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Personal Correspondence

December 20, 2002

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D.C. OFFICE OF ZONING
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Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Case No. 16920 – 1629 21st Street, N.W.
Square 93, Lot 123

Responsive Argument by Opponents

Dear Mr. Griffis:

On behalf of those neighbors who oppose the special exception for an art gallery sought by Burton Marinkovich Fine Arts and William Bass, I submit this statement as our response to the closing made by the applicants. In our view, certain facts are undisputed in this case, and those facts clearly demonstrate that a special exception for a commercial use at a critical corner of the neighborhood would be inconsistent with 11 DCMR §§ 3104 and 361.6.

At the outset, I note that no public official or group concerned with the proper balance of commercial and residential spaces supports the special exception. The ANC opposes it. The Dupont Circle Citizens Association opposes it. The D.C. Office of Planning opposes it. Two members of the City Council have expressed their opposition.[1]

The reason that every objective investigator opposes the special exception is that the

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[1] Although Councilman Evans called to the Board's attention a petition signed by persons supporting the exception, he has not withdrawn his opposition. Nor has he retracted any of the reasons for opposing the exception, which focus on the negative impact the exception would have on the neighborhood.

BZA
Case No. 16920
Exhibit No. 76

Board of Zoning Adjustment
District of Columbia
CASE NO.16920
EXHIBIT NO.76

residential character of the neighborhood already is threatened. It has been damaged and is struggling. The witnesses who say that one more gallery will not make much difference fail to account at all for the current state of affairs which is indeed precarious.

We have supplied you with a map of the neighborhood, and certain features ought to leap out even at a cursory glance. Let me point out a few of these features. If one approaches the corner of 21st and R where 1629 21st is located (and where our house also is located directly across the street) from Connecticut Avenue, there is an office building on the left hand side of R Street (which until recently contained 3 movie theaters on the first floor which apparently will be transformed into a restaurant) that runs approximately one-third of the block. On the other side of the street, there are Starbucks and Teaism, which account for a greater percentage of the block than the office building on the other side. Thus, the R Street block on which 1629 is located is becoming almost as commercial as residential. We did not have a Starbucks or Teaism when we moved here in 1990.

There are other commercial spaces on this block of R Street. As a result, we find that parking is next to impossible for guests of those who live in this neighborhood. Whereas there once were two parking meters on the block, there are now more metered spaces than other unmetered spaces. There are seventeen metered spaces in one block.

As for 21st Street between R Street and Hillyer Court, which is the block on which 1629 is located, there already is one gallery. Indeed it is the next building down from the Bass property. When one gallery in the building closed (Ira Pinto) in November 2002, another was opened almost immediately. This demonstrates the strength of demand for commercial space in the neighborhood and the propensity of some owners to capitalize on business opportunities in this area. If the special exception is granted, the side of the East street on which 1629 is located will be more commercial than residential.

We live on the other side of the street. Our block runs from R on the North to Q on the South. The Phillips Collection takes up a full half of the block. As for R Street on our side, we have Nora Restaurant at the Corner of Florida and R on one side of the street, and a string of galleries leading to the corner of Florida and R on the other side of the street.

All of the commercial entities in the neighborhood produce both automobile traffic and pedestrian traffic. As my wife testified at the last hearing, people coming to the galleries often cannot find parking so they park illegally, often in driveways. This is a problem. When the weather is bad – either cold, rainy or hot – the automobile traffic increases and parking becomes an even greater problem.

What the applicants do not address is the fact that at the current time we suffer from

increased traffic and too little parking. Although we have not sought to deny any existing commercial enterprise the right to continue, we have been trying to draw a line that will protect this fragile neighborhood from losing the neighborhood qualities that make it special.

The applicants and their expert, Mr. Williams, failed to offer any evidence as to how gallery customers actually travel to galleries. We explained that they drive for the most part, making parking for neighbors impossible and parking illegally when they get frustrated. Those of us who have attended First Fridays know how many of the attendees have driven into the neighborhood. These nights are especially troublesome but the problem is persistent and real.

