BEFORE THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Application of Martin E. Hardy pursuant to 11 DCMR § 3103.2 for)
variances from Subsection 402.4, maximum floor area ratio require-)
ments, Subsection 403.2, percentage of lot occupancy, Subsection) Application No. 16573
404.1 minimum depth of rear yard; and Subsection 406.1, minimum)
width and area of a closed court. for the construction of a two-family)
flat in an R-5-B District at premises 1821 and 1823 Florida Avenue,)
N.W. Square 2556, Lot 28 (formerly Lots 808 and 812).)

DISTRICT OF COLUMBIA
SEP 7 P 3:08

MOTION FOR STAY OF DECISION AND ORDER

Lothrop House Unit Owners Association, Inc. and Elaine Morris, parties in the above-referenced case, hereby request the Board to stay its decision and order of August 31, 2000 in case No. 16573, pending review by the District of Columbia Court of Appeals, which has been filed this date as case number TBD.

The referenced decision and order granted variances in FAR, depth of rear yard and percentage of lot occupancy for Martin E. Hardy to construct a two-family flat in place of two garages at 1821 and 1823 Florida Avenue, NW. The Lothrop House Unit Owners Association, Inc. and Elaine Morris hereby ask the Board to stay the effectiveness of that order, pending resolution of the petition for review that has been filed in the District of Columbia Court of Appeals. Under D.C. App. R. 18, any request for a stay of agency order pending review must be first directed to the agency.

The timely filing of a petition for review in the Court of Appeals is official notice to the applicant that he proceeds at his own financial risk in relying on the BZA's approval. "The Board's ... order was not final because judicial review was being sought", Interdonato v. BZA, 429 A.2d 1000, 1004 (D.C. 1981).

The Court of Appeals "would not hesitate" to order a structure to be modified or even torn down if it finds the Board has erred in allowing it to be built. See Draude v. BZA, 582 A.2d 949, 951 n.1 (D.C. 1990).

BZA
Case No. 16573
Exhibit No. 80

Board of Zoning Adjustment
District of Columbia
CASE NO.16573
EXHIBIT NO.80

Notwithstanding that the applicant proceeds at his own risk if he begins construction before the case has been decided by the Court of Appeals, in this particular case Mr. Hardy's property shares multiple party walls with the two abutting properties, 1818 and 1822 Vernon Street, NW which are also the retaining walls of the latter properties. Applicant's immediate plans include alteration of those walls. A reversal by the Court of Appeals after construction begins will result in irreparable harm to the surrounding properties, as the retaining walls may be in a half-finished state.

The Criteria for Issuing a Stay

To prevail on a motion for a stay, the movant must show that he is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that the opposing parties will not be harmed by a stay, and that the public interest favors granting a stay. Barry v. Washington Post Co., 529 A.2d 319, 320-21 (D.C. 1987), In re Antioch University, 418 A.2d 105, 109 (D.C. 1980).

The Opponents are Likely to Succeed on the Merits

In this case the movants are likely to succeed on the merits because the Board's decision is not based on substantial evidence in the record, does not flow rationally from the findings of fact, and is inconsistent with legal precedent, in particular with respect to Mr. Hardy's "practical difficulties".

The Board finally concedes in the order what it denied at the hearing - that offers by neighbors to purchase the properties "is relevant to the determination of practical difficulty". Order p. 10-11. At the same time it dismisses Elaine Morris's offer to purchase the lots which would result in a 25% profit to Mr. Hardy in one year.

The Board states that "[T]he opponents' offer would not result in a fair and reasonable return on Mr. Hardy's investment in light of Mr. Hardy's efforts in purchasing *and developing* the site". Order p. 11. The record shows clearly that Mr. Hardy has not yet developed the site! Not only is he realizing income from the property while awaiting the Board's decision by continuing

the illegal renting of parking spaces to waiters at the Washington Hilton, he testified that he has not yet made any repairs. Transcript p 29:

Ms Renshaw: All right. But you have not sought to improve those garages at all?
Mr. Hardy: No, not really...
Ms. Renshaw: You have not put anything into....
Mr. Hardy: No. I was hoping to have a clear way to go before I got involved in doing it.

