Law Offices
STEPHEN N. GELL
A Professional Corporation

1101 30th St. N.W.
Fifth Floor
Washington, D.C. 20007
Telephone: (202) 625-8311
Facsimile: (703) 522-5203

RECEIVED
D.C. OFFICE OF ZONING
2003 JAN -6 PM 5:02

January 6, 2003

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, DC 20001
By fax and mail

Re: BZA Case No. 16920,
1629 21st Street, N.W.
(Square 93, Lot 122)

Draft Findings of Fact and Conclusions of Law

Dear Mr. Griffis:

Enclosed please find Draft Findings of Fact and Conclusions of law submitted on behalf of the applicant in the subject case.

Yours very truly,

Stephen N. Gell
Stephen N. Gell

cc: Andrea Marinkovich, William Bass, Vince Micone, Stephen Saltzburg.

BZA
Case No. 16920
Exhibit No. 79

Board of Zoning Adjustment
District of Columbia
CASE NO.16920
EXHIBIT NO.79

Draft findings of Fact and Conclusions of Law submitted by Applicant

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16920 of Andrea Marinkovich and William Bass, pursuant to Section 3104.1, for a special exception to establish an art gallery within an existing apartment house under section 361 of the Zoning Regulations of the District of Columbia (11 DCMR §361). This is in an R-5-B District at premises 1629 21st Street, N.W. (Square 93, Lot 122).

Hearing Dates October 1, October 29 and November 12, 2002
Decision Dates

DECISION AND ORDER

Andrea Marinkovich, the lessee of space, and William Bass, the owner of Lot 122 in Square 93 with a street address of 1629 21st Street, N.W., are seeking a special exception from the Board of Zoning Adjustment in order to establish an art gallery in a portion of the premises. The gallery would take up approximately 1,200 square feet on the first and a portion of the second floor of the premises, much of which is shared with the residential uses. Ms. Marinkovich and Mr. Bass were represented by Stephen N. Gell, Esq. After public hearing the Board **APPROVED** the application for the reasons stated herein.

PRELIMINARY AND PROCEDURAL MATTERS

Expert witnesses

Mr. Lindsley Williams was accepted as an expert witness in land use, planning, and zoning (Transcript, October 29, 2002, at 268).

Requests for party status

The Board accepted the following persons as parties: Morton Schussheim, Solange MacArthur Muller, and Vincent Hurteau. The Board directed that the opposition parties be represented by one person. Initially Mr. Vincent Hurteau led the opposition with assistance from Mr. Richard Suisman. Subsequently, beginning at the November 12 hearing, Mr. Hurteau was replaced by Mr. Stephen A. Saltzburg.

Self Certification

The application was self-certified by Mr. Gell. (Exhibit No. 7).

Notices

All notices were sent and signs posted as required.

The Applicant's Presentation

The applicant, Ms. Marinkovich, and her business partner, Royce Burton testified in support of the application, as did Mr. William Bass, the owner of the property. Mr. Lindsley Williams, former Chair of the Zoning Commission, served as expert witness in land use, planning, and zoning for the applicant. Other testimony was presented by Ms. Ann Corbett, representing the Cultural Development Corporation, a DC non-profit which helps promote and develop cultural related projects by assisting arts organizations with facilities development. She testified and submitted a letter which supported the application, specifically stating that this use would not have a negative impact on the neighborhood. (Exhibit No. 55)

Mr. Michael Frame, who lives across 21st at 1642, Mr. David Hatfield, who lives next door on R Street, and Ms. Ellen Ambrose, who lives in a portion of the subject building all testified in support. Ms. Ira Pinto, a gallery owner in an adjacent building on 21st Street, also testified in support. Letters in support were sent by Benjamin Stearn, M.D., and Ms. Susan Perkoff Bass.

Parties and Persons in Opposition to the Application

The opposition was represented in the first hearing by Mr. Vince Hurteau and in the second by Mr. Steve Saltzburg. Their witnesses were neighbors of the subject property: Mr. Morton Schussheim, Mr. Richard Suisman, and Ms. Susan Lee. Testimony in opposition to the application was also provided by Mr. Donald Dakin, Mr. James McGrath, Chairman of the D.C. Tenant's Advocacy Coalition. Letters in opposition were forwarded from Mr. Werth V. Zuver, (Exhibit No. 52) as well as some of those testifying.

