the District of Columbia
Court of Appeals

Craig and Ann Goodman]
Petitioners]

v. No. 02-AA-149

District of Columbia Zoning Adjustment]
Respondent]

Motion to Supplement the Administrative Record

Petitioner moves that Respondent, District of Columbia Board of Zoning Adjustment's (BZA) supplement the filing of the Record in the above referenced case to include the October 2, 2001, Decision Day Transcript.

This transcript documents the errors in fact and law underlying the Board's rational (or lack thereof) for denying the 5-foot height variance requested in this case. The conflicts between this Decision Day transcript and all of the evidence and unrebutted expert testimony submitted, the plain language of Code Sections 320 and 321 and the misconduct in this case are a material part of Petitioners arguments that the BZA committed multiple errors in fact, law and process.

Petitioner respectfully requests that the record certified be supplemented to include the entire Decision Day Transcript dated October 2, 2001, a copy of which is attached hereto and incorporated herein by reference.

Respondent consents to this request,

Respectfully submitted,

Craig G. Goodman, Esq.
Petitioner
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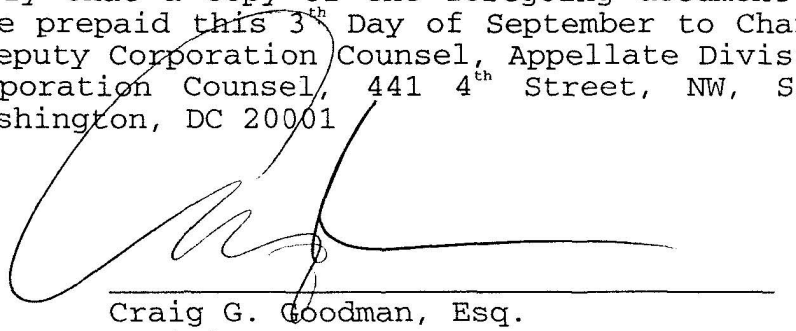
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BZA
Case No. 16696
Exhibit No. 97

Board of Zoning Adjustment
District of Columbia
CASE NO.16696
EXHIBIT NO.97

Certificate of Service

I hereby Certify that a copy of the foregoing document was mailed, postage prepaid this 3th Day of September to Charles L. Reischel, Deputy Corporation Counsel, Appellate Division, Office of Corporation Counsel, 441 4th Street, NW, Sixth Floor South,Washington, DC 20001



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August 29, 2002

Mrs. Jerrily R. Kress,
Director of the Office of Zoning
Board of Zoning Administrator
441 4th Street, NW
Suite 210
Washington, DC 20001

Re: BZA Application No. 16696;
District of Columbia Court of Appeals
Case Number 02-AA-149

Dear Ms. Kress,

Today I received the record you certified on appeal in the above matter.

The Decision Day Transcript of October 2, 2001 has not been certified as part of the transcript and is material to my case on appeal.

It is requested that you immediately certify the complete Decision Day Transcript to the Appellate Court as part of the record on appeal.

Thank you in advance for your cooperation herein.

Sincerely,

Craig Goodman, Esq.
Petitioner/Co-Counsel

cc: Charles Reischell, OCC
Office of Appeals Coordinator

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

+ + + + +

BOARD OF ZONING ADJUSTMENT

+ + + + +

PUBLIC MEETING

+ + + + +

TUESDAY

OCTOBER 2, 2001

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22 th AM 5 - NOV 2001

The Board met in Suite 220, 441 4th Street, N.W., Washington, D.C. at 9:30 a.m. Sheila Cross Reid, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

SHEILA CROSS REID	Chairperson
ANNE RENSHAW	Vice Chairperson
ANTHONY HOOD	Member
DAVID LEVY	Member
CAROL MITTEN	Member
PETER MAY	Member
GEOFFREY H. GRIFFIS	Member
SHERI PRUITT	Secretary to the Board
BEVERLEY BAILEY	Zoning Specialist
PAUL HART	Zoning Specialist
JOHN NYARKU	Zoning Specialist
MARIE SANSONE, ESQ.	Corporation Counsel

ORIGINAL

C-O-N-T-E-N-T-S

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MR. HART: The next case is Application Number 16696 of Craig and Ann Goodman pursuant to 11 DCMR 3103.2 for a variance from the limitations of Subsection 2500.4 to allow a second-story addition to an accessory garage for maid's quarters and mother-in-law suite in the R-3 District at premises 3254 O Street, N.W. That's Square 1230, Lot 809.

The hearing dates were May 1st, 2001 and July 17th, 2001.

The application was heard by the Board at this July 17th, 2001 hearing at which is was determined that additional information was needed prior to the Board giving its decision. The following submissions were requested:

*A Landscape Plan including location of the referenced granite wall.

