GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16573 of Martin E. Hardy, pursuant to 11 DCMR § 3103.2, for variances from Subsection 402.4, maximum floor area ratio requirements for a structure; Subsection 403.2, percentage of lot occupancy; Subsection 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).

HEARING DATE: June 20, 2000

DECISION DATE: July 5, 2000

DISPOSITION: The Board granted the applicant variances from 11 DCMR §§ 402.4, 403.2, and 404.1 to permit the construction of the alternative townhouse project by a vote of 5:0 (Robert N. Sockwell, Anne M. Renshaw, Sheila Cross Reid, John G. Parsons, and Rodney L. Moulden, to approve).

DATE OF FINAL ORDER: August 31, 2000

ORDER DENYING MOTIONS for RECONSIDERATION AND STAY PENDING APPEAL

The parties in opposition to BZA Application No. 16573 (the opponents) filed two post-hearing motions, a Motion for Reconsideration and a Motion for Stay of Decision and Order. After review of the motions and the applicant's opposition, the Board denied the motions at its October 3, 2000, public meeting.

Motion for Reconsideration

The Hanna Association, Inc., timely filed a motion with the Board on September 11, 2000, requesting the Board to reconsider its August 31, 2000, decision and order. The applicant, Martin E. Hardy, filed a response in opposition on September 28, 2000, more than seven days after the filing deadline established in 11 DCMR § 3126.5. The Board waived the deadline pursuant to 11 DCMR § 3101.6 to accept the late-filed opposition, since Mr. Hardy was out of

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the country at the time the motion was served and filed his response within five days of returning.

The Board's Rules of Practice and Procedure provide in 11 DCMR § 3126.4 that "A motion for reconsideration shall state specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought." The Hanna Association asserts that the record contains factual errors and erroneous conclusions of law and that the conclusions of law are not based on substantial evidence in the record, do not flow rationally from the findings of fact, and are inconsistent with prior precedent. The motion however does not specify any grounds that would substantiate its claims of error.

The Hanna Association states that if the motion is granted, it will introduce additional evidence that the applicant's property is not unique, that there is no practical difficulty or undue hardship to the applicant, and that there will be substantial detriment to the public good resulting from the neighbors' loss of light and air and economic value in their investments. Under 11 DCMR § 3126, a motion for reconsideration is based upon the existing record. To introduce new evidence, the Hanna Association would have had to (1) file a motion for rehearing under subsection 3126.2 within ten days of the issuance of the decision and order and (2) submit under subsection 3126.6 new evidence that "could not reasonably have been presented at the original hearing." The uniqueness of the subject property, the resulting practical difficulties, and the effects of granting the variance were fully explored at the public hearing on the application and discussed at length in the Board's decision and order. Even if the Hanna Association's motion for reconsideration is treated as a motion for rehearing, the Hanna Association failed to submit any new evidence or to show that any new evidence that it might seek to introduce could not reasonably have been presented at the original hearing.

Since the Hanna Association has failed to specify the grounds of its motion for reconsideration, failed to show that the Board's decision is erroneous, and failed to show that any new evidence that it might seek to introduce could not reasonably have been presented at the hearing on the application, its motion for reconsideration is denied.

Motion for Stay

The Lothrop House Unit Owners Association, Inc., and Elaine K. Morris filed a Motion for Stay of Decision and Order pending appeal to the Court of Appeals. The Hanna Association, which indicates that it too will appeal, has joined in this motion, which the applicant opposes.

Under 11 DCMR § 3125.9, the Board's decision and order, which was filed in the record and served on the parties on August 31, 2000, became effective on September 10th. The decision and order remain effective in the event of an appeal "unless stayed by the Board or a court of competent jurisdiction." 11 DCMR § 3130.4.

To prevail on their motion, the opponents must show that they are likely to succeed on the merits, that irreparable injury will result if the stay is denied, that the applicant will not be

harmed by a stay, and that the public interest favors the granting of the stay. *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987). The Board finds that the opponents have not made the requisite showing for the following reasons:

1. The opponents have not shown that they are likely to succeed on the merits. The opponents state that they will argue on appeal that Mr. Hardy will not encounter "practical difficulties" with regard to the property because the opponents have made a reasonable offer to purchase the property. Their motion for stay largely restates an unsuccessful argument made at the hearing.

