GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16823 of Humberto Gonzalez, pursuant to 11 DCMR § 3103.2 for a variance from the use provisions to allow a home occupation bed and breakfast with 10 sleeping rooms and four full-time equivalent employees under section 203 in the DCOD/R-5-D District at premises 1720 16th Street, N.W. (Square 178, Lot 800).

HEARING DATES: January 29, 2002; March 19, 2002; June 4, 2002; June 18, 2002; August 6, 2002; October 29, 2002; and November 12, 2002

DECISION DATES: January 7, 2003 and February 3, 2004

DECISION AND ORDER

This application was originally submitted November 19, 2001 by Humberto Gonzalez, the owner of the property that is the subject of the application ("Applicant"). A revised application was submitted April 10, 2002. Following a public hearing, the Board voted 3-2-0 on January 7, 2003 to deny the application.

PRELIMINARY MATTERS

Application. The application, as finally revised, requests a variance from the use provisions under section 203 to allow a bed and breakfast (home occupation) with 10 guest rooms and six full-time and two part-time employees, with a maximum of 24 social events per year hosted by guests and incidental to the bed and breakfast operation, in the DC/R-1-D District at premises 1720 16th Street, N.W. (Square 178, Lot 800).

Notice of Application and Notice of Hearing. By memoranda dated November 29, 2001, the Office of Zoning sent notice of the application to the Office of Planning, the Councilmember for Ward 2, Advisory Neighborhood Commission ("ANC") 2B, and the commissioner for single member district ANC 2B04.

A public hearing on the application was scheduled for January 29, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on December 13, 2001, mailed notice of the hearing to the Applicant, ANC 2B, and the owners of all property within 200 feet of the subject property. Hearing sessions were held on January 29, March 19, June 4, June 18, August 6, October 29, and November 12, 2002.

Requests for Party Status. ANC 2B was automatically a party in this proceeding. The Board granted party status to (i) the Dupont Circle Citizens Association; (ii) the

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Residential Action Coalition; (iii) Anne Alvarez and Louis Santucci, Barbara and Frazer Hilder, P. Kenneth and Leslie M. Jadin, and Janessa and Adrian Robinson, a group of residents of the 1600 block of S Street, N.W. represented by Ken Jadin; and (iv) Laurie Emrich, Margot Polivy, Max Salas and Vickie Bruff-Salas, Russell Stevenson, Mark Siminoff, and Lisa Kaplan, a group of residents of the 1600 block of Riggs Place, N.W. represented by Margot Polivy. A request for party status by Lucinda Eng-Garcia, the Applicant's designer and architect, was denied.

Applicant's Case. The Applicant seeks a variance to allow a bed and breakfast (home occupation) with 10 guest rooms and six full-time and two part-time employees, with a maximum of 24 social events annually hosted by guests of the bed and breakfast. The Applicant asserted that a six-room bed and breakfast would be allowed on the subject property as a matter of right, and that guest-sponsored social events are permitted as a matter of right as an accessory use to a bed and breakfast. The Applicant offered to conduct the bed and breakfast operation subject to a traffic management plan and to specified conditions regulating, among other things, the number, frequency, and timing of special events.

Government Reports. Through testimony at the public hearing and by reports dated January 15, 2002 and May 21, 2002, the Office of Planning ("OP") recommended approval of the application, conditioned on "a favorable recommendation from the Historic Preservation Review Board and suitable assurances regarding operation of the Bed and Breakfast regarding parking and special events, preferably in the form of a written agreement with the neighborhood." Through testimony at the public hearing and by reports dated September 26, November 12, and November 20, 2002, the District of Columbia Department of Transportation ("DDOT") endorsed the Applicant's proposed transportation management plan and indicated no objection to the proposed bed and breakfast use.

ANC Report. With a quorum present at a duly called public meeting held January 16, 2002, ANC 2B unanimously voted to oppose the application and to seek to negotiate an agreement with the Applicant to address issues of neighborhood concern, particularly with respect to special events potentially conducted at the subject property. The ANC indicated its support for efforts to renovate the subject property but recognized concerns about the impact of a large bed and breakfast on the residential neighborhood. ANC 2B reiterated its unanimous opposition to the application at its public meeting held May 8, 2002 with a quorum present.

Parties in Opposition to the Application. The Dupont Circle Citizens Association expressed support for the Applicant's efforts to preserve the interior and exterior of the subject property, but opposed the requested variance absent conditions addressing the "vital issues" of liquor licenses, expansion, and enforcement, mediation, and liaison with the community. Other parties in opposition asserted that the planned bed and breakfast would have an adverse impact on traffic and parking in the neighborhood, particularly as

a result of special events hosted at the subject property. The parties in opposition also argued that the Applicant had not adequately demonstrated hardship because preservation of the interior of the building could be accomplished through other uses of the building.