Office of Planning (OP) Reports

The Office of Planning recommended denial of the special exception. They expressed concern with the pedestrian and vehicular traffic from a large number of events with a cap of 100 guests at each event. OP was unclear about the allocation of the three parking spaces on premises, although it recognized that no parking was required by the Zoning Regulations. Finally OP was concerned about the erosion of residential space thus affecting the residential nature of 21st Street. The Office of Planning feels that the neighborhood will be destabilized by the conversion of 1,200 square feet of residential space added to the other galleries on R Street. They predicted that the lower rental cost for art galleries in the R-5-B zone, compared to commercial areas, would draw many more galleries to the neighborhood. (Exhibit Nos. 25 and 43)

ANC Reports

ANC 2B, by duly adopted resolution, with a quorum present, at its September 18, 2002, meeting, voted to oppose the application. The ANC cited its concern for maintaining the balance of residential and non-residential uses in this portion of the Dupont Circle community. They cited the closing of 13 residential units occasioned by the expansion of the Phillips Collection. While finding the diversity of the neighborhood an asset, they believed that livability would be adversely impacted by the "permanent encroachment of commercial ventures." At the same time, the Commission expressed support for a gallery in that location as a home occupation. (Exhibit No. 24) Mr. Vince Micone also appeared and testified on behalf of the ANC.

Letters from Councilmembers

Letters were received from Jack Evans, Councilmember Ward 2, (Exhibit No. 44), and Phil Mendelson, at large. (Exhibit No. 45) Both expressed concern about the loss of residential space and the creeping commercial uses. Councilmember Jack Evans sent a subsequent letter acknowledging the many neighbors who had signed in support of the gallery and urged the Board to take their expressions into consideration. (Exhibit No. 69)

Dupont Circle Citizens' Association

The Dupont Circle Citizen's Association, by letter of October 1, 2002, opposed the application. (Exhibit No. 31)

Findings of fact

The Subject Property and Surrounding Area

1. The building on the subject lot is composed of three distinct units with a total gross square footage of 5,654 square feet. 1629 21st Street is the first through third floors comprising 2,826 square feet, 1,200 of which would be used for the applicant's gallery (part of which is space shared with the residential units, such as the entrance foyer, stairway and second floor hall.) In addition The Robert Brown Art Gallery occupies the basement area of 918 square feet (address: 2030 R Street) and there is a two story living unit at 1627 21st Street of about 1910 square feet. Between the two galleries, the space devoted to gallery use (2118 square feet) would be less than 38% of the total space in the building. (Exhibit Nos. 57 and 71)

2. The third floor and a portion of the second floor will remain in residential use for three people including Ms. Marinkovich. (Transcript, October 29, 2002, at 262)

3. The Robert Brown Gallery, whose entrance is on R Street, has been operating in the basement of the building for some time and will continue to do so. (Transcript, November 12, 2002, at 109)

4. There will be no exterior change to the building, other than a one square foot (or less) sign, and no structural interior changes. (Transcript, October 29, 2002, at 279)

5. The subject property is at the Southeastern corner of 21st and R Streets. The R-5-B portions of the four squares separated by those two streets are comprised of the following: 57% of the gross building area is residential; 2.8-3.6% is devoted to private galleries while 39.4% is devoted to other non-residential uses. (Transcript, November 12, 2002, at 249) Mr. Suisman provided different figures. However, his analysis only considered two of the four squares joining at 21st and R Streets (those south of R Street) and failed to account for mixed use properties, declaring any building with both residential and other uses to be fully non-residential. (Transcript, November 12, 2002, at 171-202, 248, Exhibit No. 75)

6. In 2001, the Phillips Collection purchased a 15-unit rental building at 1618 21st Street for the purpose of constructing a large addition tot he museum. Although museums are permitted in the zone as a matter of right, the Phillips needed a special exception and variances to carry out its plans. The neighbors supported the project which added over 30,000 square feet. (BZA Order No. 16618. Transcript, November 12, 2002, at 197)

7. The vast majority of neighbors regard the galleries as a welcome addition to the neighborhood. 65 neighborhood residents signed an agreement restricting the operations of the gallery and supporting the variances. (Transcript, October 29, 2002, at 285, Exhibit Nos. 49 and 58) One person subsequently withdrew her support. (Transcript, November 12, 2002, at 188) Two others who did not sign the agreement did sign a petition in support. Conversely, 34 neighbors signed petitions in opposition to the gallery. (Exhibit Nos. 41, 54)

The Proposed Gallery Use

1. Ms. Marinkovich and Mr. Burton plan to relocate their small art gallery at 1506 21st Street to the subject property. They feature contemporary artworks primarily selling at the higher end. They do not need high volume traffic to be successful.