The opponents assert that there is no substantial evidence in the record to support the Board's conclusion that Ms. Morris' verbal "offer" to purchase the property at the hearing for $10,000 over the purchase price would not, in light of Mr. Hardy's efforts in acquiring and developing the site, result in a fair and reasonable return on his investment. They also assert that the additional $10,000 would result in a 25 percent return on Mr. Hardy's investment.

While Mr. Hardy did not present evidence regarding the amount of money he has spent in acquiring the property and planning the townhouse apart from the $38,500 purchase price, Mr. Hardy described how he came to purchase the property and his efforts in subdividing the two lots, planning and designing the townhouse, and applying for the variances. The record and transcript reflect that Mr. Hardy obtained the professional services of an attorney, surveyor, architect, and zoning consultants and that he spent a considerable amount of his own time in acquiring and developing the property. The Board may take notice that there are also closing costs associated with the purchase of any property. Taking into account Mr. Hardy's likely expenditures and the value of his own time, the additional $10,000 offered by the opponents would not result a 25 percent return on his investment.

In any event, the opponents now admit, and Mr. Hardy testified, that he "never received any offer with a figure." Tr. at 91. The opponents assert that the Board could have concluded that Mr. Hardy could have negotiated with one or both parties for a higher price. Any findings based upon what the opponents might offer or what Mr. Hardy might ultimately be able to negotiate would be speculative and would not support a finding that Mr. Hardy could reasonably dispose of his property so as to avoid practical difficulties. As clarified by the opponents' motion for stay,[1] the evidence would thus support an additional finding that the opponents did not made a reasonable or even bona fide offer to purchase the property. The Board therefore believes that its conclusion at page 11 of its decision and order that the opponents' purported purchase offers should not be taken into account in assessing Mr. Hardy's practical difficulties is supported by substantial evidence in the record and that the opponents are not likely to prevail on this issue on appeal.

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[1] According to the motion at page 3, "Boushra Hanna did not state how much he was willing to pay for the property." The opponents further state that the offer made by Ms. Morris was not a "take it or leave it" offer and did not represent Mr. Hanna's offer.

The opponents next argue that there is no evidence to support the Board's finding that the opponents, in stating that they were willing to purchase the property, had not taken into account the need for a certificate of occupancy and the need for substantial repairs and reconstruction. The transcript indicates that while the opponents recognized the need to clean up the garages, replace the doors, and repair the roof, *see, e.g.,* Tr. at 126, they did not recognize the need for a certificate of occupancy and the "substantial repairs required to shore up the retaining/building walls and correct structural damage to the garages," as stated in the Board's Finding of Fact No. 7. *See, e.g.*, Tr. at 91, 126, 136-37.

The opponents assert that the Board should not consider whether the purchase of the property would be an economic investment for the opponents. They erroneously state that the "bare fact" that an applicant can sell the property to the neighbors for a permitted use is relevant to the determination of practical difficulty. Under both *Roumel v. District of Columbia Board of Zoning Adjustment,* 417 A.2d 405, 408 n.1 (D.C. 1980), and *Carliner v. District of Columbia Board of Zoning Adjustment,* 412 A.2d 52, 54 (D.C. 1980) (*per curiam*), the Board may consider in assessing the applicant's practical difficulties whether the applicant can *reasonably* dispose of the subject property. The opponents' failure to take into account the substantial expenditures needed to maintain the continued garage use and the necessity of additional zoning relief for continued commercial garage use or subdivision for accessory garage use, as well as their failure to make a bona fide offer, shows that there was no reasonable offer to purchase the property. The evidence thus supports the Board's conclusion that "the opponents purchase offers should not be taken into account in assessing Mr. Hardy's practical difficulties."

The opponents also take issue with the Board's reliance on *Association for Preservation of 1700 Block of N Street, N.W., and Vicinity v. District of Columbia Board of Zoning Adjustment,* 384 A.2d 674 (D.C. 1978), for the proposition that at some point, economic harm, when coupled with some loss in the overall utility of a property, is a practical difficulty that merits an area variance. In the instant case, the Board concluded that a smaller structure than that proposed by Mr. Hardy would be economically infeasible due to the high costs of shoring up the existing retaining walls and the installation of new utilities. The opponents complain that since Mr. Hardy has not yet incurred those expenses, they should not be taken into account in assessing his practical difficulties. The Board concludes that the opponents are not likely to prevail on this argument on appeal, since the Board's analysis is the type of analysis envisioned in *1700 Block.* Under *1700 Block,* the Board evaluates economic harm and loss in utility of a property in light of the proposed structure for which the variance is sought.