FINDINGS OF FACT

The Subject Property

1. The subject property is located at 1720 16th Street, N.W. (Square 178, Lot 800) in the Dupont Circle neighborhood of Ward 2.

2. The subject property is improved with a building constructed in 1892-1893 as a single-family detached residence with approximately 12,000 square feet of living space, a courtyard, and a two-car garage. The five-story, 18-room residence was built in a mixture of Victorian, Spanish Mission, and Dutch Colonial styles.

3. The area surrounding the subject property is developed primarily with rowhouses as well as some larger apartment buildings. The Scottish Rite Masonic Temple is across 16th Street from the subject property.

4. The Applicant has a home occupation permit at the subject property authorizing operation of a bed and breakfast with six rooms and one employee. The property is currently undergoing renovation and is not presently a residence or operating as a bed and breakfast.

5. The subject property is located in the 16th Street Historic District and has been designated a contributing building to the historic district. The interior of the building is largely intact and would not be altered by the Applicant's planned renovations. The Applicant indicated an intent to seek a federal historic rehabilitation tax credit for the property, which would require, among other things, maintenance of the interior renovations for five years. The Historic Preservation Office of the Office of Planning indicated its belief that the interior of the subject property is "an architecturally significant space worthy of preservation."

6. Previous uses of the property include single-family residence (1893-1923), embassy/consulate (1924-1938), office (1942-1946), residence and music school (1947-1988), and rooming house with 13 occupants (1991-2001). The music school, with approximately 35 students and six instructors, was operated by Basil and Maria Toutorsky, who also lived in the house.

7. The Applicant purchased the property after it had been on the market for approximately three and a half years. The Applicant testified that he sought to preserve the property, including its interiors, and his sole means to do so was as a bed and breakfast because the property is too large and costly to maintain as a

single-family residence.

8. The parties in opposition testified that the immediate neighborhood contains other large former mansions that have been successfully converted to multiple dwellings, and that conversion of the subject property to apartments would be consistent with zoning and would advance several goals of the Comprehensive Plan. The opponents challenged the Applicant's assertion that the renovations necessary for the planned bed and breakfast use would actually preserve all the significant interior features of the subject property as well as his contention that the planned bed and breakfast use was the sole means to preserve the interior.

Proposed Use

9. The Applicant plans to use a portion of the building (approximately 1,800 square feet) as his principal residence and to operate the remainder as a bed and breakfast with 10 guest rooms, with a maximum of two guests per room.

10. The proposed bed and breakfast would permit registered guests to host a maximum of 24 events (such as parties, meetings, weddings, and receptions) per year. Attendance at each event would be limited to 110 people. An event conducted on a weekday (Monday through Friday) would begin no earlier than 8:30 a.m. and end no later than 9:30 p.m. Events conducted on a weekend (Saturday or Sunday) would take place between 11:00 a.m. and 10:30 p.m.; events would not be conducted on consecutive weekends. Tables and chairs for events would be stored on the premises.

11. All events would be held indoors except for wedding ceremonies, which could be held in the outdoor courtyard. No amplified music or food service would be provided in the courtyard.

12. The Applicant did not intend to obtain a liquor license for the bed and breakfast. However, liquor might be served at the events pursuant to a caterer's liquor license.

13. The proposed bed and breakfast would have six full-time and two part-time employees. No more than four non-resident employees would be on the subject property at any given time.

14. Trash generated by the bed and breakfast use would be stored in securely covered receptacles stored in a brick, enclosed area adjacent to the alley. The Applicant stated that trash pickup would be scheduled at least three times per week, and reasonable steps would be taken to prevent vermin.

15. Laundry for the bed and breakfast would be done on-site.

16. The Applicant testified that the proposed bed and breakfast use would not create objectionable noise impacts on surrounding residential properties in the neighborhood primarily because a successful bed and breakfast business depends on preserving peace and quiet for its guests.

17. ANC 2B opposed the application despite its support for efforts to renovate and improve the subject property, citing neighborhood concerns about the impact of a large bed and breakfast on the peace, order, and quiet accorded to a residential neighborhood, particularly with respect to special events potentially conducted at the subject property.