*Information on replanting of the existing boxwood trees

*A Floor Plan

*Evidence of the Commission of Fine Arts rejection of the prior owner's attempt to expand the building

*Cost of carrying lumber through the side yard to the back of the house.

The time line for these submissions were:

August 22nd for the initial submissions; responses September 5th; finding of facts September 18th; and the decision today.

Participating members were or are Sheila Cross Reid, Ms. Renshaw, Mr. Griffis, Mr. Levy, and Ms. Carol J. Mitten.

The case is now before the Board.

CHAIRPERSON REID: All right, Board Members. I think that what we can do is to open the floor for discussion. Want to do it in form of a motion and then discussion or we could just have it for discussion. I think that a motion is always good.

Ms. Mitten.

COMMISSIONER MITTEN: Okay. If you want to start with a motion, then I would move denial of the variance requested in Application Number 16696.

MEMBER LEVY: I'll second that.

CHAIRPERSON REID: Discussion.

COMMISSIONER MITTEN: For the discussion of the variance that's been requested, I believe that the Applicant has not met their burden of proof and in saying that, what immediately becomes an issue is whether or not we're even focusing on the right variance.

So, I guess I'll just have to move into

that which is I believe that this is not only an issue related to height. It's an issue related to use and in Section 2500.5 and I'll just read that.

It says in an R-1-A or R-1-B District an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building and I know we had some discussion about this during the hearing and it's a question of -- I know that the Applicant's position and perhaps it's shared by the Zoning Administrator is that because they are in R-3 that the provisions of the R-1-A and R-1-B Districts are automatically folded in but not this provision in my opinion and I can go into more detail on that if you like, but --

CHAIRPERSON REID: Did you say of the Chair?

COMMISSIONER MITTEN: I'm sorry.

CHAIRPERSON REID: Did you say the opinion of the Chair?

COMMISSIONER MITTEN: No.

CHAIRPERSON REID: Oh. Okay.

COMMISSIONER MITTEN: I said the Applicant and perhaps the Zoning Administrator.

CHAIRPERSON REID: Okay. I thought you

said and the Chair.

COMMISSIONER MITTEN: No. If I did, I mis-spoke.

CHAIRPERSON REID: Okay.

COMMISSIONER MITTEN: I didn't mean to say that.

And I believe that this provision does only apply to R-1-A and R-1-B and in the record, Ms. Sansone was kind enough to go back to the original Zoning Ordinance and show us how this has been rewritten over the years not to change its meaning, but just in the codification and the original meaning is clear that this was meant to be exclusive to the R-1-A and R-1-B Zoning Districts and in order for this Applicant to be granted the request for this addition to their garage would not only require a variance from height, it would require a variance from the use provisions of 2500.5 and we have -- and because that hadn't been advertised and there's nothing in the record to support that and yet, I don't also believe that there's adequate evidence in the record to support why they should be granted the variance from 2500.4.

CHAIRPERSON REID: All right. Further discussion. Was there a second? There's no second?

VICE CHAIRPERSON RENSHAW: Mr. Levy seconded it.

CHAIRPERSON REID: Okay. All right.

VICE CHAIRPERSON RENSHAW: I believe.

This is a very convoluted case, a very difficult case and has resulted in I'm sorry to say kind of like a *mini-range war*.

The case has put both the Applicant and the opponents I believe to considerable expense, and I personally hate to see that, trying to prove one side or another side. We have received into the file, Madam Chair, a great deal of information at the last moment and I am just wondering if any of this information should -- we should then put it out there for any kind of response by the other parties and I would like to hear from my colleagues as to their thoughts on this.

CHAIRPERSON REID: Well, we can do one of two things. If we feel that based on the information that has been submitted and the testimony at the hearings, we are prepared to take a vote today, we can do that or if you feel that you have inadequate information or you feel you need more information, then you could delay making a decision until such time that the additional information as requested has come

into the record.

If you feel that any other materials or any other information that you may acquire may have a bearing on the output of the decision, then I think it would warrant having more information coming in, but if you feel today that you have enough to enable you to be able to make a rationale and just decision, then we can move forward.

COMMISSIONER MITTEN: Madam Chair, I'm very sensitive as I know you are to giving the Applicants the full opportunity to make their case and, you know, there's been to the extent that the Board agrees with me, I believe that there's a use variance that's required that (a) has not been advertised and (b) the Applicant has not had the opportunity to meet their burden.

There's an additional side yard issue that arises out of 2500.6, but as it relates to the variance that was advertised which is for the height which would relate solely to -- the Applicant never spoke to the issue of hardship that would be created by -- or that would be created by not granting the variance and without the use variance, the only use that the garage could be put to would be storage and there was no discussion of the fact that they have

inadequate storage. They have a three-car garage plus a storage section off to the side and I think in this case if we were to allow the Applicant to advertise additional variances and drag this out, the discord in the community that Ms. Renshaw made reference to is just going to get worse and I am not sure that the Applicant is capable of meeting the burden for the use variance and even for the height variance.

