LINDSLEY WILLIAMS
Professional Consultation in Land Use, Planning and Zoning
3307 Highland Place, NW
Washington, D.C. 20008-3234

Telephone – (202) 537-4884
Facsimile – (978) 926-1059
E-Mail – LWilliams@his.com

November 20, 2002

Board of Zoning Adjustment
One Judiciary Square, Suite 210-South
441 Fourth Street, NW
Washington, DC 20001

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Re: BZA 16920 (Special Exception to Establish an Art Gallery at the Premises 1629 21st Street, NW (Square 93, Lot 122) Referenced as both "Bass Art Gallery" (Name of Property Owner) and "Burton-Marinkovich Art Gallery" (Partners/Owners of Proposed Tenant)

Honorable Members of the Board:

What follows is the Response of the Applicant's Land Use, Planning, and Zoning Expert to Opponents' Supplemental Report, namely Mr. Suisman's letter dated November 15, 2002, Exhibit 62 of the Record and each of its stated enclosures. The stated enclosures include a letter dated November 14 from Vincent Hurteau that was not in the Record at the time I inspected it Monday, November 18, when I pointed out this inconsistency to your staff, an inconsistency they resolved later that day.

Specific responses appear on the following pages.

Respectfully Submitted,

Lindsley Williams
Consultant

Copies to:

- ANC 2-B, c/o Commissioner Vince Micone
- "Opposing Neighbors," c/o Stephen Saltzburg
- Office of Planning, attention Karen Thomas

WAS1 #1138483 v2

BZA
Case No. 16920.
Exhibit No. 64

Board of Zoning Adjustment
District of Columbia
CASE NO.16920
EXHIBIT NO.64

Response to Elements of Mr. Suisman's Cover Letter dated November 15, 2002

None – There are no elements of that letter asserting facts within my area of expertise or knowledge.

Response to Elements of Statement Attributed to Mr. Schussheim (undated, unsigned)

Paragraph	Mr. Schussheim	Response
One	"We are now faced with the loss of still another residential use by commercial art space."	The applicant seeks permission to establish an art gallery within a portion of one part of a large existing building originally built as an end unit in a group of row houses. The building now consists of two apartment units and a pre-existing art gallery, the latter located in a portion of the building's English basement (2030 R Street). One apartment unit would remain, unchanged, that occupies portions of the building's first and second floors (1627 21st Street, NW). The second apartment unit (1629 21st Street) occupies portions of the first and second floors, and the entire third floor. It would **continue in residential use** on portions of the second and the entire third floor, with access from the first floor entrance. The applicant art gallery would occupy one room on the first floor, one room on the second. In addition, it would display art within the entrance lobby and along the circular stairway leading to the second floor. The residential portion of the apartment unit would continue to have three bedrooms. Accordingly, there is no loss of a residential use as such.
Two	Regarding that paragraph's reference to the Office of Planning's reports, summarized by Mr. Schussheim as " . . . stating the neighborhood may be close to the tipping point – as institutional and commercial activities supersede residential use."	There is no "tipping point" test in the relevant zoning regulations at §361. Uses allowed as Special Exceptions are deemed compatible with the area in which each proposes to locate provided they satisfy the applicable criteria. Moreover, the Zoning Commission has adopted cumulative impact tests, which are akin to "tipping point" standards, in only three situations: home occupations, community based residence facilities, and child and elderly care centers. Those rules were adopted in the 1980s, more or less at the same time as the rules now governing art galleries. Further, the Zoning Commission rejected "cumulative impact" language suggested in other text amendments during the same era (namely in cases considering Fast Food restaurant rules and the 16th Street Heights overlay). Thus, had the Commission believed that art galleries would themselves create such a stress, they had ample means already developed that could have been applied.

Paragraph	Mr. Schussheim	Response
Two	Regarding statement Mr. Schussheim about Jane Haslem's statement.	Please see my response to Statement of Jane Haslem itself, not Mr. Schussheim's summary thereof.
Three	"Other would-be businesses can also argue for converting 'just one more property.'" We risk seeing residences nibbled away one by one and the loss of community that only 24/7 residents can offer.	Virtually all uses first allowed in Commercial zones – retailers, service providers, or general offices – would face a substantial burden of satisfying the strict conditions of a use variance to occupy this or any other structure in a Residence zone. Art galleries are the only use first allowed by Special Exception in the R-5 zones. The only use, whether a viable business or not, that can seek such approval is an art gallery, not the full run of "other businesses" whatever that means. The record already reflects that the number of art galleries in the area is not increasing but is decreasing. The R-5 zone, just as the R-4 zone, permits museums, hospitals, and those private clubs "not customarily carried on as a business" to establish as a matter of right. The D Overlay, which is applied to the immediate area, also permits chanceries, which are offices of foreign governments, to establish or expand after "rulemaking" review by the Foreign Mission Board of Zoning Adjustment. Moreover, those chanceries existing as of 1978, which those in the area may well be, enjoy added rights (see §201.1(m)). Therefore, displacement of residential uses in the area by art galleries is unlikely due to dwindling numbers of that use. Rather, whatever threats are posed to the stock of residential uses appear should be evaluated vis-à-vis those other uses that are allowed to be established under controlling provisions of the Zoning Regulations.

Response to Elements of Statement of Jane N. Haslem dated November 12, 2002

Paragraph	Ms. Haslem	Response
One	"With the new project at the Phillips Museum the neighborhood is one step closer to being zoned commercial."	The new project at the Phillips Collection does not initiate any action to rezone the area to any Commercial zone. Under the "Home Rule" Charter, steps were taken by the Congress to require the creation and adoption of a Comprehensive Plan. The same legislation established that the Zoning Commission must act to adopt rules and maps that are "not inconsistent" with the Comprehensive Plan as adopted. As now adopted, the entire area that is now zoned D/DC/R-5-B, loosely the triangle formed to the west of the commercial frontage of Connecticut Avenue, to or toward Q Street, toward Massachusetts, and along Florida Avenues is declared as one where row houses and garden apartments are the predominant uses". The R-5-B zone is one classification the Zoning Commission finds satisfies the relevant standards, here supplemented by both Diplomatic and Dupont Circle overlay provisions. The Zoning Commission would have to ignore fundamental precepts of the Comprehensive Plan to establish any degree of commercial zoning within the area in question. It would also face likely vociferous opposition from area property owners and tenants, including owners of art galleries, to such a proposal.

Paragraph	Ms. Haslem	Response
Two	Regarding zoning history along the 2100 block of P Street, NW.	Zoning along the cited portion of P Street has changed over the years. Those changes mostly took place before the adoption of the Comprehensive Plan (1984). Nevertheless, the zoning now in place appears to be "not inconsistent" with the provisions of the Comprehensive Plan as currently adopted. At the time the "present" zone system was adopted in 1958, the area on the north side of P Street between 21st and 22nd Streets was zoned C-2, a moderate density commercial zone that then existed as a single zone. The overall area so zoned ran along both sides of P Street from Dupont Circle to 22nd Street, and on the south side, on to 23rd Street (applied to what is now a Mobil gasoline station). During 1964, the north side of P Street between 21st and 22nd was rezoned to R-5-D, a zone that allowed hotels to be established as a matter of right until 1978. By 1967, some of the north side of P Street between 21st and 22nd was rezoned to C-2-B, and in 1968 the balance became so zoned. In 1994, the Zoning Commission adopted and applied the Dupont Circle overlay provisions to the area along P Street and elsewhere in the Dupont Circle area, including the site of the applicant art gallery. The Comprehensive Plan's Generalized Land Use Map (2001) calls for both sides of P Street to be intended for a mix of medium density residential uses along with low or moderate density commercial uses. This is precisely the range of uses and densities allowed within the C-2-B zone district, the base zoning now in place.
Three	"We need to retain older homes and their use as residential dwellings in this area." "I fear that this neighborhood will soon follow the pattern already established in other areas."	The property at 1629 21st Street would retain residential use at that address and elsewhere in the same building (at 1627 21st Street). Given the tenets of the Comprehensive Plan, feared changes in pattern [of use] are unlikely to arise as a function of changes to underlying zoning, nor could this or any other art gallery have such significant effect.

