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DISTRICT OF COLUMBIA
OFFICE OF ZONING
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DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT
APPLICATION NO. 16573

Applicant's response to Motion of Stay of Decision and Order

Application of Martin E. Hardy pursuant to 11 DCMR #3103.2 for variances from Subsection 402.4 maximum floor area ratio requirements, Subsection 403.2 percentage of lot occupancy, Subsection 404.1 minimum depth of rear yard, and 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 NW Square 2556, Lot 28 (formerly Lots 808 and 812).

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The Board of Zoning Adjustment by unanimous vote granted the variances requested by the applicant on July 5, 2000. The Decision and Order was issued on August 31, 2000. A motion for stay of the decision and order pending an appeal at the DC Court of Appeals was filed by Ms. Elaine Morris, pro se and on behalf of the Lothrop House Unit Owners Association on September 11, 2000. The applicant in the case, Mr. Martin Hardy, was out of the country until September 23, 2000 and was unable to meet the 7-day deadline for filing a response. Accordingly the Board is requested to waive that deadline and accept this filing.

The very thorough Decision and Order of August 31, 2000 granting the requested variances is based on the evidence of the record, as contained in the 169 page transcript of the 3½ hour hearings. **The present motion, and the appeal to the Court of Appeals, raise no issues that have not already been fully addressed by the BZA in its discussions and covered in the Decision and the transcript. There is no reason to reconsider the Order or to stay its application.**

The absence of merit of the motion

The sponsors of the motion have on many occasions during the proceedings evidenced their desire to purchase the property from Mr. Hardy. They have

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used this informal "offer" to assert that they would provide the applicant with a reasonable return on his investment. In this way they hoped to lay to rest the question of the practical difficulty to Mr. Hardy if the requested variances would have been denied. This is a transparent maneuver to force the applicant to sell the property to them to their advantage, which is being repeated in the present proceedings.

The Board noted that the case cited by Ms. Morris in support of her line of argument --Rumel vs BZA—refers to an application for a use variance not an area variance. In the present case, the applicant sought and received approval to change the existing nonconforming garage use, which lacks special exception approval and a certificate of occupancy, to a conforming residential use.

In any event, even if Rumel were to be considered relevant, the Board is correct to note that any offer would have to take account of applicant's efforts in purchasing *and developing* the site. Ms. Morris asserts that "by Mr. Hardy's own testimony" development costs have not been expended (p5 of the motion). This is not true. The testimony only refers to repairs. Even though no major repairs have been undertaken, very substantial costs have already been incurred (settlement costs, architectural services, legal costs in connection with the BZA application, real estate taxes, foregone interest, etc.,). These are far in excess of any rental income received. Thus the statement by Ms. Morris that her "purchase offer" would result in a "25% profit to Mr. Hardy in one year" is simply wrong, and the Board was correct in its conclusion that the return would not be fair and reasonable. Moreover, the Board also noted that objective criteria for establishing what would be considered "reasonable" have never been established.

The issue of the case was always whether Mr. Hardy's application meets the tests for granting area variances to permit him to develop his property. These tests were met. This case is not about the purchase of the garages by Ms. Morris, or her real estate expertise. The Board was correct in noting that the opponents, even if they were to purchase the property, could not bring them into conforming use without further legal action. But this is not the point. The rest of the discussion on pp 3-4 of the motion is even more irrelevant. This refers to issues such as whether or not the cost of such further legal action was taken into account by the opponents, and the putative costs to the opponents in developing the site were they to purchase the property from Mr. Hardy. They will not be purchasing the property in any event.

The issue of effect on light and air on Lothrop House raised again in the motion was discussed at length in the hearings with the aid of computer simulations and models. The motion does not add anything to the discussion. In its Decision, the Board concluded that "the proposed project would not affect the view of any of the windows at the Lothrop House, nor affect their light or air" (Decision para 23). Specifically, it stated that "the proposed town house will not significantly affect Ms. Morris' units" (Decision para 27). The discussion of her husband's plumber's van is irrelevant to this finding.

The question of irreparable harm

Contrary to the assertions made in the motion, proceeding with the project will **not** cause irreparable harm to the opponents (Ms. Morris and the Lothrop House Owners). **By contrast, a stay would cause irreparable harm to the applicant (Mr. Hardy).**

Ms. Morris claims that party walls may be disturbed. This is not true. Contrary to what is stated in the motion, Mr. Hardy's plans do not include any alteration of party and retaining walls. Moreover, any work on shoring up the existing retaining walls can only serve to benefit Lothrop House and Ms. Morris, at least indirectly, because it is their dirt that is being retained.

The other so-called "irreparable harm" (claimed by Ms. Morris in the motion) i.e. the "harm" occasioned from construction work by proceeding with the project, is pure exaggeration. This issue has already been fully addressed by the Board.

Irreparable harm, by contrast, would be done to Mr. Hardy if the BZA were to stay its decision and stop work on the project pending action by the Court of Appeals. The project would then be delayed by perhaps two years, pending the appeal, and perhaps even longer. Together with the legal costs connected with the appeal to the Court, this will result in thousands of dollars of additional costs to the applicant, not to mention the loss of his valuable time (how can that be measured?). This would come on top of the substantial expenses already occasioned as a result of the attempts by the proposers of this motion to block the project and to force Mr. Hardy to sell the property to them.

The Public Interest

The applicant's project has been approved by the BZA. It has the overwhelming support of the neighborhood and the ANC, and will clear up the last bit of urban blight on the 1800 block of Florida Avenue. It clearly serves the public interest, as recognized specifically on p11 of the Decision. Thus the public interest does not favor a stay, contrary to the assertion in the motion.

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The arguments advanced to support the motion for stay of the decision and order have no merit. They are guided only by the self-serving interest of the opposing parties to deny the applicant the right to develop his property. The motion should be DENIED.

Respectfully submitted

Martin E. Hardy
871 Dolley Madison Blvd
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September 27, 2000

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 28th day of September, 2000, I served by first class mail, postage prepaid, a true copy of the foregoing to:

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Martin E Hardy