So, I guess I would -- well, I don't want to cut anybody off without giving them, you know, ample opportunity to make their case. I don't think prolonging this is going result in anything but additional ill will in the community and it won't change the outcome.

MEMBER GRIFFIS: Can I clarify a question to Ms. Mitten? Because you're bringing up two issues.

One, you're stating fairly emphatically that the case has been made that's before us and that is for the height variance.

COMMISSIONER MITTEN: Yes.

MEMBER GRIFFIS: Secondly, you're indicating that perhaps there's a use variance that needs to be applied for, but you are not indicating that you are not supporting this case based on the fact that there may be a use variance required.

Is that correct?

COMMISSIONER MITTEN: That's correct. Yes. I see them as two distinctly different issues.

CHAIRPERSON REID: So, with or without the use variance, you don't think that they made the case?

COMMISSIONER MITTEN: Correct.

CHAIRPERSON REID: All right.

MEMBER GRIFFIS: And I'm not sure. Maybe we can get clarity. Because I'm not sure -- I think we ought to speak to the height variance and then perhaps move on. Because I'm not sure how we would deal with the use variance. We could recommend or do we --

COMMISSIONER MITTEN: Can I just maybe step back from that and let me tell you we have to reach some consensus first about the use variance because it impacts the burden of proof for the Applicant on the height variance.

CHAIRPERSON REID: Well, wait a minute. The use variance is not before us right now.

COMMISSIONER MITTEN: But, we have to have some consensus about what use the garage or the accessory structure --

CHAIRPERSON REID: I agree with that.

COMMISSIONER MITTEN: -- may be put to.

CHAIRPERSON REID: And your point is very well taken.

However, I don't know why we -- why didn't we do this at first to have them add a use variance. Because we did discuss this matter as far as the improper use of the addition for a family member vis-a-vis domestic. Remember?

COMMISSIONER MITTEN: Yes.

CHAIRPERSON REID: So, at that point, we could have had it amended, but we didn't. So, as such, I don't think we can consider a use variance that's not even before us, hasn't even been advertised in the first place.

Can we, Ms. Sansone? Is she there?

MS. SANSONE: Madam Chair, I think the whole question of use variance came up sort of throughout the thread of the extensive record in this case. So, it's not as though the parties haven't been aware of it and haven't alluded to it.

It was never advertised. The Applicant took the position that the use was a matter of right which the Office of Corporation Counsel does not agree with, but it hasn't been advertised and I think the Applicant's position was they didn't have to deal with it because they didn't believe they really needed it.

So, I guess in a way the Applicant has been aware of the issue and has chosen to adopt a different strategy of dealing with it by not dealing with it.

CHAIRPERSON REID: Well --

MS. SANSONE: If you wish to deal with the area variance and if you were to grant it for example, we could restrict the order to say the second story may not be used for human habitation. That would be a possibility or you could, you know, perhaps evaluating the height variance on the merits decide that the Applicant hadn't made the case.

So, there's several ways of trying to deal with this.

CHAIRPERSON REID: But, I guess what I'm asking you is given the fact that we did discuss the possibility that a use variance was needed and we did indicate that, even corp counsel did, a use variance was needed. That would have been incumbent upon the Applicant to have requested that that be added to the application to be considered as well and that not having been done, we determined now that there is a use variance needed. We could make a motion. We could make a decision just based on that, on those facts. The fact that to me it's clear that there's a

use variance needed. So, if we just moved ahead on the area variance --

MEMBER GRIFFIS: Perhaps you need to take a moment and talk about the use before we go back into the case because I think that it is a large issue and that we may be able to bring some clarity to. We may not be. But, in terms of if I might speak to it, 2500.5 which Ms. Mitten has read says in a R-1-A or R-1-B District, an accessory private garage may have a second story used for sleeping or living quarters for domestic employees of the family occupying the main building.

Now, for purposes of argument, I think the other side of what Ms. Mitten is saying that that says and the key word I have is may, it seems to be granting this privilege in a R-1-A and a R-1-B which is a lower zoning than an R-3 and R-4, et cetera.

CHAIRPERSON REID: Yes. Yes.

MEMBER GRIFFIS: Therefore, a reading of this provision might be and I believe that it has been up until now the fact that it is allowing this use and by basis of extrapolation, a use that would be permitted in a higher zone allowing this in a lower zone of R-1-A and if we turn just to -- of course, I'm sure a lot of folks rely on this Section 321,

accessory use in buildings R-3; 321.1, the following accessory uses or accessory building incidental to the uses permitted in Section 320.6 shall be permitted in R-3 Districts. Any accessory use or accessory building permitted in R-1 District.

COMMISSIONER MITTEN: But, you have to read the whole sentence please.