Paragraph	Ms. Haslem	Response
Four	". . . ruling another residence to become a gallery in this neighborhood would clearly put R Street and 21st Street on the direct path to being zoned commercial."	The only other time the Board of Zoning Adjustment considered and allowed any art gallery to be established under §361 was in 1990, involving a property at the northern end of 21st Street on the east side. Known as the Tyler case, the applicant sought a use variance to commercial uses, which was denied, and authority to establish an art gallery, which was approved. In the decade following, Residential zoning remained in place without change or, as best as I can establish, without application to seek change. The "Tyler" gallery is no longer open. I am not able to establish if it ever was opened under the approval it received in 1990.

Response to Elements of Comparison Apparently Offered by Richard Suisman (undated)

Paragraph	Comparison Study	Response
Part I	Existing Residential Properties – 63 Homes [with] Building Sq Footage **264,054**	The properties in the area include both single family dwellings and those divided into more than one dwelling per building or entrance. Using Mr. Suisman's figures, the average "home" contains over 4,000 square feet (264,054/63 = 4,191.333). If true, it would be extraordinary.
Part II	Existing Non-Residential Properties Building Sq Footage 416,522 (Will be 440,522,000 after Phillips completes construction)	The total is a summation of separate elements set forth in Mr. Suisman's report, none of which I have confirmed. The Phillips addition clearly cannot add nearly half a billion square feet to development in the area (I suspect the trailing "000" is unintentional).
Part II	14 Galleries in 12 Buildings (1 Hillyer Place, 1 21st Street, 12 R Street) totaling 57,845 square feet.	Preliminary study suggested as many as 14 galleries. More detailed study reveals that this number does not account for recent closings of galleries (e.g., Pinto, at 1621 21st Street). Moreover, galleries do not tend to occupy the entirety of the buildings in which they are located. Of the nine galleries in the area that remain open as of November, 2002, the total estimated square footage is approximately 16,000 square feet, with none over 2,000 square feet. Thus, it seems reasonable that the total including those unknown would not exceed 20,000 square feet, which represents about one third of the figure Mr. Suisman supplies and a much smaller proportion of the total of non-residential uses. Typically, art galleries occupy only a portion of the overall building in which they are situated. The applicant would occupy approximately 1,200 square feet within the premises 1629 21st Street, NW, which represents 800 square feet less than four larger art galleries in the immediate area. See Table below for details

Location	Name of Gallery	Estimated Gallery Size (Sq. Ft.)
R Street, NW		
2010	Affrica	850
"	Gallery K	2,000
2012	Mateyeka	2,000
2030	Robert Brown	900
2106	Alex	2,000
2108	Anton	2.000
"	Studio	900
2112	Fonda del Sol	n/a
2114	Burdick	800
Hillyer Place		
2025	Haslem	1,000
Hillyer Court		
9	Foundry Gallery	n/a
21st Street.		
1730	Diner	1,100

Response to Elements of Letter from Mr. Hurteau dated November 14, 2002

Paragraph	Mr. Hurteau	Response
Four	"It is obvious that profitability is playing a major role and that should be a valid reason to allow retail space in a residential neighborhood."	No statement concerning motivation has any bearing on the standards established by the Zoning Commission at §361. The Zoning Commission, by the act of establishing art galleries as a Special Exception, has determined that art galleries can and should co-exist with a range of traditional residential uses.