Traffic and Parking

18. The subject property is located at the northwest corner of the intersection of 16th Street, a principal arterial, and Riggs Place, a local street. In addition to its two street frontages, the subject property is bounded by a 13-foot public alley on the west. Both 16th Street and Riggs Place are subject to residential parking restrictions from 7:00 a.m. to 8:30 p.m., Monday through Friday.

19. No additional parking is required at the subject property, as a building located in a historic district that is certified as contributing to the character of the historic district. 11 DCMR § 2100.5.

20. Because of a Metrobus stop adjacent to the subject property, the 16th Street frontage provides limited space for standing, stopping, and parking. Loading and unloading is prohibited in that space.

21. The Applicant proposed a transportation management plan, including a parking program, applicable to the regular daily bed and breakfast business as well as to special events. Pursuant to the plan, prospective guests would be advised of transportation options including Metrorail, Metrobus, taxis, trains, and shuttle buses available from the various airports to destinations in the District. Employees of the bed and breakfast operation would be given farecard vouchers to encourage use of public transportation.

22. Routine deliveries to the subject property would be made through the garage, with a driveway off Riggs Place. According to DDOT, no negative impacts due to deliveries were anticipated because most service deliveries to the proposed bed and breakfast use could likely be handled by vans within the garage at the subject property.

23. One off-street parking space in the garage on the subject property would be made available at all times for guests and deliveries to the bed and breakfast operation.

24. The Applicant testified that the proposed bed and breakfast use would not create a large demand for on-street parking in the neighborhood, because the majority of guests would arrive by taxi or public transportation rather than by private vehicle, or would park in an off-street facility arranged by the Applicant for the duration of their visit. According to the Applicant, additional off-street parking would be made available to guests by contract with a nearby commercial parking facility, while parking for events would be provided off-site by contract with a commercial parking garage or valet parking company, or both. Guests would be expected to drive directly to the off-site parking facility and walk or ride in a taxi to the subject property.

25. DDOT testified that the subject property has the physical configuration and capacity to accommodate the vehicles likely to require access to a bed and breakfast, such as guest arrivals and departures and deliveries of breakfast supplies, provided that the Applicant properly coordinated the use of the garage. However, DDOT also testified that the subject property probably lacks sufficient capacity to handle the number of vehicles likely associated with the proposed special events without generating traffic congestion in the neighborhood. According to DDOT, valet systems are prevalent and work well in other cities to provide for the safe storage of vehicles in congested urban areas where guests are unfamiliar with the available parking alternatives.

Zoning

26. The subject property is located in the Dupont Circle Overlay District (DC)/R-5-D zone. The Dupont Circle overlay is intended to preserve and enhance "a unique resource to the District of Columbia" through retention of "its low scale, predominately residential character, independent small retail businesses, human scale streetscapes, and historic character, given the high-density development pressures caused by the proximity of the Central Employment Area and Dupont Circle Metrorail Station." 11 DCMR § 1501.1. Purposes of the Dupont Circle Overlay District include:

    (a) to protect the integrity of "contributing buildings" in historic districts; to require compatibility of development with the purposes of the Historic District Protection Act of 1978, effective March 3, 1979 (D.C. Law 2-144, as amended; D.C. Code, 2001 Ed. §§ 6-1101 to 6-1115; and to preclude demolitions or partial demolitions that would lead to an increase in height and floor area ratio inappropriate to the area;

    (b) to enhance the residential character of the area by maintaining existing residential uses and controlling the scale, location, and density of commercial and residential development;

(c) to preserve areas planned as open gardens and backyards and protect the light, air, and privacy that they provide;

(d) to enhance the streetscape by maintaining the public space in front of buildings as landscaped green spaces; and

(e) to encourage greater use of public transportation and the free circulation of vehicles through public streets and alleys.

See 11 DCMR § 1501.4.

27. The Applicant's proposed bed and breakfast use would not alter the height or bulk of the subject property. The Office of Planning, noting that the subject property has been "part of the neighborhood for over 100 years," testified that its height and floor area ratio are "appropriate for the area."

28. The Office of Planning testified that the Applicant's proposal "meets the applicable purposes" of the Dupont Circle overlay district "by preserving the existing historic structure," including much of the interior and "existing gardens, walls and fences that have added to the character of this historic structure."

Requested Variance

29. The Applicant stated that variance relief was needed from two provisions of § 203 to permit 10 guest rooms and to increase the number of employees. The Applicant noted that variance relief might also be necessary from the limitation on the number of clients, guests, or customers permitted as a matter of right (*i.e.* eight), but asserted that the limitation seemed inapposite in the case of a matter-of-right bed and breakfast with four or six rooms.

30. According to the Applicant, the requested variance would merely increase the intensity of a permitted use, rather than introduce a use not permitted by right or by special exception in the R-5-D zone, and therefore was consistent with the Comprehensive Plan and would not impair the zone plan or the intentions of the zoning regulations.

31. The Applicant stated that the variance was warranted because of the unique nature of the historic property, which was too large and expensive to serve as a single-family dwelling, and because the proposed 10-room bed and breakfast operation was the sole means to avoid conversion of the building to condominiums or other use that would not preserve the ornate historic interior of the building. The Applicant also asserted that, as a contributing building in a historic district, the building could not be demolished and replaced without "extraordinary

justification," and that the Dupont Circle overlay district further restricted permitted uses of the subject property.

32. According to the Applicant, the serious hardship that would result from the strict application of the Zoning Regulations to the subject property was not self-imposed; instead, a unique and exceptional condition that created undue hardship arose from the exceptionally large nature of the structure and the quality and integrity of its interior. The Applicant testified that the subject property was on the market for almost four years without selling as a single-family residence, embassy, or other use; and that the property did not attract single-family buyers due to its large size, high cost to maintain, and cost of needed repairs, but finally attracted investors interested in turning the subject property into condominiums, which would destroy the historic integrity of the building. The Applicant asserted that it was not economically feasible to maintain the property without the requested variance.

33. The Applicant asserted that the requested variance would not have an adverse impact on neighboring property due to traffic, because the number of trips generated by the proposed bed and breakfast use would not add appreciably to the traffic on 16th Street, and because parking for the occasional events taking place at the subject property would be subject to restrictions implemented by the Applicant.

34. The Applicant stated that the requested variance would provide benefits including employment, preservation of the historic integrity of the property, and restoration of the building that would beautify the block and community and give the community a home feel. According to the Applicant, operation of a bed and breakfast subject to the proffered conditions would make the subject property a quieter and more manageable place than it would be as a single-family residence, rooming house, embassy, organization, or condominiums.

35. The Office of Planning testified that the extraordinary or exceptional situation of the subject property resulting in an undue hardship arose from the fact that the "existing historic mansion is extraordinarily large for a single-family home and the upkeep and maintenance of such a large structure would be a significant financial burden to a single family," and because the "unique, historic interior of the structure is worthy of preservation" but "[m]any of the other uses allowable in the zone would require extensive remodeling of the interior of the structure" and "would require extensive changes to the yard areas of the building altering the historic landscape of the property." According to OP, "these situations along with the character of the neighborhood combine to create an exceptional situation" of the subject property, and the proposed bed and breakfast use was the best means to preserve the interior.

36. According to OP, the requested variance could be granted without causing substantial detriment to the public good and without impairing the intent, purpose, and integrity of the zone plan. OP noted that the proposed bed and breakfast use of the subject property would involve minimal exterior improvements, that the Applicant had proffered conditions regarding parking, employee transportation, and limitations on special events, and that the proximity of institutional and high-density residential uses to the subject property and 16th Street, a major arterial, established more intense use to the south and east in the vicinity of the subject property.

37. OP testified that the proposed bed and breakfast use would further the Comprehensive Plan goals of encouraging the renovation and adaptive reuse of existing structures rather than demolition. According to OP, the requested use variance would allow preservation and restoration of a historic interior that might not otherwise be preserved, thereby maintaining continued productive use of the historic building. OP also noted that the interior would be more accessible to the public through use of the subject property as a bed and breakfast than as apartments.

CONCLUSIONS OF LAW

Under the Zoning Regulations, home occupations are permitted as accessory uses to residential uses provided that they are compatible with the residential neighborhood in which they are located. 11 DCMR § 203.1. The intent of the home-occupation provisions of the Zoning Regulations is to protect residential areas from adverse effects of activities associated with home occupations, while permitting residents of the community the opportunity to use the home as a workplace and source of livelihood under specific regulatory conditions. *Id.* Permitted home occupations include bed and breakfast facilities, so that the owner of a dwelling may operate a bed and breakfast facility offering rooms and breakfast to guests on a daily basis, subject to certain conditions. *See* 11 DCMR § 203.8.

For purposes of the relevant provisions of the Zoning Regulations, a "home occupation" is a "business, profession, or other economic activity conducted full-time or part-time in a dwelling unit that serves as the principal residence of the practitioner of the home occupation." 11 DCMR § 203.2. The home occupation must be "clearly secondary to the use of the dwelling unit for residential purposes." 11 DCMR § 203.4(a). The parties in opposition argue that the planned bed and breakfast operation would not be secondary to the use of the subject property for residential purposes because the Applicant plans to use only about 15 percent of the interior space as his residence.

The Board does not agree. The subject property was built as a single-family dwelling and has been used for residential purposes throughout most of its existence. The Applicant plans to live in the subject property, albeit in a relatively small portion of a large

dwelling, and does not plan to make any renovations to the exterior of the subject property that would alter its residential appearance or character. Bed and breakfast home occupations are specifically exempted from floor area limitations that would otherwise restrict the space that may be utilized in a home occupation. *See* 11 DCMR §§ 203.4(b), 203.8(d). Under the Zoning Regulations, "home occupations such as bed and breakfasts are considered accessory uses; the principal use is deemed to be the residential use." *See Dupont Circle Citizens Association v. D.C. Board of Zoning Adjustment*, 749 A.2d 1258 at 1261 (D.C. 2000). The term "principal use," as used in the Zoning Regulations, "distinguish[es] the accessory use from the more dominant use to which it is 'customarily incidental and subordinate,' without further intending that the more dominant use necessarily and in every case must be the predominant use of the property in question." *Id.* at 1263. The Board concludes the Applicant has satisfied the burden of proof with respect to 11 DCMR §§ 203.2 and 203.4(a).

However, the bed and breakfast operation planned by the Applicant does not conform to the requirements of the Zoning Regulations in several respects. First, the Applicant proposes to offer 10 guest rooms. A home-occupation bed and breakfast may have two sleeping rooms as a matter of right, or as many as six if approved by the Board as a special exception in the case of a home-occupation bed and breakfast operated in a dwelling located in a historic district and certified as contributing to the character of that historic district.[1] 11 DCMR § 203.8(c)(1). Secondly, the proposed bed-and-breakfast operation would have six full-time and two part-time employees, with at most four non-resident employees on the subject property at any given time. The Zoning Regulations specify that no more than one person who is not a resident of the dwelling unit shall be engaged or employed in the home occupation. 11 DCMR §§ 203.4(d), 203.8(h). In addition to requirements set forth in 11 DCMR § 203.8 specific to bed and breakfast home occupations, the Applicant's proposed use of the subject property must also comply with certain requirements applicable to home occupations generally. *See* 11 DCMR § 203.8(h). These requirements include that vehicular trips to the premises by visitors, customers, and delivery persons shall not exceed eight trips daily on a regular and continuing basis, 11 DCMR § 203.4(l); and that the practitioner shall have no more than eight clients or customers on the premises in any one-hour period, 11 DCMR § 203.4(m).

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[1] The Board notes the Applicant's assertion that the subject property is permitted to have six sleeping rooms as a matter of right since the subject property contributes to a historic district. However, the maximum number of sleeping rooms permitted as a matter of right in a home occupation bed and breakfast is two. 11 DCMR § 203.8(c). A dwelling owner may be permitted to increase the number of sleeping rooms to four with Board approval as a special exception pursuant to 11 DCMR § 203.10(b). *See* 11 DCMR § 203.8(c)(1). In the case of "a dwelling that is an historic landmark, or that is located in a historic district and certified by the State Historic Preservation Officer as contributing to the character of that historic district," the dwelling owner may be permitted to increase the number of sleeping rooms to six with Board approval as a special exception pursuant to § 203.10(b). *Id.* Thus, a home occupation bed and breakfast operated on the subject property is permitted two sleeping rooms as a matter of right, and up to six sleeping rooms if approved by the Board as a special exception pursuant to 11 DCMR §§ 203.10.(b) and 3104.

The Applicant requested zoning relief from two requirements – pertaining to the number of guest rooms and to the number of non-resident employees – but later noted a need for relief with respect to the number of guests on the premises as well.[2] A home occupation that does not satisfy all requirements of § 203 may be permitted by special exception, provided that the requested zoning relief can be granted without modification of more than two of the applicable requirements consistent with the general purposes and intent of the home occupation provisions. A request to modify more than two of the requirements is deemed a request for a variance. 11 DCMR § 203.10. The Board concludes that variance relief pursuant to 11 DCMR § 203.10(d) is necessary because the Applicant's proposed use would require modification of more than two of the requirements found in §§ 203.4 through 203.8.

The Board is authorized to grant a variance from the strict application of the zoning regulations where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of the property, the strict application of any zoning regulation would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property, provided 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 as embodied in the zoning regulations and map. D.C. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2.

The Zoning Regulations do not specify whether a variance from the provisions of § 203 should be considered an area variance or a use variance. The Board concurs with the Applicant that the difference between a use variance and an area variance may be "one of degree." *See Wolf v. D.C. Board of Zoning Adjustment*, 397 A.2d 936, 941 (D.C. 1979). Unlike the Applicant, however, the Board concludes that the variance sought by the Application is properly considered in the nature of a use variance, because approval of the zoning relief requested by the Applicant would introduce a use into the zone district under conditions other than those allowed as a matter of right or required for special exception approval, and the proposed use of the subject property could potentially alter the character of the zone district. The Application seeks approval for a home occupation bed and breakfast facility that would be larger in terms of number of guest rooms, employees, and customers than is permitted as a matter of right or by special exception;

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[2] The Applicant's submission of proposed findings of fact and conclusions of law states that variance relief is needed with respect to the number of guest rooms, the number of employees, and the number of clients or customers on the premises in any one-hour period. The submission asserts, without elaboration, that "[n]o more than two vehicles will be used in the home occupation and vehicular trips to the premises by visitors, customers and delivery persons will not exceed 8 trips daily on a regular and continuing basis." (*See* Exhibit No. 107). The Office of Planning had earlier concluded that the Application should be considered a request for a use variance from 11 DCMR § 350.4, concerning uses permitted as a matter of right in the R-5 zone, rather than a variance from § 203, because § 203 imposes "many restrictions" on home occupations, and several of the § 203 provisions "are problematic" for the Applicant's proposed use. The "problematic" provisions identified by OP were § 203.4(a), (d), (g), (l), and (m). *See* OP Report (May 21, 2002).

the more intensive use of the subject property, even for the same type of use that is permitted as a matter of right on a smaller scale, could potentially have adverse effects incompatible with the residential neighborhood in which it would be located.[3]

The purpose of the home occupation provisions – to protect residential areas from adverse effects of activities associated with home occupations – also suggests that the relief sought by the Applicant should be deemed a use variance, with the Board's inquiry focused on the proposed use of the subject property relative to a smaller home occupation bed and breakfast permitted as a matter of right or by special exception in the Residence zone district. ANC 2B raised concerns about potential adverse effects of the Applicant's proposed bed and breakfast operation on the surrounding residential neighborhood, and the parties in opposition argued that the Applicant's proposal would alter the residential character surrounding the subject property through the introduction of a large bed and breakfast business on the site, causing noise and other negative impacts on the quality of life in the neighborhood. These contentions suggest that the Applicant's proposed use could potentially alter the character of the zone district, and therefore that the requested zoning relief should be deemed a use variance. *See, e.g.,* 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning § 58:4, p. 58-17 (4th ed. 2001) ("If the variance will permit a use of the land that changes the character of the neighborhood, then it is more likely that the variance will be held to be a use variance").

The Board notes that both the Applicant and the parties in opposition made arguments regarding undue hardship, the standard applicable to a request for a use variance. *Palmer*, 287 A.2d at 541.

In deciding to apply the more stringent "undue hardship" standard applicable to a use variance, the Board notes that the requested zoning relief is not in the nature of an area variance, because the Applicant's proposed use does not entail any addition to or modification of the subject property that would require relief from applicable area requirements. *See Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972) (an area variance, relating to restrictions such as side yard, rear yard, frontage, setback or minimum lot requirements, does not alter the character of the zoned district, whereas a use variance seeks a use ordinarily prohibited in the particular district). The Applicant's proposal to operate a 10-room bed and breakfast, where two guest rooms are permitted as a matter of right, is one factor that distinguishes the Application from the regulation at issue in *Monaco v. D.C. Board of Zoning Adjustment*, 461 A.2d 1049 (D.C. 1983), cited by the Applicant. That case concerned a request for a deviation from a minimum area requirement under a regulation that authorized office use by special

[3] The Board notes that the Zoning Regulations specify a *use* variance under analogous circumstances pertaining to the addition of an accessory apartment to a single-family detached dwelling, 11 DCMR § 202. The Board may modify or waive not more than two of the applicable requirements, which concern generally the minimum lot area, gross floor area of the dwelling and the accessory apartment, configuration of the accessory apartment, owner occupancy, and aggregate number of persons living on the premises. *See* 11 DCMR § 202.10. A request to modify or waive more than two requirements is "deemed a request for a use variance." 11 DCMR § 202.10(i)(3).

exception in certain circumstances; by contrast, the Applicant's proposed bed and breakfast operation seeks to use the subject property, without deviation from any applicable area requirement, in a manner that would be significantly more intensive than permitted as a matter of right or by special exception[4].

