either proceed with variance relief, or not proceed and keep what they

had. They now risk losing not only what they were told they could build, but also losing the ability to restore what they had, through no fault of their own.

28. The Office of Planning (OP), by memorandum dated November 1, 1991, and by testimony at the public hearing, recommended approval of the application. OP stated that the site is affected by extraordinary circumstances which result from the property as well as events which have impacted the current conditions of the property. OP stated that the applicants received both preliminary and final approvals for the rear addition from District government zoning officials. The applicants were not aware that the nonconforming provisions had been changed prior to the issuance of the building permit, and apparently the zoning officials were also unaware of the changes. OP stated that the applicants relied on the actions and advice of the District government officials and on the building permit and proceeded to construct the addition. At the time the Stop Work Order was issued, a substantial amount of work was completed. OP noted that because of the nature and the extent of construction, and the financial obligations incurred by the applicants in reliance upon the building permits, the Zoning Administrator advised the applicants that work on the project could continue, and the Stop Work Order was rescinded. OP concluded that the applicants acted in good faith, relying on affirmative actions of the District government and made expensive and permanent improvements to the house. OP stated that these events combined create an exceptional situation.

29. OP, in its report and in testimony presented at the public hearing, stated that strict application of the regulations would impose a practical difficulty on the applicants because it would require the demolition of the addition. A strict application of the regulations would also preclude the applicants from rebuilding to the property's pre-existing condition before the addition was built. OP also stated that the applicants did not create the practical difficulty at issue and that no attempt was made by the applicants to subvert the law or the R-1-B District regulations. OP concluded that the addition was built in good faith with total reliance on the acts and statements of city officials and on the issuance of appropriate and necessary permits.

30. OP, in its report and in testimony presented at the public hearing, stated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the Zoning Regulations. OP stated that the addition is an improvement over the previously existing condition of the property. Moreover, the addition is well-designed and landscaped and is unobtrusive to adjacent properties and the neighborhood in general. OP concluded that the applicants have met the burden of proof.

31. The Department of Public Works (DPW), by memorandum dated July 30, 1991, stated there are no transportation issues involved in the application, and therefore, DPW has no objection to the proposal.

32. The Metropolitan Police Department, by letter dated July 19, 1991, stated that the public safety will not be affected nor will the level of police service currently being provided change as a result of the application. The department has no objection to the proposal.

33. Advisory Neighborhood Commission (ANC) 3G, by letter dated November 4, 1991, and in testimony presented at the hearing, unanimously supported the application. The ANC representatives stated that all members of the Commission visited the site, the Beins' residence and the surrounding neighborhood. The ANC found that approval of the requested variances is necessary for the applicants' use and enjoyment of the property, because of the unusual circumstances of the property and the practical difficulties of complying with the Zoning Regulations at this stage of the proceeding. The ANC further found that although one neighboring family objected to the appearance of the addition, the addition does not limit the light and air, or otherwise interfere with the reasonable use of the neighbor's property. In addition, the ANC found that the applicants' addition is in keeping with the character and use of other property in the neighborhood and is aesthetically pleasing. Moreover, the ANC found that the applicants have retained ample screening in and around the addition to their house.

34. In response to allegations by the Beinses that the Single Member District representative had a conflict of interest with respect to this case, the Single Member District representative stated that she did not feel that a conflict of interest existed. She testified that her relationship with the applicants is extremely tenuous, she had only met Mr. Fox once before the subject application was filed, and that in any event, it would not be unusual for her to know her constituents since she is an elected official. The point was also raised that Mrs. Beins is a former ANC Commissioner and the Beinses are friends with the chairperson of the ANC.

35. Five letters and a petition signed by 26 surrounding property owners were submitted to the record expressing support for the variance application and the improvements made by the applicants to the site. Supporters included the neighboring property owners to the east and west, and the vast majority of all property owners in the square who have a view of the addition. The letters of support, among other things, stated that the addition is aesthetically pleasing, it is an improvement to the neighborhood and it would be wasteful and unjust to require its demolition.

36. By submission to the record and testimony at the public hearing, Hugh and Mary Beins, owners of property located at 3812 Kanawha Street, N.W., across the alley from the site, expressed their opposition to the subject application. They stated that there were four illegalities with respect to the addition and proposed that two be permitted to remain (the family room and kitchen addition) and that two be removed (the stairs and deck). The Beinses stated that the deck and stairs interfere with their privacy. The Beinses argued that the applicants' property is not unique and that economic hardship cannot constitute a practical difficulty.