The Office of Planning tried to explain to the Board at the last hearing and in its two reports a very important point about traffic patterns. You cannot get by car to 1629 21st Street except by coming from Connecticut Avenue on R, or by coming from Florida Avenue down 21st Street. This is true for Starbucks, Teaism, the other galleries on R, and the other galleries on 21st, including the Phillips. The fact is that, while during rush hour R is an important East-West artery and 21st is an important North-South artery, the traffic on these streets is greatly complicated by the parking, temporary stops, waiting and efforts by drivers to stop at the commercial enterprises on these two streets.

The Office of Planning found that it could not possibly conclude that the exception would have "no adverse effect" on the neighborhood. Every responsible official and group who has examined the application has reached the same conclusion, and for good reason. There are already adverse effects on the neighborhood from the existing spread of commercial spaces. Any additional commercial spaces must add to the problems and thus adversely affect the neighborhood.

Neither the applicants nor their expert seem to have paid any attention to the size of the lot on which 1629 sits and the critical neighborhood corner it occupies. The two largest yards in a neighborhood starved for outdoor yard space are at 1629 and our house. Turning 1629 into a commercial enterprise would establish a large, overtly commercial space for the first time at the corner of 21st and R. As I have noted, commercial spaces dominate the corners of Connecticut and R and Florida and R. Putting one at 21st and R would remove a residential anchor from the neighborhood. The effect would be dramatic and extremely negative. The Brown Gallery already is in part of the Bass property, but it is downstairs and does not involve the mass of the 1629 property that the applicants seek to use as a gallery.

Consider that the Gallery owners plan to hold as many as 15 "openings" each year. It is unclear whether participation in First Friday events is an "opening." Thus, the actual number of

events may exceed 15 by a considerable number.[2] At each opening, the applicants propose to adhere to a maximum of 100 guests. It is unclear, however, whether this is 100 a day, 100 a night, or 100 at any given time.[3] Thus, the actual number of attendees may be in the hundreds. But, imagine only 100 people entering the premises. These 100 individuals will need transportation into the neighborhood. Traffic will increase. Parking will disappear. Some will park illegally and block driveways. Others will be dropped off and picked up by cars that will wait in front of residences for gallery attendees. Many attendees will hang around outside during decent weather. They will walk with their Starbucks coffee or other food (easily obtained from Connecticut Avenue vendors), and deposit their left-overs and used containers all over the neighborhood. The end result is increased traffic, decreased parking, increased noise, and debris left in residential yards and on the street around residences.

And this Gallery is not alone. The other galleries have their own "openings," special showings, and events. The impact of noise, debris, traffic and disruption from the totality of the commercial enterprises cannot be denied by anyone who lives here. While certain restrictions or "conditions" may apply to the operation of art galleries, such restrictions in our experience are not systematically enforced by the District government. At a time of budget shortfalls, there is no reason to burden the District government with the difficult task of monitoring one more gallery.

Why then are some neighbors willing to support the Gallery? Our conversations with them reveal two clear answers to this question. First, we have neighbors who believe that they too may be able to persuade the Board to grant them special exceptions and thus to increase the fair rental value of their property. In short, there are some owners who would not mind it if there were fewer residents and more commercial property, as long as the value of commercial property is high and they believe that they may benefit from a movement away from a truly residential neighborhood.

Second, we have any number of neighbors who were completely confused about the

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[2] We have not been served with any amended so-called "agreement." As circulated to neighbors, the so-called "agreement" provided that there would no more than 12 art walks and other joint gallery showings to which the general public is invited. It goes on to say that gallery events limited to personal invitation will not serve alcoholic beverages except wine or beer. This suggests that many more than 12 events may be contemplated.

[3] We have seen nothing in writing that answers this question, or any commitment in writing as to a maximum number of attendees. Moreover, we have seen nothing to indicate how this type of limitation is supposed to be monitored. Neither the City nor the neighbors will want to bear the burden of counting individuals entering and leaving the premises.