2. In order to address each articulated concern Ms. Marinkovich has recommended the following conditions:

    a. All gallery events will end at 9:00 p.m. or earlier and none will be catered.
    b. Alcohol will not be served at events open to the public and only beer and wine will be served at invitation-only events.
    c. There will be no more than 10 gallery events per year which are open to the general public. There will be no more than 8 gallery events per year which are by invitation only.
    d. Gallery events will be restricted to 40 guests.

e. There will be no banner or other sign except a one square foot nameplate.
f. Invitations to gallery events will contain information about Metro and nearby parking garages.
g. Two of the three parking spaces on the premises will be maintained for use of clients or guests of the Gallery.

Loss of Galleries

There are 16 galleries in the neighborhood. Three are in buildings that are currently for sale (one at 1621 21st Street and two at 2108 R Street) and may be sold for residential use. Since 1993, five have closed and been converted to residential use: 2020 R Street, 2017 Q Street, 1706 21st Street, 2016 R Street, and 1727 21st Street. (Exhibit No. 57), Transcript, November 12, 2002, at 245) Under the current Zoning Regulations and Maps a special exception would be needed to reestablish the space as gallery space. This represents a net loss of 5 galleries since 1993 and a potential loss of three more. (Subsection 361)

Traffic and Parking Impacts

1. Approximately 400 visitors a day come to the Phillips with double that number on weekends. The addition of a small gallery with 4-6 visitors a day during the week and 8-12 on weekends will have no measurable impact on the traffic. (Transcript, November 12, 2002, at 273)

2. Applicant controls three parking spaces on site, two of which would always be available to gallery visitors. (Transcript, October 29, 2002, at 252)

3. Mr. Frame who lives at 1642 21st Street, across the street from the subject property, testified that the proposed gallery would not add significantly to the already difficult parking situation but he and other neighbors have dealt with parking problems by having guests come by subway or taxi or figure out a way to park. (Transcript, October 29, 2002, at 301) Ms. Lee, who lives next door to him, testified that there was often insufficient street parking for her guests, (Transcript, November 12, 2002, at 187) Mr. Saltzburg, her husband, spoke of the added difficulty of parking based on gallery functions of 100 people. (Exhibit No. 76, at 4) These were estimates that were suggested by applicant at the initial neighborhood meeting at the gallery. Mr. Saltzburg, was chosen by several neighbors in opposition to negotiate with applicant's attorney. The applicant was forthcoming with ways to reduce the impact of the events, but Mr. Saltzburg abruptly terminated negotiations and applicant was never able to meet with or discuss impacts with the opposition. (Exhibit No. 76) Subsequently, the applicant *sua sponte* proposed a series of conditions aimed at addressing the parking concerns, such as limiting the guests to 40, limiting the gallery events to 12 open and 8 private, and undertaking to notify guests of the advantages of Metro and availability of parking garages in the neighborhood.

4. There is a Metro Station nearby at the corner of Connecticut Ave and Q Street.

5. There is an ample supply of off-site parking in the vicinity: Parking garages are located within a few blocks of the subject site:

    a. Hilton Embassy Row Hotel on Mass. Ave between 20th and 21st Streets
    b. The Westin at 21st Street and Massachusetts Ave.,
    c. The Universal North Building at Florida and Connecticut Aves and the Colonial Parking Garage at 20th St. and Mass. Ave. (Transcript, November 12, 2002, at 237, 246)

Noise, Trash, and Other Impacts

Testimony in opposition

1. Mr. Schussheim testified that the First Friday Gallery Openings brought trash and people congregating on the street but never called District officials or gallery owners to complain. (Transcript, November 12, 2002, at 215) Susan Lee testified that there was considerable litter after the "First Friday" events (Transcript, November 12, 2002, at 187) She said that she had had discussions with the owner of the Alex Gallery. However, there was no evidence presented about the nature, substance, or conclusions of those discussions. (Transcript, November 12, 2002, at 225)

Testimony in favor

2. The applicant's expert witness testified that the impact on the neighborhood from this gallery would be "deminimus". (Transcript, October 29, 2002, at 274)