MEMBER GRIFFIS: Indeed.

COMMISSIONER MITTEN: Read the whole sentence.

MEMBER GRIFFIS: Which is Section -- under Section 202 and 203 of this title. I understand there's not a --

COMMISSIONER MITTEN: Not 2500.5.

MEMBER GRIFFIS: But, then you would move towards 2500.5 in order to then to get further clarity, but again, I think it can be strongly argued that when you have -- the may is the word in question in my own mind. In terms of that seems to be allowing something that occurs and if we go based on the fact that the residential zoning builds on itself, then it is allowing something that is -- my assumption or my argument here with this section is that it is being allowed in a lesser zone.

CHAIRPERSON REID: But, just let me jump

in real quick. Under 2500.5, but how do you get around the fact that it stipulates that it must be living quarters of domestic employees of families occupying the main building and it was proffered to us that this was going to be a family member that would be occupying it and that was my point of departure.

MEMBER GRIFFIS: Oh. Well --

COMMISSIONER MITTEN: There's actually multiple layers --

MEMBER GRIFFIS: Yes.

COMMISSIONER MITTEN: -- to this issue. The first issue is can an accessory building with a second floor in R-3 be used for human habitation for whatever reason? I believe the answer is no unless you get a use variance. Mr. Griffis at least is arguing the opposite. I don't know what he thinks, but I think that it's a very -- the interpretation that suggests that Mr. Griffis is correct is contrary to the words in the Zoning Ordinance and if you take the trouble as Ms. Sansone very kindly did for us to go back to the origin of it, it's clear what was meant. So, I mean taking all that together I think the conclusion that one must draw is that without a use variance the only use that a second floor of an accessory building may be put to in R-3 is an

accessory use that's already permitted which would be storage but not human habitation.

CHAIRPERSON REID: Yes.

COMMISSIONER MITTEN: So, that's to me the threshold issue.

Now, if you agree with Mr. Griffis that well, it could be maid's quarters, then you get to the issue that you raised which is well, they said this isn't really for maid's quarters. This is for, you know, an elderly relative or something like that.

CHAIRPERSON REID: Right.

COMMISSIONER MITTEN: So, no matter how you want to make the interpretation --

CHAIRPERSON REID: And also, Mr. Goodman, I think, in his testimony did allude to that when he said that if I were two feet over another zone, it would be a matter of right use. Which, you know --

MEMBER LEVY: Madam Chair.

CHAIRPERSON REID: Yes.

MEMBER LEVY: As interesting as this is and as important as this issue is, it seems to me that -- well, the motion on the floor is to deny based on the application not for a use variance and that maybe this discussion is more relevant if the motion were to approve than it is to deny.

If the motion is denied based on the application presented to us, this conversation's no longer relevant.

If that motion fails, then perhaps this conversation's relevant to another motion that might be presented.

CHAIRPERSON REID: So, basically, Ms. Mitten has moved that it be denied predicated from the fact -- notwithstanding the use -- that use bearing is that the Applicant has not met his burden of proof as it pertains to that area variance in the first place.

MEMBER LEVY: Correct.

CHAIRPERSON REID: Was there a second?

MEMBER LEVY: There was and I'm just suggesting that perhaps if that motion were to carry, then this discussion would no longer be relevant. If that motion doesn't carry, then perhaps it would.

CHAIRPERSON REID: All in favor?

(Ayes.)

CHAIRPERSON REID: Opposed?

VICE CHAIRPERSON RENSHAW: Abstain.

MR. HART: Was that 4-0-1?

MS. PRUITT: Right.

MR. HART: Staff would record the vote as 4-0-1. Ms. Mitten made the motion. Mr. Levy seconded

and Ms. Renshaw abstained.

Next case, Madam Chair?

CHAIRPERSON REID: You have a question? Did you just say excuse me, Madam Chair?

MR. HART: No, I said next case.

CHAIRPERSON REID: Yes.

MR. HART: The final case --

CHAIRPERSON REID: We have one more.

MR. HART: -- is the application --

CHAIRPERSON REID: One more.

MR. HART: -- 16682 of W.F. Equipment Corporation pursuant to 11 DCMR 3104.1 for a special exception to allow new residential development consisting of five row dwellings under Section 353 and pursuant to Subsection 3103.2 for variances under Section 401 and 405 from the lot area, lot width, and side yard requirements for one semi-detached dwelling (Lot 36) and a variance under Section 402 from the FAR requirements for the five (5) new dwellings in the R-5A District at premises 5516 - 5526 Hunt Place, N.E. That's Square 5204, Lots 31 - 36.

The hearing date was May 8th, 2001.

The decision date was June 5th, 2001.

On a motion made by Ms. Renshaw, seconded by Ms. Hinton, the Board voted **4-0-1** to **DENY** the