Thus the Board's conclusion that the return would not be fair and reasonable is not based on substantial evidence in the record and will be reversed accordingly.

Moreover, Boushra Hanna did not state how much he was willing to pay for the property. For the Board to assume the offer made by Elaine Morris on the record was a "take it or leave it" offer and represented Mr. Hanna's offer as well, is simply out of touch with the reality of buying and selling real estate. The offer made on the record does what was intended - it establishes a reasonable baseline of a 25% profit for one year of holding the property. There is no logical reason and flies in the face of common sense for the Board to conclude Mr. Hardy could not negotiate with one or both parties for a higher price.

The Board further states, "Accessory garage use ... would require the opponents to subdivide the property to include it with their lots. Either use [commercial garage or accessory garage] would require a certificate of occupancy and substantial repairs and reconstruction. *The opponents had not taken these factors into account in making their offer.*" [1] The Board has no evidence that the opponents had not taken those factors into account, and simply assumes that the opponents are naïve and have no development experience! It has no evidence to make such an assumption.

The Board has evidence that Hanna Associates owns at least one 18-unit apartment building and that Elaine Morris owns approximately one-third of the 16-unit Lothrop House plus

[1] With regard to commercial garage use, "the Board ordinarily must grant..." an application for a special exception as long as it complies with the limited requirements of the special exception regulation, which is not as stringent as that of a variance. See French v. DCBZA, 658 A.2d 1023, 1032-33 (D.C. 1995).

all its parking spaces and that her husband, Joseph Morris is a licensed master plumber. Transcript p 123. The plat and plans of the Lothrop House condominium submitted by Mr. Hardy show that Joseph Morris was the developer. To assume with no evidence that those individuals are ignorant of the efforts required to rehabilitate the garages is simply straining for some reason to dispose of the very evidence in the record that precludes the finding of practical difficulty.

The opponents stated in the record that the garages would be repaired if they were purchased. In all due respect, precedent does not even suggest that it is proper for the Board to evaluate whether purchase of the subject property would be an economic investment for the opponents.[2] See Roumel v. BZA 417 A.2d 405 (D.C. 1980), Carliner v. BZA, 412 A.2d 52 (D.C. 1980). (The bare fact that the applicant can sell the property to neighbors for a permitted use is relevant to the determination of practical difficulty).

Furthermore, if Mr. Hardy can readily combine the two garage lots into one lot, it is equally simple for the opponents to divide them again. Why the Board considers that a problem is simply inconceivable. See Roumel v. BZA 417 A.2d 405 (D.C. 1980) (neighbors could purchase and divide property to include with their own lots).

The Board then relies on Russell v. District of Columbia Board of Zoning Adjustment, 402 A.2d 1231, 1236 (D.C. 1979) to support its grant of variances in this case where the court held in Russell that an area variance could be granted where the owner could never sell the property for a permitted residential use absent a variance. In this case, the applicant can sell the property for two permitted accessory residential uses as garages.

The Board also relies on 1700 Block of N St. N.W. v. BZA, 384 A.2d 674 (D.C. 1978) for the proposition that "at some point economic harm when coupled with a significant limitation on the utility of the structure becomes sufficient to warrant an area variance" Order p 10. By

[2] There is also an imputed value to the opponents of avoiding the construction of a twenty-foot wall blocking the rear and courtyard windows of their respective property.

refusing to consider the evidence that Mr. Hardy could sell the property for a permitted use and by factoring in Mr. Hardy's alleged "development costs" that by his own testimony have not yet been expended, the Board finds economic harm where there is none. The record does not support this conclusion of economic harm.

Thus the Board's conclusions in disregard of applicable legal precedent that the opponents' purchase offers should not be taken into account in deciding Mr. Hardy's practical difficulty cannot withstand review by the court of appeals.

The opponents will also ask the court of appeals to review whether the Board's conclusion with regard to the adverse effect on light and air were based on substantial evidence. For example, The Board's finding that a long solid wall that will rise twenty feet above the rear yard of the Lothrop House would have the same effect as a small attached one-story storage room and three parked vehicles, even if one is a "large plumber's van", is not based on substantial evidence. Order p. 8. The photographs submitted by the applicant show that the van regularly parks at the door of the storage room, is smaller than the storage room itself, and that windows of Unit 103 are at the roof level of the one-story storage room. The proposed building will be two stories above the rear yards, blocking those windows and many more.

Irreparable harm to movants; No harm to applicant

As stated above, Mr. Hardy's property shares multiple party walls with the two abutting properties, 1818 and 1822 Vernon Street, NW which are also the retaining walls of the latter properties. Applicant's immediate plans include alteration of those walls. Transcript 22-23. A reversal by the Court of Appeals after construction begins will result in irreparable harm to the surrounding properties, as the retaining walls may be in a half-finished state.

The construction at close quarters will result in noise and dust imposed on the residents of neighboring properties. This harm is irreparable if the Board's decision is reversed, plus the noise and dust of the demolition afterwards will further the irreparable harm.

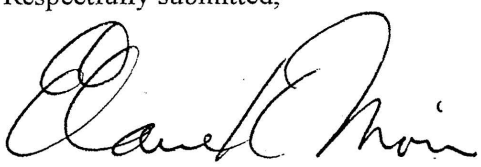
A stay would cause no harm to the applicant; rather, it would save him from precipitously evicting his parking tenants and beginning to spend money based on an order that may be ultimately reversed. He has testified that he does not want to make these expenditures until he "has a clear way to go". Transcript p 29. Until the case is decided by the Court of Appeals, he cannot have a clear way to go. He has few expenses connected with maintaining the properties (e.g. no utilities coupled with a minimal investment - $38,500) and he continues to receive rental income. Transcript p 29. The opposing parties have no wish to interfere with his income stream from the properties.

Public Interest favors a Stay

The public interest favors granting a stay. The garages have been in existence for many decades. They may not be attractive, but they are no danger to anyone. They have recently been cleaned up and the graffiti removed. If construction is begun, a construction site that could be halted in mid-stream would be much more unattractive and dangerous to the public and the surrounding neighborhood.

Accordingly, the undersigned parties request the Board to grant a stay of the above-referenced order pending a final decision by the Court of Appeals.

Respectfully submitted,



Elaine K. Morris
Lothrop House Unit Owners Association, Inc.
1822 Vernon Street, NW
Washington, DC 20009

September 7, 2000

DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
Case No. 16573, Martin E. Hardy

ORDER

In consideration of the Motion for Stay filed by Lothrop House Unit Owners Association, Inc. and Elaine Morris, parties in the above-referenced case, The board hereby GRANTS the motion and accordingly, the order dated August 31, 2000 in case no. 16573 is hereby STAYED pending a decision of the District of Columbia Court of Appeals.

IT IS SO ORDERED

_____
Board of Zoning Adjustment

Copies to:

Martin E. Hardy
871 Dolley Madison Blvd
McLean, VA 22101

Hanna Associates, Inc.
1814 Lamont Street, NW
Washington, DC 20009

Michael D. Johnson, Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capital Street, NE, Suite 2000
Washington, DC 20002

Elaine K. Morris
Lothrop House Unit Owners Association, Inc.
1822 Vernon Street, NW
Washington, DC 20009

CERTIFICATE OF SERVICE

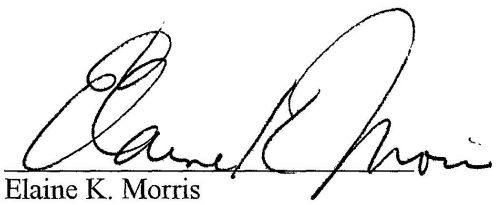
I hereby certify under penalty of perjury that on this 7th day of September, 2000, I served by first-class mail, postage prepaid, a true copy of the foregoing to:

Martin E. Hardy
871 Dolley Madison Blvd
McLean, VA 22101

Hanna Associates, Inc.
1814 Lamont Street, NW
Washington, DC 20009

Linda Softli, Chairperson
ANC 1C
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