Finally, the opponents take issue with the Board's conclusions that the granting of the variance will not result in substantial detriment to the public good. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 799, as amended; D.C. Code § 5-424(g)(3)) does not require that a variance not result in any impact, but that it not result in substantial detriment to the public good. The Board concluded that while the proposed project would have some impact on the light and views of the adjacent properties, it would not result in a substantial detriment to the public good. The Board thus concludes that the opponents are not likely to prevail on appeal in this regard.

Based on the above, the Board concludes that the opponents have not demonstrated that they are likely to succeed on the merits.

2. Irreparable Harm to the Movants (Opponents).

The opponents state that they will be irreparably harmed by the construction noise and dust and that they fear that if the Court of Appeals reverses the Board's decision mid-construction, the retaining walls may be left in a half-finished state.

The Board finds that there would be no irreparable harm resulting from construction noise and dust since any inconvenience would be temporary. Moreover, the applicant has submitted a construction management plan to the Board that will prevent, control, and mitigate construction impacts.

The Board also finds that the opponents' fear that the retaining walls would be left half-finished does not constitute irreparable harm. Since the retaining walls protect Mr. Hardy's property, it is unlikely that he would leave them half-finished. Further, as recognized in *Kuflum v. District of Columbia Motor Vehicle Services,* 543 A.2d 340, 344 (D.C. 1988), the key word in the phrase "irreparable harm" is "irreparable." The possibility of adequate compensation or corrective relief available at a later date in the ordinary course of litigation weighs heavily against a finding of irreparable harm. *See Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n,* 104 U.S. App. D.C. 106, 259 F.2d 921, 925 (1958). Any damage to the opponents from the proposed stabilization of the retaining walls could be addressed through compensation or corrective action.

3. Harm to the Applicant.

Apart from delay resulting from the ordinary course of appellate litigation, the Board concludes that a stay would not result in harm to the applicant.

4. The Public Interest Does Not Favor Granting a Stay.

The opponents assert that a stay would serve the public interest because, if they are successful in their appeal, the construction of the garages might be halted mid-stream, leaving the site unattractive and dangerous. In its decision and order, the Board concluded, as did the Advisory Neighborhood Commission for the affected area, that the public interest would be served by the applicant's project, which will remove the last vestige of urban blight from the 1800 block of Florida Avenue, N.W. The garages are in an advanced state of decay and disrepair. The site attracts public inebriates, and there is evidence of rodent infestation and public urination. A stay would delay the improvement of the site and be detrimental to the public interest.

Conclusion

Since the opponents have failed to show that they are likely to prevail upon appeal, that they will suffer irreparable injury if a stay is denied, or that the public interest favors the granting of a stay, the motion for stay is denied.

For the reasons stated above, the Board hereby **ORDERS** the Motion for Reconsideration filed by the Hanna Association, Inc., **DENIED**.

Vote: 5:0 (John G. Parsons, Sheila Cross Reid, Robert N. Sockwell, Anne M. Renshaw, and Rodney L. Moulden, to deny).

The Board further **ORDERS** the Motion for Stay filed by the Lothrop House Unit Owners Association, Inc., and Elaine K. Morris, and joined by Hanna Association, **DENIED**.

Vote: 5:0 (Robert N. Sockwell, Anne M. Renshaw, Sheila Cross Reid, John G. Parsons, and Rodney L. Moulden, to deny).

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

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

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

FINAL DATE OF ORDER: NOV 16 2000

UNDER 10 DCMR § 3125.9, "NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO SUBSECTION 3125.6" OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

Ord 16573 MS/ SMP

BZA APPLICATION NO. 16573

As Director of the Office of Zoning, I hereby certify and attest that on NOV 16 2000, a copy of the foregoing Order Denying Motions for Reconsideration and Stay Pending Appeal in BZA Application No. 16573 was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning this matter and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning