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BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

APPLICATION OF THE STUART BUILDING, L.L.C., a D.C. Limited Liability Corp.	)))	BZA Application no. 16827 Decision date: April 2, 2002 ANC 2B

SECOND SUPPLEMENTARY STATEMENT OF THE APPLICANT

In further response to the Board's requests for additional information and to the comments of the American Society for Microbiology which is not a party to this proceeding, the applicant submits the following:

1. **Historic Preservation Review Board**

The applicant has submitted an application to the DC Historic Preservation Review Board for review and approval of the proposed construction and requested certification that the building is a "contributing structure" to the Dupont Circle Historic District. In the interim, we discovered that the DC Historic Preservation Office's brochure on the Dupont Circle Historic District includes a photograph of 1750 N Street with the caption, "The Church of the Covenant set the style for the architecturally distinguished 1700 block of N Street." [Copies of the relevant pages are attached as Exhibit A]. Accordingly, there is little doubt that the Board will find that the subject property is a "contributing" structure. In an informal review of the proposal some months ago, the staff confirmed that it was a contributing structure and that the National Park Service was favorably inclined to the proposed renovation.

2. **Dupont Circle Overlay District**

The Board requested documentation describing how the project

BZA
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Exhibit No. 39

Board of Zoning Adjustment
District of Columbia
CASE NO.16827
EXHIBIT NO.39A1

complies with the purpose and intent of the Dupont Circle Overlay District (subsection 1501.4 of the Zoning Regulations). The Overlay District was created to implement the Comprehensive Plan for the National Capital as well as other public policy goals and objectives. 11 DCMR § 1500.1. The Comprehensive Plan Generalized Land Use Map shows the subject property located in an area designated for "Mixed Use Moderate Density Commercial/Moderate Density Residential" use. The special exception and variance application for conversion of what has been legally a rooming house but used as an office for the last thirty years is not inconsistent with that land use recommendation. District of Columbia tax records submitted with the applicant's supplemental submission show that the property and adjacent structures have been taxed for years for commercial use. As best we can determine, there are no remaining residential buildings on the block.

When the applicant appeared before ANC 2B on January 16, 2002, the chair remarked that if the application were for a building in any other block of the ANC, the ANC would oppose the application but, the 1700 block of N Street had already converted to commercial uses. Accordingly, the ANC supported the application unanimously. The Board is required to give "great weight" to the ANC's recommendation.

The proposed renovation would comply with the purpose and intent of the Dupont Circle Overlay District which is to preserve and enhance the Dupont Circle area as a unique resource to the city. The proposed renovation and addition would enhance the low

scale, human scale streetscape and historic character of the 1700 block of N Street and would not affect the "predominantly residential character" of the Overlay District as the building and the entire block has been used for commercial purposes, predominantly small offices, for many years. The proposed building renovation would increase the height of the building by about six inches which would still be within the height limit for the area of 65 feet. The front facade would remain essentially unchanged and the changes to the rear elevation would not be visible to the public from any street. Thus, the proposed redevelopment of the building would be "consistent with the nature and character of the Dupont Circle area in height and bulk." 11 DCMR § 1501.4(a). While the proposed FAR would increase from 2.57 to approximately 3.48, this increase would be compatible with other buildings on the block such as 1742 N Street, NW, which recently received a variance from the floor area ratio requirements under section 531 to allow additional office space in an existing office building in the DC/SP-1 District. See Application No. 16782 of 1742 N Street Co., LLC [Square 159, Lot 86], decision date November 6, 2001. The proposed FAR of the subject property is dwarfed by its neighbor, the American Society for Microbiology building, which has 60,000 square feet and is eight stories high. Moreover, the purpose of the Dupont Circle Overlay District is to "restrict the maximum permitted height and floor area ratio of new buildings to that of the underlying zone." 11 DCMR § 1501.4(a) [emphasis added]. The subject property not a new building but rather one built in the

1880's and, because of its interior configuration, requires modification to enhance its ability to support professional office use. The purposes of the Dupont Circle Overlay District include protecting the integrity of "contributing buildings" as that term is defined in the Historic Landmark and Historic District Protection Act of 1978. 11 DCMR § 1501.4(b). Demolitions or partial demolitions which would lead to an increase in height and floor area ratios are precluded only if the "increase in height and floor area ratio [would be] inappropriate to the area." 11 DCMR § 1501.4(b), 1504.5 Further, the proposed renovation and addition would not conflict with the purpose and intent of the Overlay District to "maintain existing residential uses and controlling the scale, location and density of commercial and residential development," 11 DCMR § 1501.4(c) as the use of the building would be essentially unchanged from its use as a legal fraternity's national headquarters which has been the predominant use of the building since 1974. It would not offend the purpose and intent of the Overlay District to "preserve areas planned as open gardens and backyards and to protect light, air, and the privacy that they provide," 11 DCMR § 1501.4(e), as the proposed renovation merely extends the upper three stories of the building to fill in the footprint of the existing two lower stories. There is no "open garden or backyard" area other than a small parking lot that would remain unchanged except for the installation of an open fire stairway required by the fire code. The proposed variance in floor area ratio would not affect the streetscape in any way. 11 DCMR §

1501.4(f). By eliminating one parking space, the building will "encourage greater use of public transportation" via the two nearby metro stops and numerous bus lines.

The evaluation standards of the Dupont Circle Overlay District are inclusive but not exhaustive in nature and it is not expected that an application "will exemplify all standards or achieve all of them in a superior fashion." 11 DCMR § 1504.1. "The relative value of the public benefits offered, the degree of flexibility or other development incentives requested, and the potential adverse impacts, if any, to be accepted or mitigated, shall all be judged, balanced and reconciled according to the specific circumstances of each case." 11 DCMR § 1504.2. In other words, no application is expected to achieve ALL of the objectives of the Dupont Circle Overlay District. If not inconsistent with the Comprehensive Plan and if generally compatible with any other directly applicable city-wide and neighborhood plans, the application shall be approved. 11 DCMR §1504.4. As the Court said in Palmer v. BZA, 287 A.2d 535, 541 (DC 1972), the variance procedure is "designed to provide relief from the strict letter" of the zoning regulations. Where there is a conflict between the Dupont Circle Overlay District requirements and the underlying zoning, the more restrictive requirements of the Dupont Circle Overlay District shall govern. 11 DCMR § 1502.3.

In this case, the proposed variances for FAR and parking contribute to the enhancement of a working environment and amenities superior to those which can be achieved by applying the

other provisions of the Zoning Regulations. "Flexibility in the siting, design, type and location of buildings is encouraged." 11 DCMR 1504.4. In the Dupont Circle Overlay District, the matter-of-right height and floor area ratio limits are to be the maximum permitted only for a planned unit development (PUD). If the subject property were used for residential purposes, a floor area ratio of 4.0 would be permitted as a matter of right. Thus, it cannot be said that the proposed floor area ratio of 3.20 (or 3.48 with the fire stairs) would be excessive or out of character -- rather, the use of the building for offices and the construction of the extension as proposed would have less impact than what could be constructed for residential use in the same space. Indeed, the useable floor area to be added by the addition, 1139 square feet, is less than the space existing in the current building that is currently unusable for rental purposes (the attic, the central staircase, and the first floor corridor from the second entrance way).

3. **Dimensional drawings of the existing building, including sections.** These drawings were provided in Exhibit 2 to the Supplementary Statement of the Applicant submitted on February 19, 2002. In addition, the applicant is providing drawings that show the existing conditions with areas highlighted showing non-usable space to make the point that the proposed addition would merely replace unusable space with a roughly equivalent amount of usable space. This would serve the purpose of providing "present and future occupants with a living or working environment and amenities

superior to those which can be achieved by applying the other provisions of the Zoning Regulations." 11 DCMR § 1504.5.

4. **Roof structure plan.** The section drawing of the existing roof structure was submitted with Exhibit 2 to the Supplementary Statement of the Applicant dated February 19, 2002. In addition, the applicant is submitting drawings of the existing roof structure and proposed roof showing sightlines that indicate that the addition would not be visible from the street. [Exhibit B].

5. **Additional documentation justifying the increase in floor area ratio and the proposed exclusive use for office space.** The applicant is submitting additional drawings showing the amount of unusable, unrentable space in the current building (the entire attic area is served by a non-legal stairway access, the first floor area is significantly reduced by the second entryway and corridor from the second entryway, and the central interior historic staircase and landings takes up about 1/4 of the floor space on each floor). [Exhibit C]. Thus, the proposed addition will add useable space roughly equivalent to the amount of unusable space that exists in the building at present.

In addition, the applicant reiterates that the subject property is confronted with a number of exceptional conditions related both to the land and configuration of Square 159 and to the existing improvements on the property and that of its neighbors. These exceptional conditions directly relate to the Applicant's inability to comply with the building density requirements of §531.1. The subject property is surrounded on three sides by the

60,000 square foot office tower owned by the American Society for Microbiology at 1752 N Street. This condition emphasizes the shallow condition of the lot which is only 103 feet long and which cannot be expanded. This shallow condition is a direct result of the ASM building to the south of it and the presence of a central alley, known as St. Matthew's Court, to the south of the ASM's south wing. St. Matthew's Court runs through the interior of Square 159. If the subject property extended to St. Matthew's Court instead of being cut off by the ASM building, it would not require the requested relief.

In addition, Square 159 is not a typical square. Instead of the usual intersection of lettered and numbered streets, Square 159 has two diagonal avenues among its five boundary streets. This arrangement results in a progressive narrowing of the depth of the lots as they progress from west to east within the square.

At its previous meeting, the Board seemed inclined to rule without considering the economic implications of a denial of permission to exceed the FAR to build the proposed addition. A review of the applicable decisions of the DC Court of Appeals indicates that this would be a mistake. In Gilmartin v. BZA, 579 A.2d 1164, 1171 (DC 1990), the Court of Appeals said that "at some point" economic harm may become sufficient to justify a variance "at least when coupled with a significant limitation on the utility of the structure." It is for the BZA to determine in the first instance whether such a limitation is "significant."

In this case, the present configuration of the building is for

five offices and a conference room. The existing building which was originally constructed as a residence provides for architecturally interesting but an inefficient spatial arrangement for professional office use which is a permitted use in SP Districts. The proposed addition would increase the service of the building to ten offices from five. This would "increase the vitality of surrounding commercial uses, by providing more potential customers for stores, theaters, offices and services." Statement of reason, Order no. 235 (Sept. 14, 1978), case no. 78-2, at 20 (order of the Zoning Commission increasing the FAR for "apartment house or other residential use" in the special purpose districts).

In Palmer v. BZA, the seminal case on this issue, the Court held that because of the nature of the respective types of variances and their effects on the zone plan, the higher "undue hardship" standard applies to requests for use variances while the lower "practical difficulty" standard applies to area variances. 287 A.2d 535, 540-41 (DC 1972). Palmer did not establish a precise definition of what constitutes "practical difficulties." Id. at 542. The court merely set forth a general standard that the applicant must show that strict compliance would be "unnecessarily burdensome."