3. Michael Frame who lives across the street from the subject property (Transcript, October 29, 2002, at 299), and Ellen Ambrose, who lives in a portion of the building which will house the applicant, testified that the "First Fridays" were never a problem. Ms. Ambrose testified that the "First Fridays" are only 2 hours once a month. (Transcript, November 12, 2002, at 231) Ira Pinto, an adjacent gallery owner testified that galleries do not produce mess or noise. (Transcript, November 12, 2002, at 235)

4. There was only praise for the operations of the applicants in their current location at 21st and P Streets. (Transcript, November 12, 2002, at 231) Also it is noted that applicants have agreed not to serve liquor or other alcoholic beverages when they participate in the "First Fridays", thus cutting down on the possibility that they would contribute to any objectionable behavior or add to the litter.

5. There was testimony that the subject property had been rented to college students in the past. A next door neighbor supporting the gallery complained that there

had been considerable noise from previous tenants of a group house. (Transcript, November 12, 2002, at 232) Dr. Stearn, another nearby neighbor, wrote that his greatest fear is that the property will turn into another group house for college kids. (Exhibit No. 65)

6. For most people who live in the area, the presence of galleries adds positively to the ambiance of the neighborhood. Many people bought into the neighborhood because of the galleries and the ambiance. Suisman (Transcript, November 12, 2002, at 177), Frame (Transcript, October 29, 2002, at 298), Hatfield (Transcript, November 12, 2002, at 232), and Benjamin Stearn, M.D. (Exhibit No. 65). Mr. Saltzburg and Ms. Lee live at 1646 21st in "The Gallery Town House Condominiums", so-named, obviously, to use the prevalence of galleries to attract residential purchasers. (Transcript, October 29, 2002, at 296)

Conclusions of Law and Opinion

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(2) (2001)), to grant special exceptions as provided in the Zoning Regulations. The applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR 361 to allow a portion of the subject premises to be used as an art gallery. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

To meet their burden of proof under Subsection 3104.1, the applicant must demonstrate that the proposed art gallery is in harmony with the general purpose and intent of the Zoning Regulations and Maps, that it will not adversely affect the use of the neighboring property in accordance with the Zoning Regulations and maps, and that it meets the special conditions listed in Subsection 361 for art galleries.

Under Subsection 361.2 the art gallery shall be located and operated so that it is not likely to become objectionable to adjoining and nearby property because of noise, pedestrian and vehicular traffic, hours of operation, or other objectionable conditions. Under Subsection 361.4 "[a]dequate off-street parking, but not less than that required by chapter 21 of this title, shall be provided to accommodate occupants, employees, and visitors likely to come to the gallery by automobile." Finally, Subsection 361.5 provides that "[t]he proposed use shall not adversely affect the present character or future development of the surrounding area."

The Board's discretion in reviewing a special exception application is limited to a determination of whether an applicant has complied with the requirements of these subsections. If the applicant meets its burden, the Board ordinarily must grant the application. *First Baptist Church of Washington v. District of Columbia Bd. Of Zoning Adjustment*, 432 A.2d 695, 698 (D.C. 1981).

Further, the Board is required under D.C. Code § 10309.10(d) (2001) to give "great weight" to the affected ANC recommendation. The Board must "articulate why

the particular ANC itself, given its vantage point, does – or does not – offer persuasive advice under the circumstances." *Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1384 (D.C. 1977). The Board has carefully considered the ANC's report and as discussed below finds the ANC's recommendation unpersuasive.

Objectionable conditions

The Board concludes under Subsection 361.2 that the proposed art gallery, in 1,200 square feet of the subject property, is not likely to become objectionable to adjoining and nearby property because of noise, pedestrian and vehicular traffic, hours of operation, or other objectionable conditions. As noted above, other galleries in the neighborhood operate in a responsible way. (Transcript, October 29, 2002, at 335) Applicant's expert planning and zoning witness, Mr. Lindsley Williams, testified that there would be "no objectionable conditions". (Transcript, October 29, 2002, at 274) Ann Corbett of the Cultural Development Corporation echoed this view. (Transcript, November 12, 2002, at 152, 157) While traffic is high, it does not appear that the additional traffic comming to this gallery will have an impact. Mr. Williams testified that given the high volume of traffic along R Street, a designated one-way, west-bound, arterial street and southbound along 21st Street, which carries traffic volume sufficient to designate it a "collector" street, the additional traffic would be imperceptible. (Exhibit No. 23, Transcript, October 29, 2002, at 273)

The Board is unpersuaded that parking would be a significant problem. The Dupont Circle Metro station is nearby and there was testimony that patrons often come by taxi. (Transcript, October 29, 2002, at 261) Additionally, there was ample testimony that several parking garages are available within a few blocks of the gallery. (Transcript, November 12, 2002, at 237, 246) Moreover, applicant has accepted a condition that she will encourage the use of Metro and will include parking information on invitations to events at the gallery.