"neighborhood agreement" that the applicants asked them to sign. As Dora Marcus said in her letter to the Board, she thought that the agreement was between those of us opposing the Gallery and the applicants. There was no neighborhood agreement negotiated with neighbors, but many people simply did not know this.

Because of several comments made by Mr. Gell during his closing, I want to make it clear to the Board that there was a time when a group of neighbors asked me to talk with Mr. Gell and to see if there were any conditions that would satisfy the concerns about protecting the residential character of the neighborhood. I attach hereto a draft that Mr. Gell circulated to me asking that I see if the neighbors would support it.[4] The neighbors met after the first ANC meeting, I presented the draft, the neighbors discussed it, and they unanimously decided that there were no conditions that would adequately address the adverse effects on the neighborhood that I have discussed above.[5]

Many of these neighbors were critical participants in negotiations with The Phillips Collection when it sought to expand. Fighting the Phillips' defiance of all neighborhood concerns was critical, many of us believe, to providing hope that we could preserve the residential character of our neighborhood. The Phillips already anchored the corner at 21st and Q. As long as neither the Phillips nor any other gallery anchored the corners at 21st and R, we thought there was a decent chance that the residential character of 21st Street above the Phillips would be largely preserved. That was important then and it is important now.

So, the two reasons we find for some neighbors supporting the application are that some want to maximize the chance that they too may be able to obtain a special exception if it would make them financially better off, and others mistakenly believed that the opponents of the exception had agreed to the "neighborhood agreement."

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[4] The draft is Attachment 1 to this Letter. The Board will see that many of the commitments made in the proposal, which the neighbors rejected unanimously, have been omitted from the so-called neighborhood "agreement." No witness has testified that any signer of a petition in support of the exception was told by Mr. Bass, Ms. Marinkovich, Mr. Gell or anyone else that during actual negotiations the applicants had offered to place substantial restrictions on the use of the property that are not found in the so-called neighborhood "agreement."

[5] Attachment 2 to this letter is an e-mail from Mr. Gell to Mort Schussheim and me dated Thursday, September 19, 2002, asking whether Mr. Gell could meet with us and other neighbors. I telephoned Mr. Gell to inform him that the neighbors were meeting to discuss his draft proposal, they might well reject the proposal but I could not say for certain, and they did not wish Mr. Gell to attend their meeting.

One of the things that no neighbor apparently realized – because no one addressed it – is that the so-called "neighborhood agreement" provides that there can be no change of modification portion of the agreement unless signed in writing by Ms. Marinkovich, Mr. Bass and a majority of the neighbors signing. Thus, if more than half of the neighbors who signed move from the neighborhood, the agreement can never be modified. If all the neighbors want a change, it cannot occur unless Ms. Marinkovich and Mr. Bass agree. No witness has expressed any recognition that the agreement will likely be forever the way it is phrased. Moreover, the language appears to exclude the ANC and BZA from the process. Any modification agreed to by the signers apparently is effective without public scrutiny. That is against public policy and promises to delegate public authority to private individuals for no good reason.

No rational person could conclude that the exception is consistent with § 1327.1(a). The land use objective for the Dupont Circle area north of Massachusetts Avenue is "to promote the retention and expansion of current residential uses and discourage the expansion of commercial uses." The exception would fly in the face of this objective. It would detract from the expansion of residential uses, and encourage commercial uses.

§ 1363.1 recognizes, as the applicants and their expert fail to, that a variety of commercial enterprises – restaurants in particular – already have had an increased impact on residential areas in terms of evening parking. The impact of a new gallery cannot be assessed fairly without considering how galleries relate to other commercial enterprises. People come to galleries and then want to eat, or eat and then want to visit galleries. They park for longer periods. They carry food and drink with them. There are no receptacles for these items in our residential areas so our lawns and sidewalks become the receptacles.

My neighbor, Morton J. Schussheim, explained to the Board in November that he has owned and resided at 1619 21st Street for 27 years. He described the loss of neighbors and of neighborhood. He asked that the Board draw a line, because we have lost too much already. Any more is unacceptable.