In order to prove that an applicant suffers from "practical difficulties," two elements must be proven: The applicant must demonstrate that (1) compliance with the area restriction would be "unnecessarily burdensome," A.L.W., Inc. v. BZA, 338 A.2d 428, 431

(DC 1975) and (2) the practical difficulties are unique to the particular property. Barbour v. BZA, 358 A.2d 326, 327 (DC 1976). Economic use of property has been considered as a factor in deciding what constitutes an unnecessary burden or practical difficulty. Gilmartin v. BZA, 579 A.2d at 1171, citing Barbour v. BZA. A showing of a hardship or difficulty which inheres in the land at issue is not necessary to prove uniqueness. A condition inherent in the structures built upon the land, rather than the land itself, may serve to satisfy the burden of demonstrating uniqueness. Capitol Hill Restoration Society, Inc. v. BZA, 534 A.2d 939 (DC 1987). Thus, the fact that the subject property, because of its old, historic construction, has a high proportion of unusable space becomes a relevant factor to be considered by the Board.

Because of the exceptional conditions that impact the subject property, a strict application of the FAR limitations of § 531.1 would result in a practical difficulty for the Applicant's project renovation which is intended to bring a historic structure up to modern standards, to improve a number of life safety and spatial deficiencies of the building that are directly related to physical issues imposed by the shallowness of the lot and to the historical use and configuration of the subject building. The deeper lots of neighboring buildings such as 1752 N Street have permitted those owners greater flexibility in making building improvements such as those contemplated by the present application's proposal for a modest addition of approximately 15 feet for the upper three

stories. The subject property is only 17 feet, 6 inches wide by 103 feet deep. If it extended only about 10 to 15 feet deeper, the 2.5 FAR would generate more than sufficient gross floor area for which the applicant seeks relief.

In addition, the applicant has no alternative choice for construction of additional space. The area chosen for the building addition is on top of its existing footprint and represents the location which is the most efficient to meet the life safety requirements of the building code as well as the least destructive to the historic facade of the building which is located in a historic district. In addition to the fire stairway, the applicant intends to install a handicapped-accessible elevator in presently unusable dead space on the first floor as well as an ADA-compliant restroom on the first floor. This application demonstrates the difficulty encountered when attempting to improve life-safety and accessibility in a historic building. Because the subject property already exceeds the permitted building density prior to the proposed addition, the applicant could not undertake its proposed life safety improvements within the available zoning for the subject property. Unlike its neighbor, the American Society for Microbiology, the subject property could not rise eight stories and still be within the height limitation imposed upon it. It is also burdened by the fact that its lot cannot be enlarged nor the square footage of its historic structure reduced. Thus, for all of those reasons, the strict application of § 531.1 of the Zoning Regulations would pose a practical difficulty for the applicant

because it would effectively prevent the modernization of an existing historic building to accomodate required emergency egress, handicapped accessibility and spatial efficiency.

Increased expense and inconvenience to applicants are among the proper factors for consideration in judging an application for a variance. Tyler v. BZA, 606 A.2d 1362 (DC 1992). In that connection, the applicant is submitting its pro forma statement of projected income and expenses for the building that were submitted to Eagle Bank, the lender, that show the carrying costs of the building will be approximately $25,000 per month. [Exhibit D]. In Wolf v. BZA, 397 A.2d 936, 943 (DC 1979), the Court approved conversion of a two family row house into three single family apartments after finding practical difficulties for an area variance. The applicant demonstrated difficulty in renting the large dwelling as two apartments and that he could not obtain sufficient rent from the two dwellings to maintain the building. In Monaco v. BZA, 409 A.2d 1067 (DC 1979), the Court ruled that the Board properly granted a use variance to permit conversion of a moving and storage facility to a squash court and parking facility and the elevation of its roof above the regulation height limit where "marketability" of the property for residential use would otherwise be unfeasible and investment would yield loss rather than profit. In Tyler, the testimony of the applicant suggested that it was not merely seeking the most profitable use of its land but without the variances faced difficulty financing any improvement of the property. The prohibitive cost of preserving the building,

while a foreseeable and self imposed hardship, did not require denial of the variances by itself. Thus, the fact that the building in its current configuration would not generate enough income to support the debt service and ongoing maintenance and management of the building is a proper factor to be taken into account by the Board.

The confluence of these factors establishes the subject property as one affected by an exceptional situation or condition sufficient for the purposes of the three-prong test for variance relief established in § 3103.2. Gilmartin v. BZA, 579 A.2d 1164 (1990).

6. **Trash plan.** Exhibit 5 to the applicant's February 19, 2002 Supplementary Statement was a proposal from a local trash company that serves the building next door at 1748 N Street to provide twice weekly trash removal and two supercans. Those may be located at the rear of the building underneath the stairs. Access may be obtained in the same manner that the company currently has access to 1748 N St.

7. **Updated computations to clarify the correct floor area ratio and lot occupancy.** See Exhibit 2 to the Supplementary Statement of the Applicant dated February 19, 2002.

8. **Review by the Fire Department to assess whether the project will be capable of meeting fire code requirements.** On March 15, 2002, the applicant met with Mr. Sydney Lester, Manager of the Fire Protection Division, and Mr. Dan Hoeng, an engineer on Mr. Lester's staff. After reviewing the architectural drawings,

they confirmed that the existing structure does not meet the fire code because there is no secondary means of egress and the existing central staircase is not enclosed. They advised that the proposed renovation could comply with applicable national and local fire codes by (1) adding a rear stairway for a secondary means of egress; (2) installing sprinklers and a fire alarm system with smoke detectors; and (3) installing a smoke evacuation fan. So, the rear exterior stairs will be mandatory.

The installation of the rear stairway will probably eliminate one of the current three legal parking spaces even though the architect's rendering of the parking area with the stairway shows that three small cars could park there. [Exhibit E].

Mr. Hoeng and Mr. Lester advised that a waiver from compliance with the fire code would be required if the open stairway was to be extended to the fifth floor. A waiver application will be submitted to Mr. Denzel Noble of the DC Fire Protection Division. Mr. Hoeng said in a subsequent telephone conversation that the chances of its approval were "good." He also stated that if the Board had any questions that Mr. Lester would be able to respond by telephone (202-442-9557). Minutes of the meeting on March 15, 2002, as well as the Preliminary Design Review meeting of May 2, 2001 with representatives of the Fire Protection Division, Structural, and Engineering staff are included in Exhibit E.

9. **Review by DDOT/DPW and OP of the roadway access from the rear of the property.** Following the Board's meeting on March 5th, Mr. Jackson from the Office of Planning confirmed that the alley

adjacent to the parking area of 1750 N St. is a public alley. The alley closing documents submitted in Exhibit 4 of the Applicant's Supplemental Statement on February 19, 2002 effected the closing of another alley in Square 159 (this was determined by comparing the S.O. number to the number on the zoning map). The applicant regrets the error which confused the Board and the applicant. Access to the rear parking area of 1750 N Street is accessed via a roadway off St. Matthews Court, through a gate controlled by an electronic combination lock, and across the alley and approximately 49 sq. ft. of the lot of 1748 N Street.[1]

Mr. Jackson also advised that the Historic Preservation Office considers 1750 N Street a "contributing building" to the Dupont Circle Historic District so that no additional parking would be required beyond any parking required before this application.

On March 14, 2002, the applicant met with Mr. Leslie Booker of DDOT for a site visit and demonstrated the means of access to the parking lot. The applicant informed Mr. Booker that Mr. Lawrence Ochs, who has his office in 1748 N Street which is owned by the Black Rock Group, LLC (Mr. Ochs' two sons), had offered to provide a year to year license for access across the property of 1748 N St. to the parking area behind 1750 N Street. A writing to that effect has been requested but not yet provided. Mr. Ochs had informed the applicant that the previous owners of the subject property had a similar arrangement during their occupancy of the property with the

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[1] As a practical matter, the owners of 1748 N Street will not be able to build out to their rear lot line as it is limited to building over 80% of the lot.

previous owner of 1748 N St., Mr. David Lamb, in return for an option to purchase the building. When contacted by telephone on March 21, 2002, Mr. Ochs advised he had been out of town and that payment for this license will be required. He refused an offer of $1 per year. So, at this time the parties are not in agreement as to the terms of access over the property of 1748 N Street that is adjacent to the public alley and to the entrance to the rear of 1750 N Street's parking lot. However, the applicant has been accessing the parking area behind 1750 N St. without hindrance since August 1, 2001 from the public alley way and anticipates that this arrangement will continue.

The applicant provided Mr. Booker with a copy of the DC Court of Appeals' decision in Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. BZA, 384 A.2d 674 (DC 1978)(included in the last exhibit to this submission) in which the Court permitted the YMCA to build a large facility at the corner of 17th Street and Rhode Island Avenue without any parking whatsoever in light of the combination of area parking spaces, bus and subway service (two metro stops within walking distance) so that off street parking was not necessary.

10. **Response to the objection of the American Society of Microbiology ("ASM") to the proposed extension of the subject property.** ASM did not seek party status in this proceeding. ASM occupies a 60,000 square foot office building which rises eight stories and is immediately adjacent to the subject property on the south and west sides. It is amazing that ASM asserts that a small

extension of the upper three stories of the subject property to match the existing footprint of the bottom two stories would "significantly reduce the light and air" to its atrium when (1) its own building is eight stories high and cuts off light and air to the atrium as well as to 1750 N Street, (2) the proposed extension does not encroach upon or overhang the atrium which begins at the rear boundary of 1750 N St. but merely would extend the existing structure by about fifteen feet on the upper stories, (3) the atrium is totally enclosed so that its access to air would not be affected by the proposed extension (4) the atrium's two story height is at the same height as the existing footprint of the two lowest stories of 1750 N St. so that only the largely open fire stairs would be between the atrium and the eastern exposure, (4) the 3 story high brick wall of 1746 N Street already blocks the morning sun from the east to the atrium as depicted in photographs submitted with the Supplemental Statement of the Applicant dated February 19, 2002, (5) the party wall built by ASM between the atrium and the parking lot of 1750N is approximately 10 feet high and cuts off the eastern exposure of the lower portion of the atrium to the morning sun, and (6) the ASM has made no evidentiary showing that the extension of an adjacent building would affect the USE of the atrium (such as by preventing people from walking through or sitting in the atrium) or the light reaching it.

ASM asserts that its structure was "designed in reliance on existing zoning laws." A review of the file of the BZA application for the ASM building at 1752 N St., NW at the time of its

construction showed that it did not undergo any review by the Office of Planning. Also, the existing zoning laws permit construction of up to an FAR of 4.0 for residential use which, under the current certificate of occupancy for 1750 N Street, could be done as a matter of right. Thus, it is specious to think that the ASM detrimentally relied upon existing zoning regulations in the construction of its building. If it were so concerned about light and air to its atrium, it would not have constructed an eight story office tower on the south and west sides of its atrium.