The Board's initial inquiry in a request for a variance considers whether the subject property exhibits exceptional narrowness, shallowness, or shape, or exceptional topographical conditions or other extraordinary or exceptional situation or condition of the property. The District of Columbia Court of Appeals has held that "existing structures on the land are part of the 'property' and may be 'exceptional conditions' for variance purposes." *Draude v. D.C. Board of Zoning Adjustment*, 527 A.2d 1242, 1255 (D.C. 1987), *citing Clerics of Saint Viator, Inc. v. D.C. Board of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974).

Based on the testimony and evidence in the record and the Findings of Fact, the Board concludes that the subject property exhibits an "extraordinary or exceptional situation or condition." The existing building on the subject property was constructed and initially used as a single-family dwelling, but has not been used solely as a single-family residence since 1923 and is not likely to be used again as a single-family dwelling due to its large size. The former mansion is architecturally and historically significant, and has been designated a contributing building to the 16th Street historic district, which restricts the owner's ability to demolish the building and redevelop the subject property.

A use variance cannot be granted absent a showing that the strict application of the Zoning Regulations would result in "exceptional and undue hardship upon the owner of the property," because a use variance "seeks a use ordinarily prohibited in the particular district" and thus would "alter the character" of that zone district. *Palmer*, 287 A.2d at 541. "The Board generally cannot grant a variance just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance if the owner could use or improve the land in other ways compatible with zoning restrictions." *Draude*, 527 A.2d at 1255, *citing Palmer,* 287 A.2d at 540 (use variance cannot be granted unless reasonable use cannot be made of the property in manner consistent with the Zoning Regulations; an inability to put property to more profitable use or loss of economic advantage is not sufficient to constitute hardship). To be granted a variance, the Applicant must show that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may reasonably be adapted. *Bernstein v. D.C. Board of Zoning Adjustment*, 376 A.2d 816, 819 (D.C. 1979). A mere desire to use property in a given manner, or in a manner designed to return a greater profit, does not constitute a showing of an undue hardship that will support the granting of a use variance. *Bernstein*, 376 A.2d 816, 820. *See also Taylor v. D.C. Board of Zoning Adjustment*, 308 A.2d 230, 236; *Silverstone v. D.C. Board of Zoning Adjustment*, 396 A.2d 992 (D.C. 1979); and *Capitol Hill Restoration Society, Inc.*

v. D.C. Board of Zoning Adjustment, 398 A.2d 13 (D.C. 1979) (unique circumstances of property, not owner's personal circumstances, provide basis for granting variance).

The Applicant claims that undue hardship will result from the strict application of the Zoning Regulations to the subject property because the existing building is too large and costly to serve as a single-family residence, because maintenance of the subject property without the requested variance would be economically infeasible, and because the historic integrity of the mansion, including its ornate interior, would be destroyed if the building is not used as a bed and breakfast facility but is converted to another potential use such as condominiums. The Office of Planning testified that hardship arose from the significant financial burden associated with subject property if used as a single-family dwelling and from the fact that the interior of the building is worth preserving, but many uses permitted on the subject property as a matter of right would require extensive changes to the property whereas the proposed bed and breakfast is the best means to preserve the interior. However, the parties in opposition presented testimony that the Zoning Regulations permit several uses of the subject property besides a home occupation bed and breakfast, and contended that the interior of the building could be preserved through those other uses, as has been done in other large, historic mansions in the vicinity of the subject property.

The Board is not persuaded that the strict application of the Zoning Regulations will result in undue hardship upon the owner of the subject property. The Applicant has not demonstrated that the building could not be put to an alternative use permitted under the Zoning Regulations that would be economically feasible. The Zoning Regulations facilitate the adaptation of historic properties to new uses by offering certain relief from otherwise applicable requirements, such as a waiver of the parking requirement, and by permitting, as a special exception, certain uses not otherwise allowed in a Residence zone, such as the use of residential buildings by nonprofit organizations, 11 DCMR § 217, and a greater number of guest rooms in a home occupation bed and breakfast, 11 DCMR § 203.8(c)(1). This flexibility recognizes constraints potentially associated with the use of historic properties and enlarges the scope of their potential uses consistent with the Zoning Regulations.

The Board credits the testimony of OP that the ornate interior of the subject property is significant and worthy of preservation. However, the Applicant has not adequately demonstrated that the proposed bed and breakfast use is the sole means to preserve the building's interior, or that an alternative use of the subject property consistent with the Zoning Regulations would require its destruction. Nor would a grant of the requested variance ensure the preservation of the building's interior in the future. The Applicant has indicated an intent to seek federal historic preservation tax incentives for the certified rehabilitation of the subject property, which would require preservation of the interior for five years after completing the rehabilitation; however, the Applicant has not sought designation of the interior by the Historic Preservation Review Board or undertaken other

possible means of ensuring the long-term preservation of the historic interior of the building.