FINDINGS OF FACT:

1. Based upon the Court's rulings in de Azcarate and Beins, the Board finds the following facts in the record to be relevant to the issue of an "an extraordinary or exceptional situation or condition":

(a) On four separate occasions, the applicants herein received both preliminary and final approvals for the addition from zoning officials of the District of Columbia Government. These included the preliminary reviews on May 6 and 10, 1983, the stamping of the construction documents as approved for zoning on August 19, 1983, and the issuance of the building permit on August 22, 1983.

(b) The change in the zoning text occurred two weeks prior to the issuance of the building permit. Had the building permit been issued two weeks earlier, the Zoning Regulations would have been met. Neither the applicants, nor the city officials who issued the permit were aware of the change in the zoning text.

(c) Prior to the construction of the new addition, the original house (like most other houses in the area) was a nonconforming structure in that it did not conform to the 25 foot minimum rear yard requirement of the Zoning Regulations. The prior garage and family room addition extended to within seven feet of the rear property line. The new family room addition is built on top of the earlier garage addition, and the new family room does not extend any farther north than did the earlier addition.

(d) Upon receipt of the building permit, the applicants immediately acted in reliance thereon by accepting bids on the construction, hiring a contractor, obtaining financing for the project, and carrying

the project forward through demolition and construction.

(e) At the time the Stop Work Order was issued on October 26, 1983, demolition of the family room and deck were virtually completed. The applicants met with the Zoning Administrator and the Office of the Corporation Counsel who advised the applicants that work on the project could continue and the Stop Work Order was rescinded.

(f) The applicants acted in good faith, justifiably relied on the actions of the D.C. officials and on the building permit, and made expensive and permanent improvements to their property. The equities favor the applicants in this case.

2. Based upon the evidence and testimony, the Board finds that the strict application of the Zoning Regulations would impose a practical difficulty since it would require the applicants to demolish their family room, deck and stairway, as well as the four foot kitchen addition. Further, a strict application of the regulations would preclude the applicants from rebuilding the prior family room to its pre-existing condition.

3. The Board finds that the applicants purchased the house with the prior nonconforming family room, deck and garage in place. If these could not be rebuilt, the house would lose a portion of its value. Thus, having spent over $115,000 in legal fees and construction costs since 1983, the applicants would be forced to spend at least an additional $115,000 to make the house strictly comply with the Zoning Regulations, resulting in a house that would be smaller than the one they purchased 12 years ago.

4. The Board agrees with the Office of Planning report and recommendation.

5. The Board agrees with the report and recommendation of the Advisory Neighborhood Commission.

6. The Board finds that it is common for ANC Commissioners to know their constituents and that no conflict of interest is involved in this case.

7. Based upon the evidence and testimony, the Board finds that 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. The applicants' 1983 renovation of the house is an improvement over the prior existing condition of the property. The addition is tastefully designed and landscaped, and is unobtrusive.

8. Based upon the evidence and testimony, the Board finds that the present family room extends no farther into the rear yard than the prior family room, and extends only seven inches into the side yard, leaving 7'5" between the applicants' house and the west lot line. There is a fence lined with mature trees, providing substantial screening between the applicants' property and the neighboring property to the west.

9. The evidence of record reflects that the addition is similar to a number of other additions in the immediate area. The addition is compatible with the character of the neighborhood as well as other additions in the block. The addition is consistent with and reinforces the open/closed undulation of the alley. Eight of the nine houses on the subject block do not meet the current zoning requirements for side or rear yards.

10. The record reflects that the Zoning Regulations changed two weeks prior to the issuance of the permit. The Board finds that under former Section 8103.5 of the Zoning Regulations (August 1983 ed.), if the permit application were filed on August 4, 1983 (two weeks earlier) there would be no issue. Former Section 8103.5, as interpreted by the Office of the Corporation Counsel, stated that a project was vested as to zoning as of the date of filing of the permit application. Former Section 8103.52 stated that a permit had to be picked up within six months of the filing of the application. The requirement at that time was that work must have commenced within six months of issuance of the permit. Thus, the Board finds that if the permit application had been made on or before August 4, 1983, then construction could have commenced pursuant to the former zoning regulations as late as August of 1984, and still be valid as to zoning. Here, they started construction in October of 1983, ten months earlier. The Board finds that this sequence of events does not result in substantial detriment to the public good or substantial impairment of the intent, purpose or integrity of the zone plan. The Board also finds that greater harm to the public good will occur from a policy standpoint if the applicants are forced to demolish the addition, which was constructed in good faith, than will occur if the addition is permitted to remain.