It is disappointing that Lindsley Williams argues in his November 15, 2002 supplemental report that the Strategic Neighborhood Action Plans provide support for the exception. One has to read the plans with blinders (or with glasses paid for by a client) to conclude that the SNAP provides any support for taking a major residence on a crucial corner and turning it commercial. There are commercial areas within the cluster in which our neighborhood exists. We have no problem with galleries rising in commercial areas. Our opposition is to removing a residence from a neighborhood that has too few.

Mr. Williams argues that the land use objective for the Dupont Circle area north of Massachusetts Avenue "to promote the retention and expansion of current residential uses and

discourage the expansion of commercial uses" can be satisfied by imposing reasonable conditions upon the applicants. This argument defies logic and demonstrates the lack of understanding that the applicants and their expert have with respect to the Comprehensive Plan. It is impossible that a reduction of current residential uses can "promote the retention and expansion of current residential uses." It is impossible that the expansion of a commercial use on a critical corner can "discourage the expansion of commercial uses." The applicant and their expert argue against the Comprehensive Plan, and their argument would destroy a neighborhood.

One last point remains to be made. It is a response to one of the most perverse arguments presented to the Board. Mr. Gell argued to the Board that neighbors too easily oppose special exceptions by imposing costs on applicants. The argument is perverse because it misstates the reality that Mr. Gell knows as well as anyone. The Basses told the neighbors that they wanted to rent to a gallery to increase the rent they could get on their property. Their incentive was to maximize the return on their house, not to protect the neighborhood. None of the neighbors who is opposing the exception has any financial interest in 1629 21st Street. The fact is that Mr. Gell and Mr. Williams are paid advocates before the Board, and they are paid by the applicants. Those neighbors who oppose the exception have not hired a lawyer. Nor have they paid an "expert" to come before the Board. The truth is that the neighbors who mediated a solution with the Phillips to protect their neighborhood had to invest funds in that effort.[6] The resources simply do not exist for neighbors – none of whom gets any financial gain from opposition – to match the resources of the owner of property and his proposed lessee. They stand to gain from the exception. They have an incentive to pay what it takes to make it costly and difficult for neighbors who oppose their exception to do so effectively. I represent my neighbors in this matter free of charge. The time I have invested and the time they have invested is our gift to the neighborhood we cherish. We hope and trust that this Board will not permit the applicants to damage this neighborhood further.

Sincerely yours,



Stephen A. Saltzburg

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[6] Mr. Gell represented the neighbors in their opposition and ultimate settlement with the Phillips. Thus, he knows better than anyone how difficult and expensive it is for neighbors to try to oppose an owner or owner/lessee who see financial profit in turning property that is residential into commercial property. We invite Mr. Gell to share the legal bills he submitted to the neighbors with the Board. The Board can see for itself that Mr. Gell knew the argument he was making was not only fallacious but completely backwards.

ATTACHMENT 1

NEIGHBORHOOD COOPERATION AGREEMENT

This AGREEMENT, made as of this ____ day of _____, 2002, by and among Andrea Marinkovich trading as Burton Marinkovich Fine Art and William Bass (collectively referred to herein as "the Gallery"), Advisory Neighborhood Commission 2B (hereinafter referred to as "ANC 2B"), and the undersigned Neighbors of the Gallery (hereinafter, with their successors and assigns, collectively referred to as the "Neighbors").

W I T N E S S E T H :

WHEREAS, Ms. Marinkovich is the lessee of 1629 21st Street, N.W., (hereinafter "the building") which is formally known as Square 93, Lot 122 and which is a contributing building to the Dupont Circle Historic District; and

WHEREAS, pursuant to the application filed with the District of Columbia Board of Zoning Adjustment ("BZA") as BZA Application No. 16920, the Gallery seeks a special exception to permit the first floor and a portion of the second floor to be used as an art gallery; and

WHEREAS, Neighbors have raised some concerns about the operation of the Gallery and Ms. Marinkovich desires to address these concerns; and

WHEREAS, the Gallery seeks to operate the gallery and residential portions of the property in such a way that it will not have a negative impact on the neighborhood.

WHEREAS, the Gallery desires to obtain the support of Neighbors and ANC 2B as necessary to fully implement the proposed use of the building as modified under this Agreement; and

NOW, THEREFORE, in consideration of the foregoing and of the agreements herein contained, and for other good and valuable consideration, as further described herein, the mutual receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. The Gallery agrees that it will operate the gallery and residential portions of the property in such a way that it will not have a negative impact on the neighborhood.

2. The space described in the application will be used as an art gallery and/or otherwise in compliance with the Zoning Regulations:

3. When the Gallery participates in art walks or other joint gallery showings, or when it sponsors Gallery openings to which the general public is invited, no alcohol will be served. These shall be limited to 15 per year. Gallery events limited to personal invitation will not serve alcoholic beverages except wine and beer. No guests of any of these events will be admitted after 9:45 p.m. The Gallery will make good faith efforts to have all guests leave by 10:15 p.m., but in no event will guests remain after 11:00.

4. Security lighting will be sufficient to provide reasonable security but will be directed away from neighboring windows. Those lights not directed at the building will utilize low glare lights.

5. The Gallery will seek no change in the parking regulations adjacent to the property or nearby.

6. The third floor may be rented to and inhabited by individuals only in accordance with strict rules, among them, 1. No visitor may stay overnight without permission of Andrea Marinkovich, her successor, assign, or agent. 2. Tenants shall adhere to all security rules adopted by the Gallery. 3. Noise and lights shall not be permitted to intrude on the neighborhood in a negative fashion.

7. The Neighbors and ANC 2B (consistent with its rules) will support, in writing, the Gallery's application No. 16920 before the BZA.

8. The parties hereto agree to request that the BZA incorporate this agreement by reference in any Final Order in Case No. 16920. In any event, all the terms of this agreement shall continue in full force and effect and, except as specified herein, shall be enforceable as permitted by law, including through injunctive relief.

Enforcement

9. The Gallery, the Neighbors and ANC 2B will appoint an Arbitrator, when needed, by mutual consent, who will interpret and enforce this Agreement.

10. When a complaint is made of a violation of this agreement, the Neighbors will advise Ms. Marinkovich and Mr. Bass in writing. They shall have 30 days to correct the violation or put in place a policy which will assure that the complained-of activity does not continue. Within two weeks of the filing of the complaint, a negotiator will be chosen from among the Neighbors to meet with a representative of the Gallery to discuss the matter and seek to find a satisfactory resolution. If corrective acitons are not taken, an Arbitrator will be chosen. On as expeditious a schedule as possible, the Arbitrator shall conduct a proceeding where, with minimum formality, the Arbitrator will hear and determine the violations of this agreement, decide whether relief shall be granted and issue an appropriate order. The ruling of the Arbitrator shall be made within 30 days after conclusion of the hearing and shall be binding and conclusive and shall not be subject to appeal. It may be entered by any party as a judgment under D.C. Code sections 16-4310, 4311 or 4312 and be enforceable through the Superior Court of the District of Columbia as provided by D.C. Code section 16-4313, as amended from time to time.

11. If the Arbitrator finds against the Gallery, the Arbitrator may issue a warning or impose penalties with consideration for the following guidelines:

a) for a substantial violation (that is, other than a minor non-compliance) a fine of up to $250 per infraction for the first three infractions in any one calendar year; up to $500 per infraction for each of the next three infractions per year; and up to $1,000 per infraction for each subsequent infraction;

b) a direction similar to an injunction or cease and desist order to the Gallery to refrain from certain conduct or to undertake certain conduct, consistent with this Agreement in cases of substantial and repeated violation.

12. Penalties will be donated to a § 501(c)(3) organization(s) selected by ANC 2B.

13. If the Arbitrator rules substantially against the Gallery, the Arbitrator's fees shall be paid 100% by the Gallery. If the arbitrator rules substantially for the Gallery, the Arbitrator's fees shall be paid 75% by the party or parties which initiated the proceeding and 25% by the Gallery. If the Arbitrator rules that the complaint was frivolous, all fees shall be paid by the initiating party or parties.

14. It is further understood that ANC 2B may independently bring forward its own concerns under District laws and regulations.

General Provisions

15. It is understood that this Agreement does not limit the ability of any party at any time to enforce existing law or the Zoning Regulations or to seek or oppose any change in any existing law or the Zoning Regulations. The terms of this agreement may be changed by approval of the Gallery, the ANC, and at least a majority of the Neighbors. Nothing herein shall prevent the Gallery or their successors or assigns from seeking relief from any provision of the Zoning Regulations at any time.

16. These provision shall be in full force so long as the space which is the subject of the application is used for an art gallery pursuant to the special exception issued by the BZA in case no. 16920. They shall also apply to subsequent certificates of occupancy based on the cited special exception.

17. If any provision of this Agreement or any application thereof shall be declared to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions hereof and any other application thereof shall not in any way be affected or impaired, and such remaining provisions shall continue in full force and effect. Nothing herein will supersede the laws and regulations of the District of Columbia or prevent the parties hereto from seeking enforcement of said laws and regulations.

18. This Agreement constitutes the entire agreement between the parties with respect to the subject matter described herein.

19. All parts of this Agreement shall be governed by and construed in accordance with the laws of the District of Columbia.

20. The terms of this Agreement are binding on the Gallery, Ms. Marinkovich, Mr. Burton, Mr. William Bass, the building owner, ANC 2B, undersigned Neighbors and their respective successors and assigns.

21. No change or modification of this Agreement or any waiver of the provisions hereof shall be valid unless same is in writing and signed by Ms. Marinkovich, Mr. William Bass, ANC 2B, and a majority of the Neighbors signing hereto, or their successors and assigns. All notices and communications hereunder shall be in writing and deemed duly given if personally delivered or delivered by facsimile or certified mail, return receipt requested, postage prepaid as follows:

a) If to Neighbors: Stephen Salzburg, Esq.

_____

b) If to ANC 2B: Mr. Vince Micone
2007 O Street, N.W. #105
Washington, D.C. 20036
Fax: 202-861-0519

With a copy to: ANC 2B
9 Dupont Circle, N.W.
Washington, D.C. 20036
Fax: 202-296-7333

c) If to the Gallery Ms. Andrea Marinkovich
1629 21st Street, N.W.
Washington, DC 20036

Mr. William Bass

_____

Stephen N. Gell, Esq.
Fifth Floor, 1101 30th Street, N.W.
Washington, DC 20007

22. The parties hereto shall be responsible for notifying each other of any change of address or change of parties to be notified.

23. Any date specified in this Agreement which is a Saturday, Sunday or legal holiday shall be extended to the first regular business day after such date which is not a Saturday, Sunday or legal holiday. Any reference herein to the singular shall include the plural and reference to the male, female or neuter gender shall include reference to all other genders.

24. Time shall be of the essence with regard to all matters contained within this Agreement.

25. The date on which this Agreement is accepted by the last party to accept and sign this Agreement shall be inserted as the effective date of this Agreement under the first paragraph. This Agreement may be executed in counterparts, such that all counterparts when read together shall constitute one instrument.

Signatures

ATTACHMENT 2

Date sent: **Thu, 19 Sep 2002 17:09:46 -0400**
From: **Stegell <sgell@his.com>**
To: **"Schussheim, Mort" <mortjs@aol.com>, "Saltzberg, Steve" <ssaltz@law.gwu.edu>**
Subject: **Neighborhood agreement**

Vince Micone will be leaving town the latter part of next week. Could we meet this weekend so that if another meeting is needed it can occur before he leaves town? I can meet anytime this weekend and will try to get Micone to attend.

Who else besides the two of you should be at the meeting? Solange Macarthur Muller, Vince Hurteau and Carol Ridker come to mind but I have to rely on you for that input. Thanks, Steve