ASM asserts that the application has not satisfied the "public good" test for the variance which requires a showing that the proposed variance will provide "no substantial detriment to the public good nor impairment of the intent, purpose and integrity of the zone plan." The "public good" must not be confused with the more narrow interest of the owners of a neighboring building. Draude v. BZA, 582 A.2d 949 (1990). ASM confuses its desire not to have a fire stairway and extension next door with "substantial detriment to the public good." ASM has not provided evidence of any detrimental impact on the public (as opposed to its private) interest and has not provided any scientific or testimonial evidence that the USE (as opposed to the view) from its atrium will be adversely affected by the proposed extension to the adjacent building.

The location of the atrium at issue is immediately adjacent to the two stories of 1750 N Street that are already built out to the level that ASM objects to for the upper stories and is completely

overshadowed by the eight stories of the ASM building that surround the atrium on three sides. The pictures submitted by the applicant with its Supplemental Statement demonstrate that the ASM's own building towers over its neighbors. ASM thus has failed to demonstrate that the "public" good would be adversely affected by an extension on the rear of a building that is dwarfed by its objecting neighbor. It has also failed to demonstrate that the proposed extension would tend to affect adversely the use of a neighboring property as it has provided no evidence that the function of the atrium as a sitting area and corridor will be affected. 11 DCMR § 3108.1. It has also failed to demonstrate that the proposed extension would result in an unreasonable level of direct and reflected sunlight. Draude v. BZA, 582 A.2d 949 (DC 1990). In Draude v. BZA, 582 A.2d 949 (DC 1990), the BZA found that the condominium units facing an addition to George Washington University's ambulatory care facility "do not fail to benefit from a reasonable level of direct and reflected light." The BZA found that the non-conforming roof structure would not adversely affect the light and air of adjacent property, would not materially impair the intent and purpose of the regulations and was not likely to become objectionable to the neighboring property. GWU's architect testified that there is a significant difference between direct sunlight and reflected light, and that "direct light can penetrate the passageway between the buildings and reflected light exists between both buildings." He noted that the light colored materials used in construction of both buildings were conducive to maximizing

reflected light and that GWU could build a matter of right building that would "block all light on the portions of the condominium closest to I Street and would narrow the passageway between the buildings and reduce reflected light available to the habitable rooms of the condominium." Overall, he concluded that because of the penetration of direct sunlight between the buildings and the color of the building materials, there would be no adverse impact on the reflected light available to the condominium. Thus, the fact that the applicant in this case could build an extension up to an FAR of 4.0 as a matter of right is a factor to be taken into account when determining whether an extension would unreasonably interfere with light and air to neighboring properties. In any event, ASM has failed to muster any evidence of any deleterious impact of the proposed extension with respect to light and air to its atrium that would remotely compare to the amount of light and air blocked by its own building.

ASM also is erroneously of the view that this extension is merely the fancy of a greedy land speculator and that the proposed extension would "increase profits" rather than relieve economic hardship. Obviously its attorney did not bother to contact the applicant to learn that the building was purchased at a market price and that applicant intends to occupy the building. The proposed extension would provide a means to earn rents that would barely cover the debt service and operating costs of the building (i.e., this will be a non-profit operation for the foreseeable future). Also, the fact that the economic hardship imposed by

market conditions and the unique interior configuration of this historic building was foreseeable does not preclude the granting of a variance. Increased expense and inconvenience to applicants are among the proper factors for consideration for a variance. Tyler v. BZA, 606 A.2d 1362 (DC 1992)(The prohibitive cost of preserving the building, while a foreseeable and self imposed hardship, did not require denial of the variances by itself).

It is ironic that the ASM asserts that the public good would be better served by denial of the variance which would essentially preclude constructing a required emergency fire stairway to be attached to the exterior of the rear of the building. The new fire-rated stairwell will vastly improve egress and life safety in the building which is now served only by a central staircase that, but for a sprinkler system, would have to be enclosed. The addition to the third, fourth and fifth floors would improve the spatial arrangement of the building and consequently the enjoyment and economic productivity of its occupants. All of these factors should weigh more heavily on the "public good" than a speculative claim of reduced light and air to an adjacent atrium. All of these improvements, with the exception of the fire stairs, will be made within the existing footprint of the building -- thus reducing to a de minimus level the addition required to effect so much good.

Also, the ASM has not acknowledged that the "public good" is being protected by the ANC's review as well as the Office of Planning and historic preservation-related reviews that the proposed project has undergone. These reviews insure that the

architectural heritage of the building and the Dupont Circle Historic District will be protected. The proposed addition will not result in any substantial detriment to the integrity of the zone plan or the Zoning Regulations and Maps.

If anything, the "public good" is embodied by the recommendation of the ANC to approve the application. The Board is required to give "great weight" to the ANC's views. Certainly that "great weight" should overcome the parochial objections of the neighbor concerned about a speculative exacerbation of a situation that it largely created itself when it chose to build eight stories and exceeded the height and FAR limits. For all the above reasons, variance relief to the subject property can be granted without harm to the public good or the zone plan.

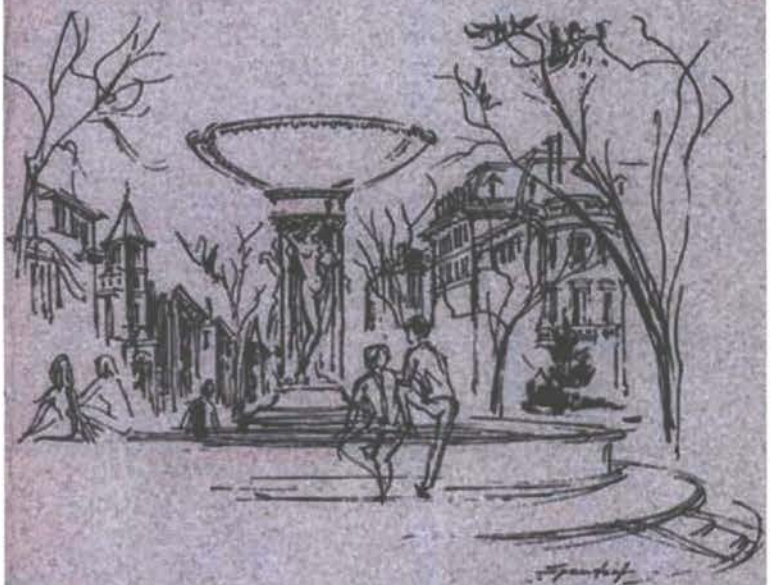
Respectfully submitted,



Pamela B. Stuart, as
managing member of
The Stuart Building, LLC

EXHIBIT A

DUPONT CIRCLE HISTORIC DISTRICT



WASHINGTON, D.C.

Dupont Circle Historic District

Roughly bounded by Rhode Island Avenue, M, and N Streets on the south, Florida Avenue on the west, Swann Street on the north, and the 16th Street HD on the east. Includes approximately 3100 buildings c. 1875-1940. DC listing 11/3/64 (preliminary identification), designated 6/17/77, NR listing 7/21/78; expanded DC designation 6/30/83 (effective 1/4/85), NR listing 2/6/85.

- Among the city's most elegant historic residential neighborhoods.
- Notable for superior examples of Victorian rowhouse architecture in Queen Anne and Richardsonian styles, as well as some of the city's finest turn-of-the-century mansions in Beaux Arts, Chateauesque, Renaissance, and Georgian Revival styles.
- Has served as the home of many prominent and affluent Washingtonians, as well as foreign legations.
- Prominent local and national architects are represented.
- Unusually rich and varied streetscapes, many along the diagonal L'Enfant avenues, with centerpiece at Dupont Circle.
- Fine examples of early apartments, 1920s commercial buildings along Connecticut Avenue.

Restoring or renovating your Dupont Circle property? Call the D.C. Historic Preservation Division. An historic preservation professional is assigned to assist you with technical information. 202-442-4570

SUGGESTED READING:

Goode, James M. *Best Addresses*. Washington, D.C.: Smithsonian Institution Press, 1988.

Goode, James M. *Capital Losses: A Cultural History of Washington's Destroyed Buildings*. Washington, D.C.: Smithsonian Institution Press, 1979.

Griffen, Mark G. & McCloskey, Ellen M. *Lily Spandorf's Washington Never More*. Washington, D.C.: Grew Publishing Co., 1988.

Massachusetts Avenue Architecture. Vols. 1 & 2. Washington, D.C.: Commission of Fine Arts, 1973, 1975.

Maury, William M. *Alexander "Boss" Shepherd and the Board of Public Works*. Washington, D.C.: The George Washington University, 1975.

Records. The Columbia Historical Society.

Cover: Dupont Circle looking E. toward P Street. Drawing by Lily Spandorf. Top opposite page: John Fraser, architect of the British Legation, 1300 Connecticut Avenue (1873, demolished), also designed this residence at 2000 Massachusetts Avenue at Dupont Circle for Senator James G. Blaine of Maine, one of the founders of the Republican Party in 1856, Secretary of State under Garfield, and Republican candidate for president in 1884. The house was leased by Chicago millionaire Levi Leiter from 1883 to 1894, and purchased in 1901 by George Westinghouse, inventor and founder of the Westinghouse Electric Company. *Picturesque Washington*, 1884.



THE JAMES G. BLAINE MANSION

On this spacious plain, a few years ago an almost valueless area of swamps, those palatial mansions, the pride and boast of the capital, are erected. Here are the residences of the wealthiest citizens, and those of the millionaires from different sections of the United States who make Washington their winter home....Here are the foreign legation buildings, and here the leaders of society have congregated under splendid roof-trees. On every side is a dazzling spectacle of luxury and grandeur. Joseph West Moore, *Picturesque Washington*, 1884.

In 1791 L'Enfant had planned this northwestern-most residential area for the new Federal City around a major circular element intersected by three grand avenues named after three of the original thirteen states—Massachusetts, Connecticut, and New Hampshire. Although Boundary Street, now Florida Avenue, had earlier been one of the most traveled approaches from Southern Maryland plantations to the Port of Georgetown, the future Dupont Circle neighborhood was still largely rural in 1871 when the Board of Public Works, under the leadership of Alexander Shepherd, began its massive city-wide infrastructure improvements. An area of fields,



2120–2128 Florida Avenue (ca. 1868). Courtesy Kiplinger Washington Collection, W. E. Barrett photograph (1967).

Richardsonian Romanesque south side of the 1800 block of Q Street, was designed as coordinated rows. Other streets, with houses built by individuals, developed as microcosms of architectural design along the avenues.

1750 N



The Church of the Covenant set the style for the architecturally distinguished 1700 block of N Street. 1750-56 N Street pictured. Courtesy Kiplinger Washington Collection, W. E. Barrett photograph (1967).