Mr. Schussheim and Ms. Lee testified that people congregate on the street during First Friday Gallery Opening events and that some trash is left behind. (Transcript, November 12, 2002, at 215, 225) However, Mr. Schussheim never thought the problem serious enough to complain to the District or to the gallery owners about the annoying conditions. Ms. Lee did testify that she had talked to the District about the Alex Gallery. (Transcript, November 12, 2002, at 225) However, there was no evidence presented about the nature, substance, or conclusions of those discussions. (Transcript, November 12, 2002, at 225) Counterbalanced to that testimony, Vince Micone, ANC 2B Chair, testified "we don't see that many bands of happy people on Friday night urinating around the neighborhood or getting too excessively drunk on the wine that they get at the galleries. I wanted to clarify that for the record." (Transcript, October 29, 2002, at 335) Similarly, Michael Frame and Ellen Ambrose said that the "First Fridays" were never a problem since they are only once a month or less. (Transcript, November 12, 2002, at 231) Ms. Ambrose testified that she has known about the Burton Marinkovich Gallery for 7 or 8 years and they have never had a problem with trash at their current location. (Transcript, November 12, 2002, at 231) Ms. Pinto, a former gallery owner, testified that the galleries do not cause a mess or noise. (Transcript, November 12, 2002, at 235)

The Office of Planning found the potential for objectionable effects but did not take into account the conditions proffered by the applicant to reduce the impact. They assumed that the events would run until 11:00 p.m. (Exhibit No. 25) They assumed there would be catering. When the applicant proposed conditions which would eliminate catering and end events at 9:p.m., as well as accepting other strict limitations on events, the Office of Planning dismissed all conditions as unenforceable. (Transcript, November 12, 2002, at 112-115) Later in the hearing, the Office was at pains to explain why they had recommended conditions regarding parking, numbers of events, numbers of guests, time of events, etc., in the case of the Phillips expansion and then recommended approval based on those conditions. (Transcript, November 12, 2002, at 120)

More important, the Office of Planning's casual dismissal of conditions as "unenforceable" would appear to be in direct opposition to Section 361.3 of the Zoning Regulations, which mandates that the Board "consider and regulate, if necessary, the anticipated frequency, number of attendees, and other characteristics of show openings, or other group gatherings." (11 DCMR § 361.3) The Zoning Commission did not appear to be in doubt as to the enforceability of the conditions by the Zoning Inspector, which are usually investigated after hearing complaints from neighbors. The Commission was cognizant of the District's system of investigation of infractions and imposition of citations and fines. Since many of the events are open to the public, neighbors and Zoning Inspectors have substantial opportunities to monitor the number, size, and duration of events, whether alcohol is served, whether the events are being catered, etc.

As to parking, the Office of Planning also dismissed the availability of three parking spaces even though Ms. Marinkovich testified that two of them would always be available for guests and patrons. (Transcript, November 12, 2002, at 117) More importantly, the Office of Planning was not aware of the five parking garages in the immediate vicinity (Transcript, November 12, 2002, at 134-5, 237, 246) or of applicant's promise to recommend Metro or include parking information on invitations. (Transcript, November 12, 2002, at 134-5) Nor did they consider Ms. Marinkovich's testimony that many of their clients come by cab or metro. (Transcripts, October 29, 2002, at 251, November 12, 2002, at 243)

Adverse effect on the present character or future development of the surrounding area.

Zoning Commission Order 558 of January 11, 1988 was adopted to change art galleries in R-5 districts from a matter-of-right to a special exception. The Zoning Commission clearly desired to encourage the establishment of galleries but introduced some safeguards to protect residential uses from potentially harmful effects of the operation of the galleries.