11. As to the privacy concerns of the Beinses, the Board reiterates its prior finding that the impact of the addition to the Beins' use and enjoyment of their house and yard, viewed objectively, is not substantial. (1988 Order in BZA Appeal No. 14093, Finding No. 37). A 12-foot wide alley separates the two rear yards. The new construction does not in any way diminish the light and air of the Beinses. In addition, the applicants could, as a matter-of-right, install windows along the back of the house in conformance with the Zoning Regulations, which would be much more intrusive than the addition.

12. As the Beins' argument that there are illegalities, the Board finds that the addition was built with a building permit and that the applicants are before the Board seeking variance relief for those aspects of the addition which were later found to encroach into the side and rear yards. Given the instructions of the D.C. Court of Appeals, the issue of whether or not illegalities exist is immaterial to this application.

13. The Board finds that the Beins' proposal to remove the deck and stairs is not a reasonable approach and would be inequitable. The ANC has rejected the proposal, the addition does not substantially harm the Beinses, and the applicants have acted in good faith on affirmative acts of the D.C. Government and made expensive and permanent improvements on their property. Also, the new addition is virtually identical in location to the prior addition. Moreover, if the existing family room and deck are required to be removed, the applicants could build an accessory building up to 15 feet in height to occupy up to 30 percent of the rear yard. This accessory structure could be placed on the rear lot line, and a roof deck could be added to the structure. Alternatively, the applicants could have a 500 square-foot deck in the rear yard, an inch or so from the house. The existing addition is far more compatible with the adjacent properties than these or other matter-of-right alternatives.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicants are seeking area variances, the granting of which requires a showing that the site is affected by extraordinary or exceptional situations or conditions, that the strict application of the Zoning Regulations will result in practical difficulties to the applicants and that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan.

The Board concludes that the applicants have met the requisite burden of proof. The property is affected by extraordinary or exceptional conditions relating to the history of the addition. The D.C. Court of Appeals held in de Azcarate v. D.C. Board of Zoning Adjustment, 388 A.2d 1233 (D.C. 1978), that the extraordinary or exceptional condition which is the basis for a variance need not be inherent in the land, it can be caused by subsequent events extraneous to the land itself. As applied to this application, the Board concludes that these events include the city officials' approval of the addition, the issuance of the building permit, the reliance of the applicants on the permit and the lifting of the subsequent Stop Work Order by the Zoning Administrator on advice of the Office of the Corporation Counsel, and the economic prejudice to the applicants. On this basis, the

applicants reasonably proceeded in good faith to construct the subject addition.

The Board concludes that there are practical difficulties as a result of the exceptional conditions. Strict application of the Zoning Regulations would require demolition of the family room, deck and kitchen addition, and restoration of the house, all at substantial cost. It would also prevent the reconstruction of the prior addition. The practical difficulty also involves the applicants' good faith and detrimental reliance on assurances and actions of the City and the economic prejudice to the applicants if the regulations were strictly applied.

The Board further concludes that the addition is consistent with the purpose and intent of the R-1-B District and can be granted without substantial detriment to the public good. The addition significantly improves the property, and it extends no further into the rear yard than the prior addition. The Board believes greater harm will result if the applicants are required to demolish the addition than if the addition is permitted to remain.

Finally, the Board concludes that the applicants acted in good faith relying on actions of the government, that they made expensive, permanent improvements, and that the equities strongly favor the applicants.

The Board has afforded the ANC the "great weight" to which it is entitled. Accordingly, it is hereby **ORDERED** that the application is **GRANTED.**

VOTE: 3-0 (Maybelle Taylor Bennett and Paula L. Jewell to grant; Carrie L. Thornhill to grant by proxy; Sheri M. Pruitt and Charles R. Norris not voting, not having heard the case).

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

ATTESTED BY: Madeliene H. Robinson
MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: DEC 30 1992

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

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