The World's Columbian Exposition, held in Chicago in 1893, had a profound effect on the development of Washington and popularized the ideal of a monumental capital city built in white marble and limestone in the mode of Beaux Arts classicism. In the Dupont Circle area, many of the original brownstone and brick mansions were demolished to make way for the palatial designs of Jules Henri de Sibour, Carrere & Hastings, and others. More modest row houses also were built with neo-classic detail and less exuberant massing. Limestone and buff brick replaced brownstone and dark-red pressed brick.



The Perry Belmont House (International Eastern Star Temple), 1614 New Hampshire Avenue, was designed by Sanson & Trumbauer in 1909. Courtesy Historical Society of Washington, D.C. (1918)

A HETEROGENEOUS RESIDENTIAL NEIGHBORHOOD

By 1884 tourists were riding the trolley up Connecticut Avenue to view the mansions concentrated along the wide diagonal avenues intersecting Dupont Circle. The majority of residences within the developing neighborhood were, however, rowhouses of somewhat less grand pretensions. Doctors, lawyers, teachers, government clerks, craftsmen, servants, laborers and others lived side by side with high government officials, diplomats, and the socially elite. Public transportation allowed easy access to downtown employment. Senators and Supreme Court justices often used the trolleys for the trek to Capitol Hill. The Georgetown waterfront was an easy walk for skilled and unskilled workers. Services such as carpentry, dressmaking, and plumbing were furnished by skilled workers living in the neighborhood. Neighborhood needs were also met by corner grocery stores and local dairies.



Christian Heurich Brewery, 1229 20th St. (1861). *"The excellence and purity of Heurich's beer is universally known. In its manufacture nothing of a deleterious character is used, while the best malts of Canada, Wisconsin, and Ohio are manipulated in its production. The increased use of Heurich's lager beer in hospitals and private families is a sufficient guarantee of its purity and healthfulness."* Courtesy Historical Society of Washington, D.C.

Households were often large, including extended family, boarders, and servants. The custom of unmarried adult children continuing to live in the parental home persisted well into the twentieth century. Boarders were not unusual in a city with a long tradition of boarding houses. Many servants were required in the large houses, and even less affluent households, lacking modern conveniences, relied heavily upon full-time domestic help. Servants often lived in. This was especially true for those who had emigrated from England, Ireland and Sweden or who were



A. Grass cabinetmaker, 1209 New Hampshire Avenue. Demolished Courtesy Historical Society of Washington, D.C.

EXHIBIT B

STOIBER & ASSOCIATES, PC
architecture and interiors

1621 connecticut avenue, nw # 200
washington, dc 20009
202.986.4100 fax: 202.986.1606
email: stoiber@erols.com

TRANSMITTAL

TO: **Ms Pam Stuart**
FAX: **202-835-2202**

DATE: **5 March 2002**
PROJECT: **1750 N St**
PROJECT NO:
RE: **Roof Structure Plan**

WE ARE SENDING YOU **2** PAGES (INCLUDING COVER) VIA: **FAX**

COPIES	DATE	NO.	DESCRIPTION
1	3-5-02	1 page	Roof Structure Plan

THESE ARE TRANSMITTED AS CHECKED BELOW:

	For approval	X	As requested	Return for corrections
X	For your use		For bids due	For Payment
	For review and comment		Approved as noted	

REMARK:

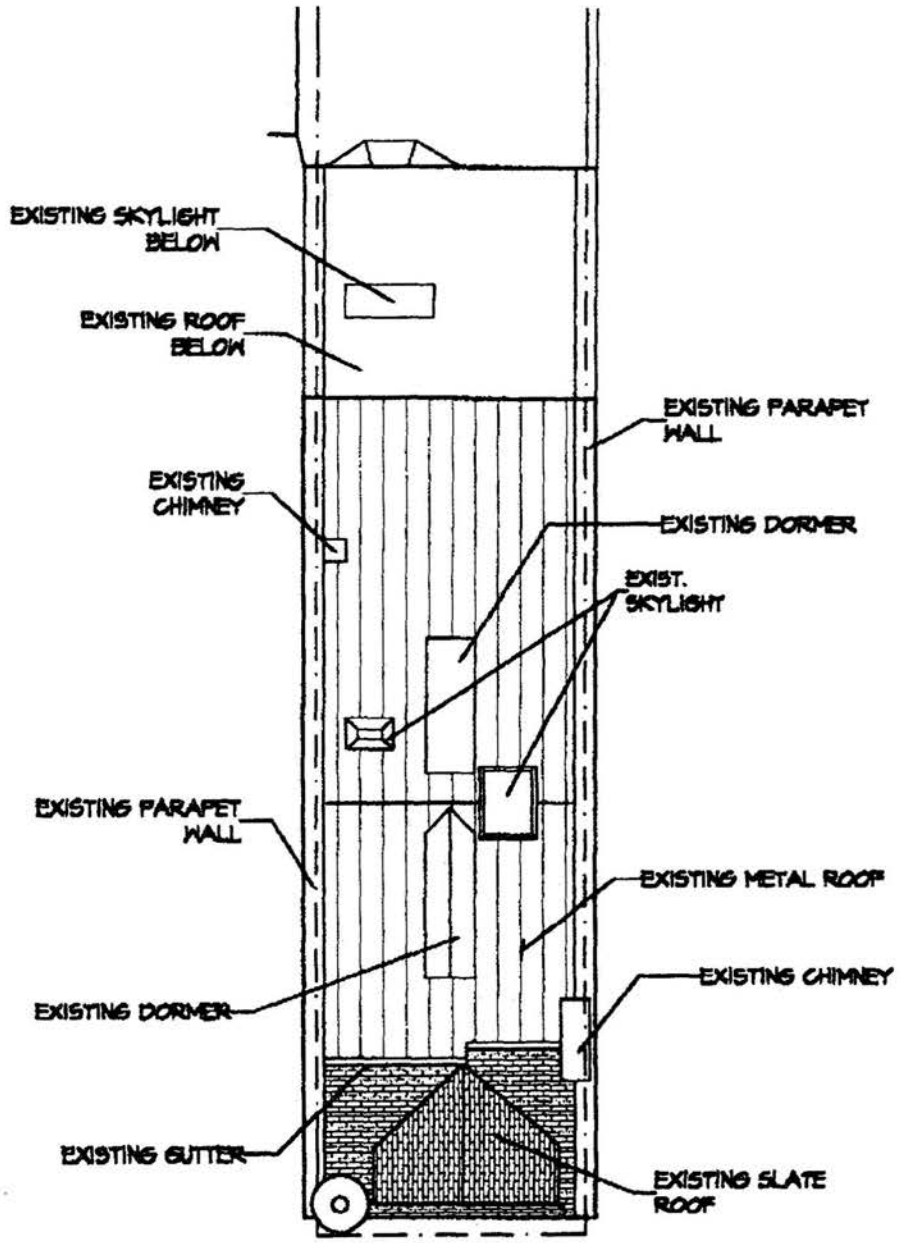
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Thank You.

FROM: **Jeff Stoiber**
COPIES: **file**

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ROOF STRUCTURE PLAN - EXISTING

(existingroof-t/bea/Stuart-1750 N St NW01.01)

0 8 16 32

STOIBER & ASSOCIATES, PC
architecture and interiors

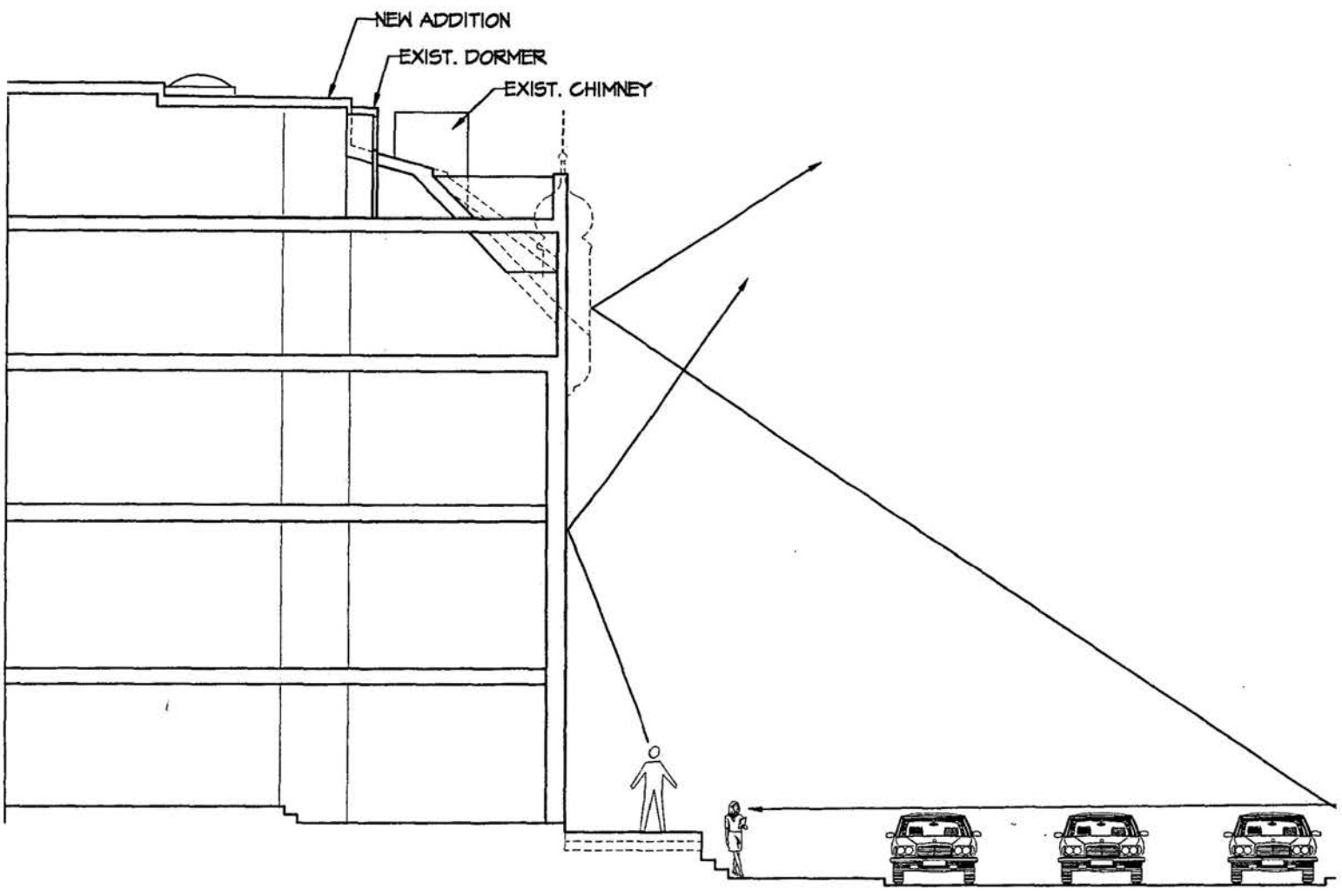
1621 connecticut avenue, nw • 200
washington, dc 20009
202.986.4100 fax: 202.986.1606

PROJECT: 1750 N ST. NW
WASHINGTON, DC

TITLE: RENOVATION AND ADDITION

DATE: 3-5-02

SHEET 1 OF 1



1/A1 SECTION THROUGH THE STREET AND THE BUILDING WITH SITELINE

1/8"=1'-0"

(Section-k/Stuart-1750 N St NW/C

EXHIBIT C

STOIBER & ASSOCIATES, PC
architecture and interiors

1621 connecticut avenue, nw • 200
washington, dc 20009
202.986.4700 fax: 202.986.7606
email: stoiber@erols.com

TRANSMITTAL

TO: **Ms Pam Stuart**
FAX: **202-835-2202**

DATE: **19 February 2002**
PROJECT: **1750 N St**
PROJECT NO:
RE: **Floor Plans - usable space**

WE ARE SENDING YOU 3 PAGES (INCLUDING COVER) VIA: **FAX**

COPIES	DATE	NO.	DESCRIPTION
1	2-19-02	2 pages	Floor plans

THESE ARE TRANSMITTED AS CHECKED BELOW:

	For approval	X	As requested	Return for corrections
X	For your use		For bids due	For Payment
	For review and comment		Approved as noted	

REMARK:

Attached are drawings showing the existing conditions, with areas highlighted showing non-usable space.