The Board further concludes that any hardship on the Applicant does not arise from the strict application of the Zoning Regulations to the subject property but is self-created. The Applicant failed to demonstrate that no reasonable use could be made of the property in a manner consistent with the Zoning Regulations, or that preservation of the building's interior required or warranted the grant of the requested variance. Rather, the Applicant claims undue hardship arising from a desire to use the property in a manner inconsistent in several respects with a home occupation bed and breakfast permitted as a matter of right or by special exception.

The "self-created hardship" rule precludes the grant of a use variance when "the peculiar circumstances which render the property incapable of being used in accordance with the restrictions contained in the [zoning regulations] have themselves been caused or created by the property owner, [because] the essential basis of a variance – that is, that the hardship be caused solely through the manner of operation of the [zoning regulations] upon the particular property – is lacking." *Foxhall Community Citizens Ass'n v. D.C. Board of Zoning Adjustment*, 524 A.2d 759, 761, citing 3 A. Rathkopf and D. Rathkopf, THE LAW OF ZONING AND PLANNING, § 39-01 (4th ed. 1986); (citations in accord omitted). The self-created hardship rules applies to owners who purchase property with actual or constructive knowledge of zoning restrictions from which they intend to seek administrative relief. *Foxhall*, 524 A.2d at 761, citing 3 R. Anderson, AMERICAN LAW OF ZONING § 20.44, -45. See also *Dwyer v. D.C. Board of Zoning Adjustment*, 320 A.2d 306 (D.C. 1974), citing *Clouser v. David*, 114 U.S.App.D.C. 12, 13, 309 F.2d 233, 234 (1962) (hardship must result from location, situation, or condition of property, and not solely from owner's appropriation of it for commercial purposes without first having obtained necessary change in zoning).

With respect to the need to afford great weight to the issues and concerns raised by the affected ANC, the Board notes that ANC 2B's opposition to the application stemmed from concerns about potential adverse effects of the home occupation bed and breakfast on the surrounding residential neighborhood. Since, the Board's denial of this application results from the applicant's failure to demonstrate undue hardship, the Board does not reach the issue of whether the application can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan. Therefore, the BZA need not address the specific issues and concerns raised by the affected ANC, which pertain exclusively to that portion of the variance inquiry.

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the issues and concerns of ANC 2B, the Board concludes that the Applicant has not satisfied the burden of proof for a variance from the provisions of § 203 to allow a home occupation bed and breakfast with 10 sleeping rooms and more

than one non-resident employee in the DCOD/R-5-D District at premises 1720 16th Street, N.W. (Square 178, Lot 800).[5] For the reasons stated above, it is hereby **ORDERED** that the application be **DENIED**.

VOTE (January 7, 2003): **3-2-0** (Anne M. Renshaw, Carol J. Mitten, and David A. Zaidain to deny the application; Geoffrey H. Griffis and Curtis L. Etherly, Jr., opposed)

Because the term of Board member Anne M. Renshaw expired before issuance of this Order, the Board conducted a second decision meeting on February 3, 2004 and voted to **ADOPT** this **ORDER** as the decision of the Board as follows:

VOTE (February 3, 2003): **4-0-1** (Curtis L. Etherly, Jr., David A. Zaidain and Geoffrey H. Griffis to adopt the order; Carol J. Mitten to adopt the order by proxy: Ruthanne G. Miller not voting, not having participated in the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this Order.

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

FINAL DATE OF ORDER: FEB - 9 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. MN/rsn

[5] Based on the testimony and evidence in the record, the Board is unable to determine whether the Applicant's proposed use of the subject property would comply with applicable home-occupation limits on the number of vehicular trips to the premises by visitors, customers, and delivery persons, 11 DCMR § 203.4(l), and on the number of clients or customers on the premises, 11 DCMR § 203.4(m). Nor has the Applicant justified the grant of a variance from those requirements. The Board concludes that the Applicant has not met the burden of proof with respect to either compliance with or variance relief from zoning requirements pertaining to the number of daily vehicular trips to the premises by visitors, customers, and delivery persons or to the number of eight clients or customers on the premises in any one-hour period.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16823

As Director of the Office of Zoning, I hereby certify and attest that on FEB - 9 2004 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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