> The Commission is not persuaded that an art gallery is a hostile element in residential zones, simply because it is not classed as a residential use. An art gallery provides a benefit to city life that is not incompatible with the variety of residential structures that are allowed in the R-5 zone." (ZC Order No. 558, at 3)

As Subsection 361.5 indicates, the Zoning Commission was concerned about the character of the area into which a gallery was being introduced. However, the area is characterized by not only residences but museums, embassies, and private clubs which are matter-of-right, as well as Galleries by special exception (or grandfathered) and chanceries which were in existence in 1978. (11 DCMR §§ 201.1(j)(m), 330.5(g)(h)) De facto, it should not be called "residential", but "mixed-use". The character of the area is also informed by the adjacent DC/C-3-B Zone District along Connecticut Ave. Mr. Williams provided the percentages as follows: 57% of the gross building area is residential; 2.8-3.6% is for private galleries while 39.4% is devoted to other non-residential uses. Art galleries are by no means a dominant use. (Transcript, November 12, 2002, at 249) Adding 1,200 square feet would not change the area in any noticeable way. Conversely, denying approval to this gallery without substantial evidence of a negative impact would chill the possibilities that new galleries would risk the cost of obtaining a special exception. Considering the net loss of four galleries since 1993 and the potential loss of two other galleries whose buildings are currently for sale, and the fact that only one special exception has been applied for in the last 12 years (*Tyler*, BZA Case. No. 15343, a gallery that no longer exists), denial here could thwart the clear intent of the Zoning Commission to encourage galleries. (Transcript, November 12, 2002, at 244, Transcript, October 29, 2002, at 277)

It should also be noted that the Zoning Commission did not ask the Board to consider cumulative impact, either expressly or by implication. In the three cases where the Zoning Commission has wanted the Board to consider cumulative impact, it has expressly so stated: Child Development Centers where such facilities are required to be spaced 1000 feet apart unless the BZA finds that there is no cumulative impact (Section 205.8), home occupations where the Board is permitted to consider cumulative impact of a home occupation on a referral from the Zoning Administrator (Section 203.12), and Youth Care Homes and Community Residence Facilities (Section 218.6). Such a test was never contemplated for galleries and should not be applied by the BZA. If there is a concern about the loss of residential space, the appropriate avenue for such relief is a rule-making proceeding by the Zoning Commission, such as an amendment to the Dupont Circle Overlay Zone.

There is substantial evidence that residential uses in the neighborhood remain strong and unassailable.

1. Mr. Williams testified that in preparing and issuing the Strategic Neighborhood Action Plan (SNAP) through the Office of Planning, the District found no problem with the numbers of galleries in residential areas. Rather, the galleries (particularly the "First Fridays") and the Phillips were expressly regarded as positive elements. (Exhibit No. 61, page 2, See also Transcript, November 12, 2002, at 159-60)
2. Residential space for three occupants will continue to be available in the subject premises above the gallery.
3. On the 1600 block of 21st Street, (below R), there will continue to be many residences: African Missionaries, Ms. MacArthur-Muller, Mr. Suisman, Mr.

Saltzburg, Ms. Lee, Mr. Schussheim, Ms. Ambrose, Ms. Marinkovich, and others, not to mention substantial numbers of residential units in the squares above R Street.

4. While the Phillips expansion has removed 13-15 residential units, the addition of 15-16 units of housing near 21st and R Streets since 1990 has strengthened the residential character. (Exhibit No. 57)
5. There was a net increase of 1,300 residential units in the Dupont Circle area between 1990 and 2000. (Transcript, November 12, 2002, at 126)
6. Since 1990, there has been a net loss of 4 galleries in the neighborhood.

Nevertheless, the Office of Planning continues to conclude that a "tipping point" has been reached. Could it be that the Office of Planning disagrees with the Zoning Commission about the appropriateness of galleries in R-5-B areas? Ms. Steingasser seemed to be saying just that when she testified that galleries should not be located in the R-5-B district but, rather, in the commercial district on Connecticut Ave. (Transcript, November 12, 2002, at 100, 127) Similarly, in the OP memorandum to the Board, Mr. Altman wrote that if the Zoning Commission had wanted a gallery in that neighborhood, it would have established an arts overlay zone as it did in the Downtown Arts District, and the Uptown Arts District. (Exhibit No. 25 at 5) OP is entitled to its view, but the proper way to bring it about is to propose a change in the regulations, for Zoning Commission review and action.