Please let us know if you need any additional drawings for submittal.

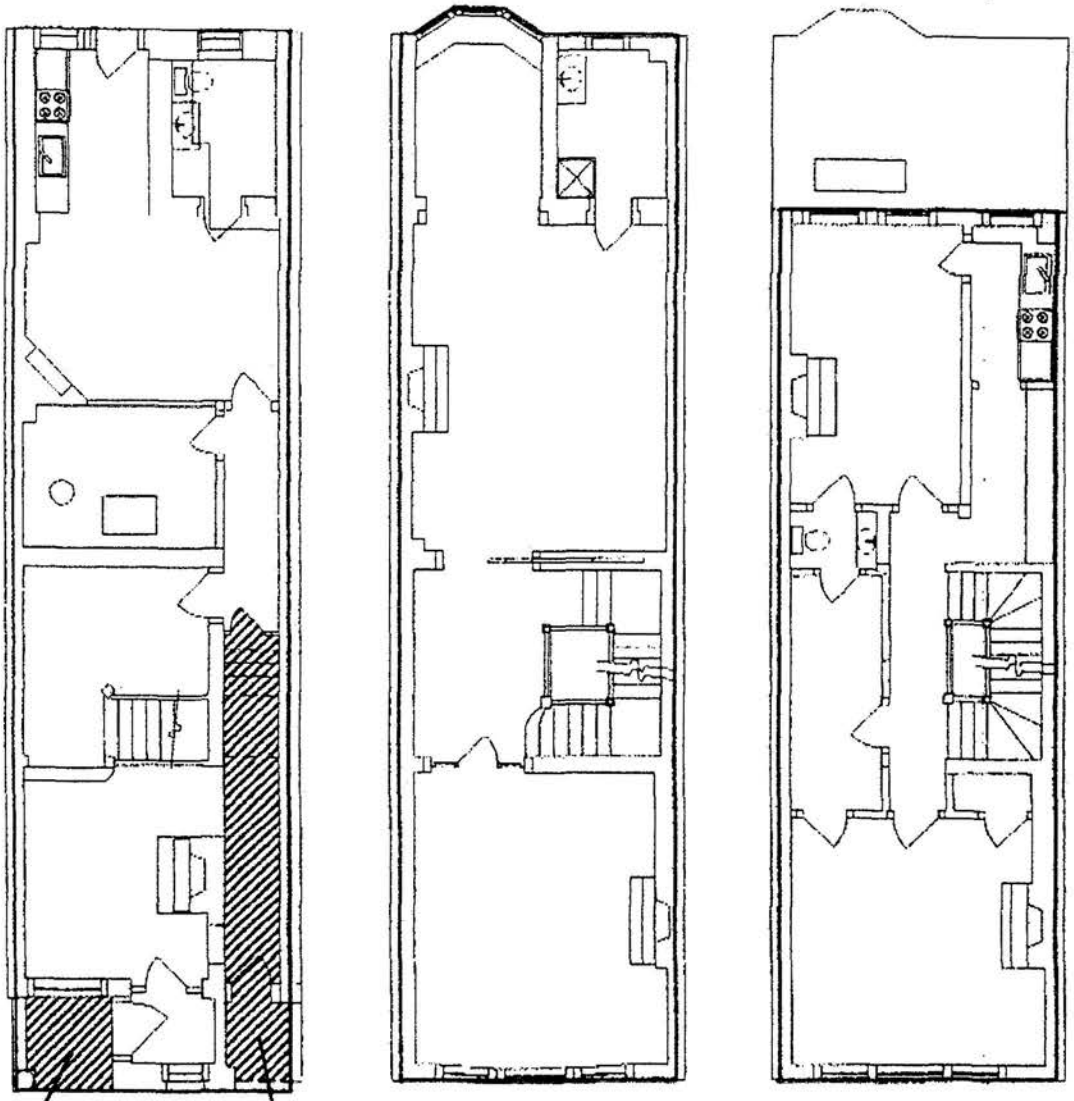
Please let us know of any questions or comments.

Thank You.

FROM: **Jeff Stoiber**
COPIES: **file**

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FLOOR PLANS - EXISTING

(existsect-K:\boza\Stuart-1750 N St NW\01.01)

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architecture and interiors

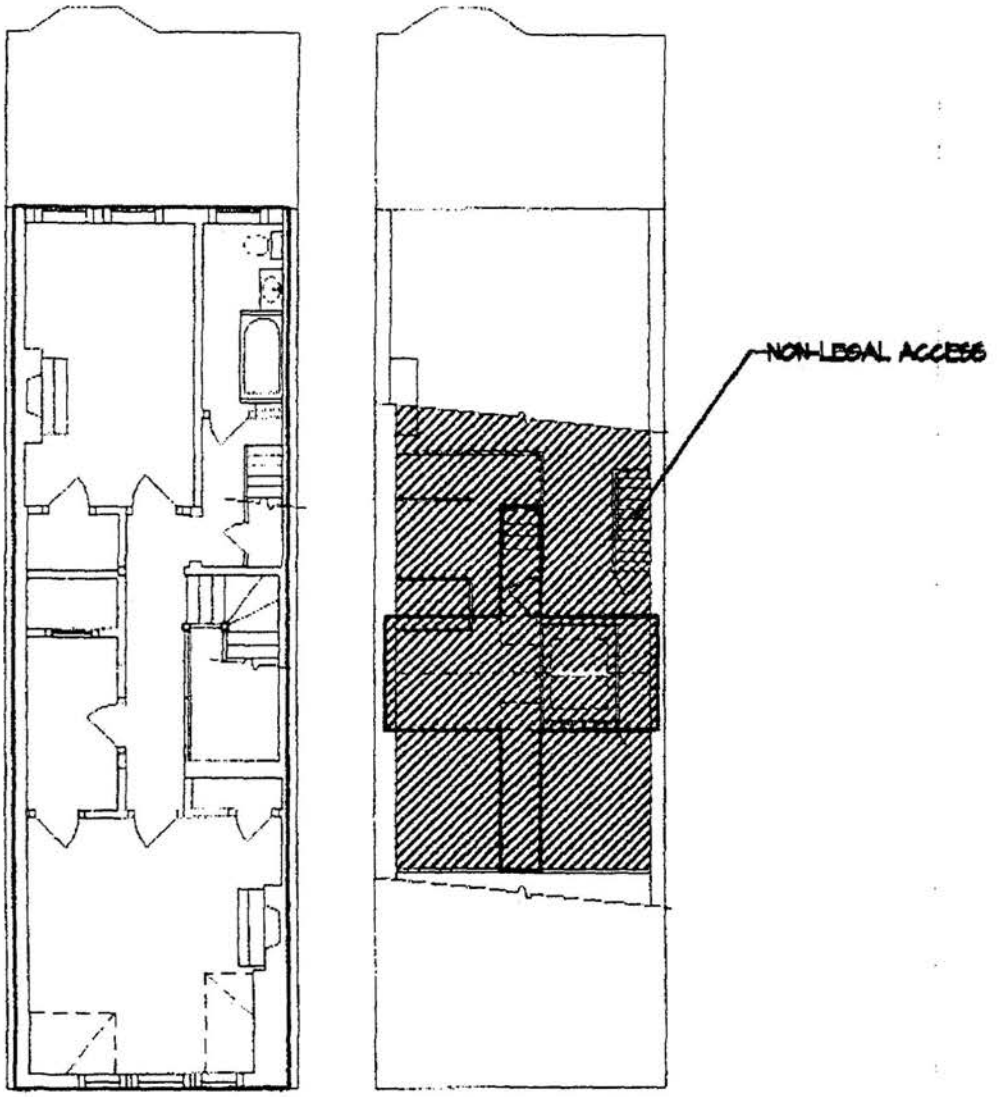
1621 connecticut avenue, nw # 200
washington, dc 20009
202.986.4100 fax: 202.986.1606

PROJECT: 1750 N ST. NW
WASHINGTON, DC

TITLE: RENOVATION AND ADDITION

DATE: 2-19-02

SHEET 1 OF 2



FLOOR PLANS - EXISTING

(existsect-k/222/Stuart-1150 N St NW/0101)

0 8 16 32

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washington, dc 20009
202.986.4100 fax: 202.986.7606

PROJECT: 1150 N ST. NW
WASHINGTON, DC

TITLE: RENOVATION AND ADDITION

DATE: 2-14-02

SHEET 2 OF 2

EXHIBIT D

PRO FORMA FACTS AND FIGURES FOR 1750 N St., NW

Projected Income

1. 1st floor office (12 x 22) 264 sq. ft. $2500/mo
   with brick fireplace (may be made smaller w/ window)

2. 2nd floor office (14'6 x 15'6) 225 sq. ft. 3000/mo
   with fireplace; faces street

3. 3rd floor front office (14'6" x 15'6") 225 sq. ft 3000/mo
   with fireplace; faces street

4. 3rd floor back office (16 x 14) 224 sq. ft. 2700/mo
   no fireplace

5. 3rd floor middle office (10'6" x 14') 147 sq. ft. 1500/mo
   smaller, next to bath

6. 4th floor front office (14'6" x 14'6") 210 sq. ft. 3000/mo
   with fireplace; faces street

7. 4th floor middle office (11' x 18') 198 sq. ft. 1800/mo
   no window

8. 4th floor back office (16' x 15') 240 sq. ft. 2800/mo
   no fireplace

9. 5th floor back office (PBS) (16' x 15') 240 sq.ft. 2800/mo

10. 5th floor middle office (KEV) (11' x 18') 198 sq. ft. 1800/mo

Note that all tenants will be considered to be renting a proportionate share of the common areas of the building (conference room, kitchen, baths, hallways, etc. The total square footage of the building is projected to be 56

total monthly income: $24,900
vacancy factor 10%
$268,920 gross effective income

EXPENSES

accounting	75
advertising	25
insurance	150
janitorial service	500
snow removal	50

elevator maintenance	400	
mortgages		
acquisition (850,000 @ 7.75%)	7999	
construction (800,000 @ 7.75%)	7528	
home equity/2nd trust (200,000 @ 7.75%)	1882	
total mortgage:	17,409	
pest control	35	
property management/		
receptionist/mail sorter	3000	
repairs and maintenance	1000	
replacement reserve	120	
supplies	200	
taxes		
real estate	2000	(may not have to pay this due to historic credits)
personal property	100	
payroll	300	
other		
trash removal	200	
Utilities	500	
electric		
gas		
water & sewer		
cable tv		
telephone		
miscellaneous		

I am also getting a bid on a property management contract.

Assumptions:
$268,920 in annual gross effective income. $8.50 per sq. foot expenses. $47,600 in expenses using the $8.50 per sq. foot. 6% of gross rents for management fees. 25 cents per sq. ft. for replacement reserve ($120 per month/$1400 per year).

$221,320 (net operating income). 15 year mortgage at 8.25% of 1.8 17,460 x 12 = $209,520. 1.06 coverage (most banks want 1.2 or 1.25).

EXHIBIT E

STOBER & ASSOCIATES, PC
architecture and interiors

1621 connecticut avenue, nw • 200
washington, dc 20009
202.986.1700 fax: 202.986.1606
email: stober@erols.com

TRANSMITTAL

TO: Ms Pam Stuart
FAX: 202-835-2202

DATE: 11 March 2002
PROJECT: 1750 N St
PROJECT NO:
RE: Parking Layout

WE ARE SENDING YOU 2 PAGES (INCLUDING COVER) VIA: FAX

COPIES	DATE	NO.	DESCRIPTION
1	3-11-02	1 page	Partial Site Plan With Parking Layout

THESE ARE TRANSMITTED AS CHECKED BELOW:

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	For review and comment		Approved as noted	

REMARK:

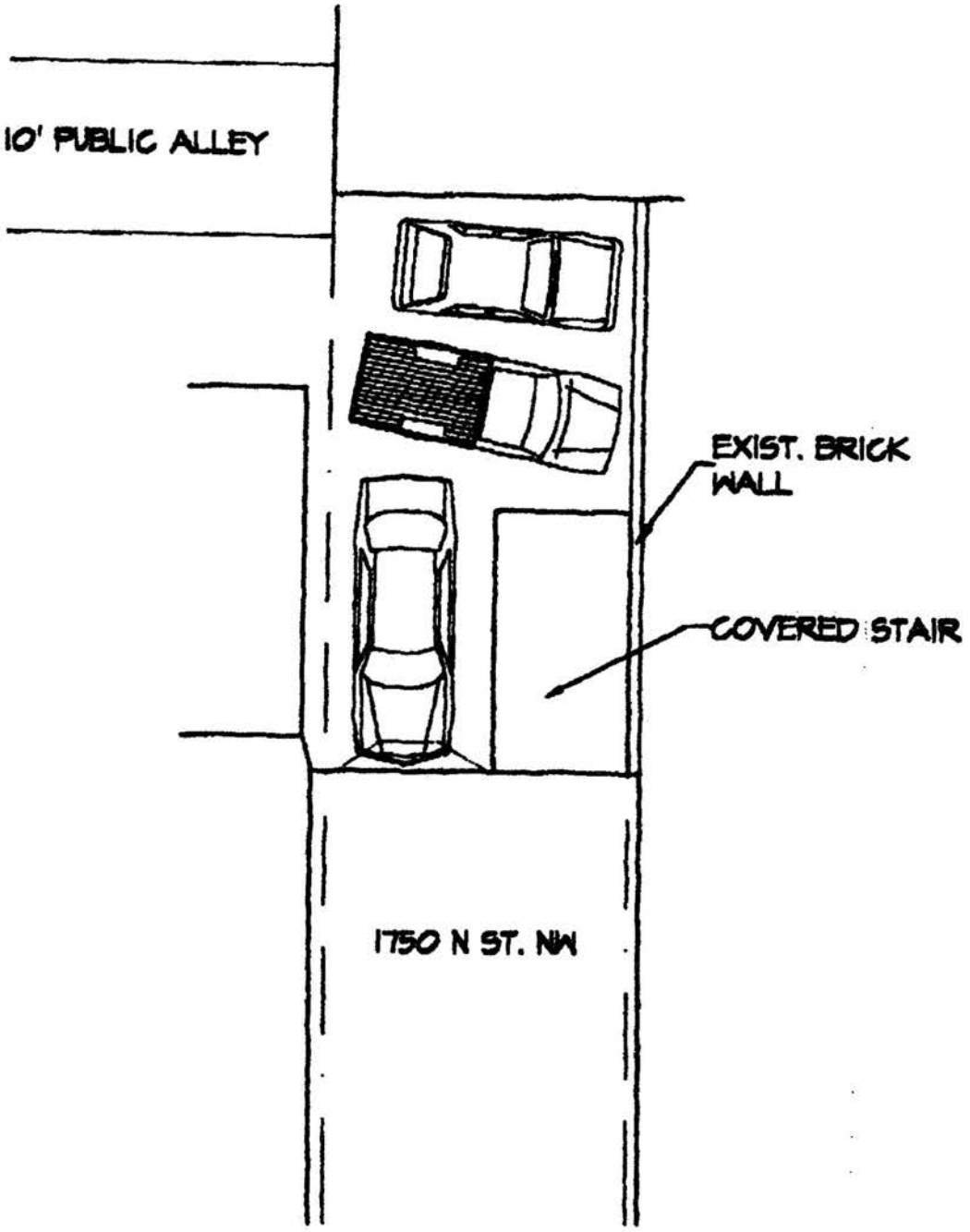
Please let us know of any questions or comments.

Thank You.

FROM: Robert Carhuff
COPIES: file

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S:\96A WordStuart - 1750 N St. NW\Trans\Stuart0311.02fax.wpd



PARTIAL SITE PLAN WITH PARKING LAYOUT

1"=10'-0" (parking-o/Stuart-1750 N St NW01.01)

STOIBER & ASSOCIATES, PC
architecture and interiors

1621 connecticut avenue, nw # 200
washington, dc 20009
202.986.4100 fax: 202.986.1606

PROJECT: 1750 N ST. NW
WASHINGTON, DC

TITLE: RENOVATION AND ADDITION

DATE: 5-11-02

SHEET 1 OF 1

March 21, 2002

MEMORANDUM

To: Board of Zoning Adjustment

From: Pamela B. Stuart, managing member PBS
The Stuart Building, LLC, and
Sydney Lester, Manager, DC Fire Protection Division

Re: BZA application 16827

Minutes of meeting with Sydney Lester, Manager, District of Columbia Fire Protection Division and Mr. Dan Hoeng, engineer DC Fire Protection Division

A meeting was held in the offices of the Office of Zoning on Friday, March 15, 2002 to discuss the BZA's questions concerning fire protection and access to 1750 N Street, NW. Present were Pamela Stuart, Mr. Sydney Lester and Mr. Dan Hoeng.

Mr. Lester and Mr. Hoeng advised that the existing building does not meet applicable fire code standards because the existing interior stairwell is not enclosed and there is no secondary means of egress.

After examination of the architectural drawings of the proposed renovation to the structure, Mr. Lester and Mr. Hoeng said that the building is capable of meeting the applicable fire code requirements if:

(1) the building is fully sprinklered per NFPA 13 (1996) and all applicable local codes and standards;

(2) a fire alarm system with smoke detectors is installed as required by national and local codes;

(3) a second means of egress is installed so that occupants will be able to exit the premises from the rear via an exterior rear stairway;

(4) and a smoke exhaust fan added (due to the atrium condition that exists because of the center stairway).

The construction of the rear stairway is required because the existing interior stairwell is open.

The building as proposed (five stories, including the expansion and renovation of what is currently attic space) would be able to meet the fire code without a sprinkler system being installed if the central stairwell were enclosed with two hour rated materials and the rear fire stairway added as proposed. Alternatively, the central stairway could be left open and the building sprinkled but the code permits this only for the first four stories. It is possible that the central stairwell could be left open and extended to the fifth floor as proposed in the plans, but a waiver from the strict application of the fire code would be required. A waiver application will be filed for review and approval by Mr. Denzel Noble of the Fire Protection Division.

STOIBER & ASSOCIATES, PC
architecture and interiors

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washington, dc 20009
202.986.1100 fax: 202.986.1606
email: stoiber@erols.com

CONFERENCE REPORT

Project: Stuart Building
1750 N Street, NW
Washington, DC 20036-2902
Renovation

Date: 2 May 2001

Present: Harris Lanier - Fire Protection
Robert Chen - Structural
Ravi Shankar - Engineering
Enrique Astiz
Dick Piper
Jeff Stoiber
Robert Carhuff

Re: ***Preliminary Design Review***

The Schematic Design drawings were presented and approved with the following comments:

1. Fresh air: Fresh air supply to A.H.V.S. is not required if calculations are provided which show that operable windows will suffice.

2. Sprinklers: Not required. If provided, stair probably can be left open.

3. Standpipe: Required (for bldgs. 30' or greater in height.)

4. Fire alarm: Required.

5. Stair: Enclosure is required to be 2 hr. rated. 1st floor enclosure must separate stair from lobby and elevator. This stair can exit into the Lobby.

6. Halls: No rating required.

7. Exterior stair: Needs to be covered. Contact Mr. Chen to confirm zoning issues.

8. Toilet: One toilet per floor required, not required to be on each floor (1999 amendment).

9. Mop sink: One needed.

10. Drinking fountain: One bottled water is ok.

11. Stair-2nd fl.: Submit waiver application for door swing into stair and it will be approved.

Selected Cases

Service: **Get by LEXSEE®**
Citation: **606 A.2d 1362**

*606 A.2d 1362, *; 1992 D.C. App. LEXIS 104, ***

GEOFFREY TYLER, et al., PETITIONERS, v. DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, RESPONDENT, BRONBERG, INC., INTERVENOR.

No. 90-1418

DISTRICT OF COLUMBIA COURT OF APPEALS

606 A.2d 1362; 1992 D.C. App. LEXIS 104

March 12, 1992, Argued
April 17, 1992, Decided
April 17, 1992, Filed

PRIOR HISTORY: **[**1]** Petition for Review of a Decision of the District of Columbia Board of Zoning Adjustment

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner area residents sought to review a decision of respondent District of Columbia Board of Zoning Adjustment (Washington), which granted two area variances to a limited partnership that owned two historic townhouses that intervenor buyer planned to demolish to build an apartment complex.

OVERVIEW: A limited partnership owned two historic landmark townhouses. The buyer contracted to purchase the property contingent on the grant of two area variances for floor area ratio and height. The buyer planned to demolish the townhouses and build a 21-unit apartment building, which was opposed by the area residents. The zoning board granted the variances and stated that its decision was not based on economic factors. The court vacated the board's decision because it was unable to determine what non-economic factors formed the basis of the decision. Moreover, the board's disavowal of reliance on economic considerations may have reflected a misunderstanding of the court's precedents. Where the zoning board elected not to explain the non-economic justification on which it purported to base its decision, it was required to address the evidence of economic feasibility and make explicit findings relevant to it.

OUTCOME: The decision of the zoning board was vacated insofar as it granted the floor area ratio and height variances. The court remanded the case for further consideration in light of the court's opinion.

CORE TERMS: variance, height, area variance, economic factors, apartment building, exceptional, practical difficulty, non-economic, feasibility, historic, regulations, landmark, block, zoning, demolish, site, preserving, developer, hardship, restoration, construct, setback, construction loan, special exception, neighboring, architect, build, feet, practical difficulties, properly granted

CORE CONCEPTS - ♦ Hide Concepts

Real & Personal Property Law : Zoning & Land Use : Judicial Review

A court may not supply a rationale for an agency decision by conjecture from what it did.

Real & Personal Property Law : Zoning & Land Use : Judicial Review

A court may not substitute its reasoning for the District of Columbia Board of Zoning Adjustment's when that reasoning appears to be lacking in its order.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The District of Columbia Board of Zoning Adjustment (BZA) may grant variances under D.C. Code § 5-424 (g)(3); D.C. Mun. Regs. tit. 11, § 3107.2. The applicant for a variance has the burden of showing: first, that the property is unique because of some physical aspect or other extraordinary or exceptional situation or condition inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

In the case of area variances as distinct from use variances, an applicant is not required to show undue hardship but must satisfy only the lower practical difficulty standard.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The court is of the view that the District of Columbia Zoning Board of Adjustment must either explain the non-economic reasons on which its decision purportedly rests, or else reconsider the decision in light of the evidence of economic justification. The court's precedents make clear that such evidence may indeed be considered in deciding whether area variances should be granted.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

Conclusions legally sufficient to support the District of Columbia Zoning Board of Adjustment's decision must flow rationally from the findings.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The court has never held that proof of economic burden is irrelevant to the decision whether to grant an area variance.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The District of Columbia Board of Zoning Adjustment has no authority to grant a variance in order to assure the economic viability of the use of a particular property in a particular manner.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

Even in the context of area variances, the court has rejected any suggestion that added expense alone would entitle a property owner to a variance. But the court has recently eliminated any doubt that economic use of property may properly be considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in area variance cases.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

A substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property is not a practical difficulty that merits an area variance. On the other hand, at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the existing structure or property.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

Increased expense and inconvenience to applicants for a variance are among the proper factors for the District of Columbia Board of Zoning Adjustment (BZA) consideration.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.

Real & Personal Property Law : Zoning & Land Use : Conditional Use Permits & Variances

The court holds that if the District of Columbia Zoning Board of Adjustment elects not to explain the non-economic justifications on which it purports to base its decision, it must address the evidence of economic feasibility and make explicit findings relevant to it.

COUNSEL: James T. Draude for petitioners.

C. Francis Murphy, with whom Louis P. Robbins and Jonathan L. Farmer were on the brief, for intervenor.

John Payton, Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel, filed a Statement in Lieu of Brief for Respondent the District of Columbia Board of Zoning Adjustment.

JUDGES: Before ROGERS, Chief Judge, FARRELL, Associate Judge, and PRYOR, Senior Judge.

OPINIONBY: FARRELL

OPINION: [*1363] FARRELL, *Associate Judge:* In granting the two area variances disputed here, the Board of Zoning Adjustment (BZA or Board) stated that its decision was not, and could not be, "based on economic factors." Because we are unable to determine from the Board's decision what non-economic factors formed the basis of the decision, and because we think the Board's disavowal of reliance on economic considerations (despite explicit testimony by the applicant's witnesses that these motivated the request for variances) may reflect a misunderstanding of our precedents, we must vacate the decision and remand the case to the Board for further consideration. Either the Board must explain the non-economic **[**2]** reasons that justified the disputed variances, or it must expressly consider the evidence of economic feasibility offered in support of the application. *See* Levy v. District of Columbia Bd. of Zoning Adjustment, 570 A.2d 739, 753 (D.C. 1990) ("A court may not supply a rationale for the agency decision by conjecture from what it did"); Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164, 1171 n.6 (D.C. 1990) ("court may not substitute its reasoning for BZA's when that reasoning appears to be lacking in its order").

I.

The property at issue is located at 2521-2523 K Street, N.W., and is improved by two townhouses (known as the Cooper Houses) which have been designated historic landmarks. Applicant Saint James Washington Limited Partnership (St. James) is the current owner of the property, and intervenor Bronberg, Inc. has a contract to purchase the property contingent on the grant of the requested variances. The BZA granted St. James six variances to permit construction of a twenty-unit apartment building on the property which would preserve and incorporate the Cooper Houses. Petitioners, who are area residents, oppose **[**3]** only two of the variances granted. The first would permit a variance from the maximum allowable height (90 feet) n1 to provide for a residential apartment building 107.5

feet in height. The second would permit a variance from the maximum allowable FAR (Floor Area Ratio) of 6.0 n2 to provide for a FAR of 7.7.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 11 DCMR § 400.1 (1987).

n2 11 DCMR § 402.4 (1987) (R-5-D, or high density residential, use).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Cooper Houses were designated landmark buildings in 1984. n3 After an application for a permit to demolish the buildings was denied by the Mayor's agent, D.C. Code § 5-1004, the former property owner obtained certain variances from the Zoning regulations to construct an apartment building on the remainder of the site, but then abandoned the project. Bronberg, Inc., in conjunction with its (contingent) purchase of the property from the present owner, St. James, originally offered a plan to leave intact and incorporate the facade of each of the Cooper Houses but otherwise to demolish them. Opposition to this **[*1364]** plan **[**4]** resulted in a revised proposal from Bronberg which, as finally approved by the Historic Preservation Review Board, permitted temporary partial demolition of the houses, to be followed by their complete restoration using original materials after the apartment building was erected. The Cooper Houses would then constitute two single-family dwellings incorporated into the twelve-story apartment building constructed behind them.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 *See* Historic Landmark and Historic District Protection Act of 1978, D.C. Law 2-144, D.C. Code §§ 5-1001 *et seq.* (1988).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

A hearing on the application for the six variances (together with a request for a special exception pertaining to the roof structure) took place before the BZA on October 25, 1989. The Board had received the recommendations of Advisory Neighborhood Commission (ANC) 2A and the Office of Planning in favor of the variances. ANC-2A applauded Bronberg's agreement to preserve the two historic structures rather than merely the facades, since the Cooper Houses are "the oldest **[**5]** houses remaining in the Foggy Bottom area and among the oldest in the city." At the same time, ANC-2A acknowledged that the houses were "in precarious condition, not likely to last another year," having been the victim of years of neglect and recent fires and vandalism. In favoring the variances, ANC-2A recognized that the need to preserve the entire structures "had added significantly to [the developer's] costs by reducing usable space within the structure, and requiring additional major expenditures to retain the integrity of the total structures of the Cooper Houses." ANC-2A noted that Bronberg's president had made available to the ANC's consultant "a financial statement prepared in connection with a [construction] loan application," and that "the figures were reasonable." The Office of Planning likewise affirmed that "the presence of the landmark structures on the property has created the need for the requested variances," since "without the [Cooper Houses], the applicant could develop a comparable 20-unit residential building, as a matter-of-right without variance relief."

Testifying before the Board, Gerald I. Goldberg, Bronberg's president, stated that the FAR and height variances **[**6]** were necessary, in essence, "to make this economically feasible." Echoing ANC-2A's conclusion that the Cooper Houses -- uninhabited since 1983 -- were "in a terrible state of disrepair . . . that continues to get worse," Goldberg explained that the obligation to preserve them imposed by the Historic preservation Review Board made construction of the apartment building "very expensive . . . because of the great area that the historic buildings cover." In particular, the need to depart from the normal FAR limitations

was

strictly one of economics. The [cost of the] restoration of these town houses will far exceed the . . . income that we can derive from the resale of these town homes. . . .

In order to have a design which fits in with the historic structures, which fits in with the scope of the block, we have a very, very complex structure. This cost has to be recovered through the sale of square footage, of retail square footage.

We have done an economic balance to determine the amount of FAR that we had to market if we . . . would be able to build the project. That then drove the height, because the only place that we were allowed to build by the Historics Board [sic] was back and **[**7]** up.

According to Goldberg, since the "debt ratio coverage" reflected in the proposed plan had "no excess," a construction loan could not be obtained without the height and FAR variances: "If you take anything out of that building . . . the equation no longer balances and you can't get a construction loan. So, it's really like a no-go game."

The project architect testified and confirmed that the restoration of the Cooper Houses would mean "a negative economic value" without the variances. Among other things, incorporation of the two-story homes into the apartment building would result in there being no "new saleable area" in the building up to a height of twenty feet. According to the architect, the "additional FAR, additional density on the site helps us offset the cost of restoring the Cooper homes, and that's really what Mr. Goldberg is requesting here."

[*1365] In its decision granting the FAR and height variances, the BZA acknowledged the architect's testimony that "the additional height compensates for the inability to build anew on the front of the lot." It also took note of opposing testimony by the representative of ANC-2A-03, the single-member district in which the property is **[**8]** located, "that the developer failed to support his statement that resulting profits from the project would be exceeded by the cost of preserving the Cooper Houses if the FAR and height variances are not granted." Nevertheless, as we pointed out at the beginning, the BZA expressly concluded "that its decision in this matter cannot be based on economic factors," and therefore determined that "detailed financial information from the developer would be irrelevant." In denying petitioners' application for reconsideration, the Board reemphasized the point that its "conclusions are not based on economic factors." Instead, after setting forth the legal standard for the grant of variances, the Board concluded:

In the Board's opinion, the narrowing of the lot at the rear, the location of neighboring structures at their contiguous property line and the presence of the landmark structures creates an exceptional condition in the development of the property. The applicant is required to restore, preserve and design around the historic structures. The applicant is unable to demolish them and construct a new building that would not need variance relief. The Board therefore concludes that this is an **[**9]** exceptional condition which creates a hardship for the owner in meeting the requirements of the Zoning Regulations.

II.

The BZA may grant variances under D.C. Code § 5-424 (g)(3) (1988); *see also* 11 DCMR § 3107.2 (1987). The applicant for a variance has the burden of showing:

first, that the property is unique because of some physical aspect or "other extraordinary or exceptional situation or condition" inherent in the property; second, that strict application of the zoning regulations will cause undue hardship or practical difficulty to the applicant; and third, that granting the variance will do no harm to the public good or to the zone plan.