The Office of Planning offered no evidence that one more gallery even came close to tipping the balance between residential and nonresidential. No studies were cited, no interviews were taken, no governmental or other reference was invoked to show that the placement of a gallery of 1,200 square feet in a three thousand square foot residential space would have any impact on the "residential" character of the neighborhood. (Transcript, November 12, 2002, at 121) For instance, no evidence was presented that people have stopped looking for homes in the neighborhood because it lacks a "residential feel" or that prices had come down. (See (Exhibit No. 65, where Dr. Stearn stated that houses around the corner on R Street consistently sold for $1.5 million, sandwiched between galleries). No evidence was presented by OP or opponents that neighbors complain that their neighborhood has lost its appeal as a place to live. Of the approximately one hundred neighbors who testified or signed petitions, two/thirds affirmed the neighborhood appeal by supporting this additional gallery. (Transcript, October 29, 2002, at 285, 49 and 58)

For evidence of the commercialization of the neighborhood, OP points to the traffic signals at the head of 21st Street, which OP subsequently admitted had been there for a very long time. (Transcript, November 12, 2002, at 103) It also seems odd that OP is now convinced that 1,200 square feet of gallery space is "tipping the balance" (Exhibit Nos. 25 and 43), while a year and a half ago, the addition of 30,000 square feet to the Phillips with attendant removal of 15 units of housing did not. (Transcript, November 12, 2002, at 120).

Finally, there seemed to be some disagreement in the Office of Planning as to whether this gallery contributed to the erosion of residential uses. In response to a question from the Chair, Ms. Thomas said that OP did not have a problem with galleries as such, but this one is "taking up some residential space". (Transcript, November 12, 2002, at 100) However, Ms. Steingasser later testified that it was not the loss of residential space that was the problem but the establishment of a new gallery. (Transcript, November 12, 2002, at 109) The Office, she said in response to a Board question, would have no concern about the expansion of the basement gallery to the first and second floors. (Transcript, November 12, 2002, at 109)

ANC Report and Great Weight

The Advisory Neighborhood Commission 2B opposed the application only on the "tipping point" issue, i.e., the loss of residential space and the "encroachment of commercial ventures" (Transcript, October 29, 2002, at 336, Exhibit No. 24). He expressed the fear that once converted to non-residential use, it would not change back. (Transcript, October 29, 2002, at 337). With the net loss of four galleries, his fears appear to be unfounded. Mr. Micone cited N Street between Connecticut Ave and 17th Street, which has become non-residential, having started with substantial residential uses. (Transcript, October 29, 2002, at 337) However, N Street is zoned SP-1 which, unlike the R-5-B zone, does permit office use.

No concern was expressed in the ANC letter or testimony about parking, traffic, trash, noise, light, or other similar effects. Indeed, at the ANC meeting, little, if any, testimony was offered concerning lights, noise, trash or other disruptive behavior coming from the current galleries and no negative evidence was presented concerning the operations of the applicants in their current location at 21st and P Streets. (Transcript, November 12, 2002, at 213) Moreover, the ANC seemed to blunt its criticism by recommending that the applicant establish the gallery as a home occupation. (Exhibit No. 24) While such a move would reduce the amount of space devoted to gallery use, it would still involve the conversion of a portion of the premises from residential to commercial use. Mr. Micone described the neighborhood as having "deep divisions" on the issue and urged the Board to listen carefully to the positions on both sides. (Transcript, November 12, 2002, at 158-9)

The division in the neighborhood, the lack of substantive evidence that a tipping point has been reached or that the neighborhood is in danger of losing its residential character, and the apparent acceptance of some commercial use for the property, leads us to discount the ANC vote as non-persuasive. The Board notes that while the original vote was unanimous, a motion at a subsequent meeting to reconsider failed by only one vote. (Transcript, November 12, 2002, at 161)

Based on the findings of fact, having given great weight to the ANC recommendation, and having considered the Office of Planning reports, the Board concludes that the proposed project meets the test for a special exception. Applicant has

demonstrated that her gallery would not impact the neighborhood adversely. Accordingly it is hereby **ORDERED** that the application is **GRANTED,** subject to the following conditions:

1. All gallery events will end at 9:00 p.m. or earlier and none will be catered.
2. Alcohol will not be served at events open to the public and only beer and wine will be served at invitation-only events.
3. There will be no more than 10 gallery events per year which are open to the general public.
4. There will be no more than 8 gallery events per year which are by invitation only.
5. Gallery events will be restricted to 40 guests.
6. There will be no banner or other sign except a one square foot nameplate.
7. Invitations to gallery events will contain information about Metro and nearby parking garages.
8. Two of the three parking spaces on the premises will be maintained for use of clients or guests of the Gallery.

Submitted by Applicant