Gilmartin, 579 A.2d at 1167 (quoting *Capitol Hill Restoration Society v. District of Columbia*

Bd. of Zoning Adjustment, 534 A.2d 939, 941 (D.C. 1987)). n4 Petitioners do not dispute that the need to preserve the Cooper Houses created an "exceptional situation" within the meaning of the statute. As the BZA found, "the applicant is unable to demolish [the houses] and construct a new building that would not need variance relief." Petitioners' challenge, rather, is to the Board's finding of "practical **[**10]** difficulty" and its determination that the exceptional condition of the property justified the FAR and height variances requested. Petitioners concede that in the case of area variances (in issue here) as distinct from use variances, an applicant is not required to show "undue hardship" but must satisfy only "the lower 'practical difficulty' standard," *Gilmartin,* 579 A.2d at 1170 (quoting *Palmer v. District of Columbia Bd. of Zoning Adjustment,* 287 A.2d 535, 540-41 (D.C. 1972)). Petitioners contend, however, that St. James and Bronberg failed to demonstrate -- and the Board failed to find -- any connection between the exceptional condition of the property and the FAR and height variances other than the economic justification offered by the applicant but which the Board rejected in eschewing reliance on "economic factors."

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n4 Concerning the second and third requirements, the Board found "that granting the requested relief will not be of substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan." Petitioners do not challenge these findings in this court.

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We are forced to agree with petitioners that it is not possible to glean from the Board's decision a rationale for granting the variances unrelated to the evidence of economic feasibility it purported to reject. But we do not agree with petitioners that for this reason the Board was required **[*1366]** to reject the application. Instead we are of the view that the Board must either explain the non-economic reasons on which its decision purportedly rested, or else reconsider the decision in light of the evidence of economic justification outlined above. As we explain below, our precedents make clear that such evidence may indeed be considered in deciding whether area variances should be granted.

The Board cited three factors creating an exceptional condition in the property and resulting "hardship for the owner in meeting the" zoning requirements: "the narrowing of the lot at the rear, the location of neighboring structures at their contiguous property line[,] and the presence of the landmark structures." Nowhere did the Board explain how these factors justify the height and FAR variances without regard to the economic considerations it professed to reject. The sole place at which the Board referred **[**12]** to "the narrowness of the site" was in citing ANC-2A's approval of the plan; n5 but, as explained earlier, ANC-2A's approval rested critically on the fact that "additional height" was necessary "if the project were to be economically sound." The contiguity of the neighboring structures is mentioned nowhere else in the Board's decision, and its relation to the variances is unexplained. Reading the decision as a whole, we are convinced that the principal feature of the property which the Board believed justified the FAR and height variances was the Cooper Houses and the need to "compensate" for their preservation. But the sole link testified to by the developer between preserving the houses and the height and FAR variances was "economic feasibility," as the additional FAR needed to market the improved property (and indeed to obtain a construction loan) "drove the [request for additional] height."

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n5 At the very end of its recommendation, ANC-2A had stated: "Although it would be our preference to have somewhat less height, we recognize the special problems created both by the narrowness of the site and the necessity of preserving the integrity of the Cooper Houses, a goal which is uppermost in our considerations."

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In short, the Board's disavowal of reliance on economic factors seems inexplicable and prompts the reader to look for other language in the decision suggesting that it did not mean what it said. Intervenor calls our attention to one of the very last paragraphs of the decision where the Board did conclude that "it is impracticable because of the size and configuration of the lot[,] and the design requirements of the Historic Preservation Review Board tend to make full compliance restrictive, *prohibitively costly* and unreasonable" (emphasis added). But the "it" the Board referred to here was compliance with the standard setback requirements for roof structures, and the issue it was deciding was the applicant's separate request for a special exception from those requirements. n6 Thus, try as one might to the contrary, we are compelled to take at face value the Board's conclusion that it was not relying on economic factors; and we are unable to find in its decision any non-economic justification explained adequately to support the grant of the variances. *See* Levy, 570 A.2d at 746 ("conclusions legally sufficient to support the [Board's] decision [must] flow rationally **[**14]** from the findings").

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n6 11 DCMR § 411.11 (1987) provides that, "where impractible because of [enumerated] conditions . . . that would tend to make full compliance unduly *restrictive, prohibitively costly, or unreasonable,* the Board shall be empowered to approve the . . . structure . . . even if such structures do not meet the normal setback requirements . . . ." (emphasis added). Hence it is clear that in using identical language in its decision, the Board was concerned with the applicant's request for a special exception from the setback requirements, not the request for FAR and height variances.

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Given the rationale which St. James and Bronberg frankly provided for the variances, the Board's refusal to consider economic factors may very well have stemmed from a misunderstanding of our precedents. Petitioners assert that "this Court has held repeatedly that the BZA does not have authority to grant variances to make a particular project economically feasible." Stated thus categorically, the contention is erroneous. **[**15]** We have never held that proof of economic burden is irrelevant to the **[*1367]** decision whether to grant an area variance. To take just one case, we held quite the opposite in Monaco v. District of Columbia Bd. of Zoning Adjustment, 409 A.2d 1067 (D.C. 1979), in sustaining the grant of a height variance which the BZA had expressly justified on grounds of economic feasibility. *Id.* at 1072 & n.18. Petitioners cite decisions arising in the context of *use* variances, where we have indeed held that "the Board . . . has no authority to grant a variance in order to assure the economic viability of the use of a particular property in a particular manner." Silverstone v. District of Columbia Bd. of Zoning Adjustment, 396 A.2d 992, 994 (D.C. 1979) (emphasis added); *see also* Russell v. District of Columbia Bd. of Zoning Adjustment, 402 A.2d 1231, 1236 n.8 (D.C. 1979). n7 Even in the context of area variances, we have "rejected any suggestion that added expense alone would entitle a property owner to a variance." Draude v. District of Columbia Bd. of Zoning Adjustment, 582 A.2d 949, 956 (D.C. 1990) (emphasis **[**16]** added). But we have recently eliminated any doubt that "economic use of property" may properly be "considered as a factor in deciding the question of what constitutes an unnecessary burden or practical difficulty in [area] variance cases . . . ." Gilmartin, 579 A.2d at 1170.

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n7 "In the context of *use* variances, this court has held 'an inability to put property to a more profitable use or loss of economic advantage is not sufficient to constitute hardship.'" Russell, 402 A.2d at 1236 n.8 (emphasis in original) (quoting Palmer, 287 A.2d at 542).

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In *Gilmartin,* the court sought to harmonize several of our precedents and explain the relevance of economic hardship to the decision whether to grant an area variance. We pointed out that in *Barbour v. District of Columbia Bd. of Zoning Adjustment,* 358 A.2d 326 (D.C. 1976), the court had sustained the denial of an area variance requested to permit expansion of a kitchen even though alternative **[**17]** methods of expansion (conforming with the regulations) "would [have] cost fifty to ninety percent more" and reduced the interior or backyard living space. *Gilmartin,* 579 A.2d at 1170. By contrast, in *Association for Preservation of 1700 Block of N St., N.W., & Vicinity v. District of Columbia Bd. of Zoning Adjustment,* 384 A.2d 674 (D.C. 1978), the court upheld the grant of an area variance from off-street parking requirements because, although "in both *Barbour* and *1700 Block* the practical difficulties were ones of increased costs and reduced enjoyment of the property," "it was clear that in the latter the costs were far larger and the restrictions upon use were far greater"; and in *1700 Block* "there was no feasible alternative that would have complied with the [zoning] regulations . . . ." *Gilmartin,* 579 A.2d at 1170. We summarized this distinction as follows:

Thus, *Barbour* suggests that a substantial increase in the cost of an intended improvement coupled with some loss in the overall utility of the property was not a practical difficulty that merited an area variance. *See also Myrick [v. District of Columbia Bd. of Zoning Adjustment],* 577 A.2d [757,] 761-62 **[**18]** [D.C. 1990] (cost of renovation of interior space insufficient to justify area variance where expansion of living space could be achieved in accordance with regulations). On the other hand, *1700 Block* indicates that at some point economic harm becomes sufficient, at least when coupled with a significant limitation on the utility of the [existing] structure [or property].

Id. at 1170-71.

We remanded in *Gilmartin* because the BZA had not adequately addressed the economic reasons offered by the applicant, noting that "it is for BZA, in the first instance, to weigh carefully the claims of potential difficulty advanced here in light of *Barbour, 1700 Block,* and other applicable precedents." *Id.* at 1171. But we reiterated that "increased expense and inconvenience to applicants for a variance are among the proper factors for BZA's consideration." *Id. See also Wolf v. District of Columbia Bd. of Zoning Adjustment,* 397 A.2d 936, 943 (D.C. 1979) (Board properly granted area variance to permit conversion to three-unit rental apartment where "marketability" of property would otherwise be **[*1368]** "unfeasible" and investment would yield loss rather than profit); **[**19]** *Russell,* 402 A.2d at 1236 (area variance properly granted "where the owner could never sell the unimproved lot for a [permitted] residential use absent a variance"); *see generally* ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING & PLANNING § 38.04, at 38-48 to 38-53 (1991) (discussing need to prove "significant economic injury" in order to show practical difficulty).

As in *Gilmartin,* it is for the BZA, should it no longer endeavor to justify its decision on non-economic grounds, n8 to decide in the first instance whether the evidence of economic feasibility in this case is sufficient to warrant the FAR and height variances. Our cases uniformly hold that "the 'nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.'" *Gilmartin,* 579 A.2d at 1171 (quoting *Wolf,* 397 A.2d at 942). Though the testimony offered by the applicant, if credited, suggests that St. James was not merely seeking "the most profitable use for [its] land," *Russell,* 402 A.2d at 1236, but faced difficulty financing any improvement of the property **[**20]** without the variances, it is the Board's task to decide on which side of the -- necessarily imprecise -- line drawn by *Gilmartin* the evidence in this case falls. n9 In remanding, we hold only that if the Board elects not to explain further the non-economic justifications on which it purported to base its decision, it must address the evidence of economic feasibility and make explicit findings relevant to it.

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n8 *Cf.* United Unions, Inc. v. District of Columbia Bd. of Zoning Adjustment, 554 A.2d 313, 318 (D.C. 1989) ("financial needs" not basis of Board's grant of variances; "rather, the peculiar difficulties of adding on to the original Corcoran building seem to comprise the practical difficulties that the variances were designed to surmount").

n9 In light of our decisions, we reject petitioners' argument that the prohibitive cost of preserving the Cooper Houses was a difficulty the applicant (and the prospective purchaser) could have foreseen and that this "self-imposed" hardship by itself required denial of the variances. *See* Gilmartin, 579 A.2d at 1171 ("prior knowledge or self-imposition of the difficulty . . . [is] but one of the many factors that BZA [may] consider in reaching its decision"); *Russell*, 402 A.2d at 1236 n.7; *1700 Block*, 384 A.2d at 678.

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Accordingly, the decision of BZA is vacated insofar as it grants the FAR and height variances and the case is remanded for further consideration in light of this opinion.

So ordered.

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