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Jan 10, 2003

BZA
441 4th St
Wash.DC

Re; Case # 16920 -Bass

Members of the Board

Attorney Steven Saltzburg is out of town. He sent me an email(attached) requesting that I deliver the attached "Opponents Proposed Finding of Fact and Conclusions of Law".

I am not familiar with the time requirements for delivery but, if needed, please consider this letter a request for a waiver of time requirements.

Thank you

Sincerely

Richard Suisman

BZA
Case No. 16920
Exhibit No. 80

Board of Zoning Adjustment
District of Columbia
CASE NO.16920
EXHIBIT NO.80

Subj: **Findings of Fact**
Date: 1/9/03 12:33:06 PM Eastern Standard Time
From: Steves1646
To: RSUISMAN, MORTJS

File: Findings of fact and conclusions of law.doc (66048 bytes)
DL Time (46000 bps): < 1 minute

Susan and I do not get back to DC until Friday afternoon. Gell has done proposed findings of fact and conclusions of law. So I did some. They are attached. I am hoping one of you can print them out and submit them with a short cover letter saying that I am out of town and you are submitting them for me.

Thanks,
Steve

Opponents' Proposed Findings of Fact and Conclusions of Law

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 opponents of the special exception claim that the gallery is inconsistent with the residential character of the neighborhood, would create additional parking problems in an already crowded neighborhood, and would increase traffic which also is already a problem in the neighborhoo. Stephen A. Saltzburg represented the opponents. Ms. Marinkovich and Mr. Bass were represented by Stephen N. Gell, Esq. After public hearing the Board **DENIED** 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). Richard Suisman was permitted to offer opinion testimony on behalf of the opponents.

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.

Dora Marcus, who lives at 2102 R Street, submitted a letter in which she explained that, when she signed a petition supporting a "neighborhood agreement," she believed that the opponents of the special exception had relinquished their opposition and supported the "neighborhood agreement." She did not realize that the "neighborhood agreement" was not negotiated with any neighbors.

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) At the November 12, 2001 hearing, the Office of Planning appeared and testified against the special exception. The OP testimony explained that the only route to the front door of the Phillips Gallery and to one of the entrances to the Cosmos Club parking lot was down 21st Street or across R Street and then down 21st Street. Thus, any cars traveling to 1629 21st Street would add to heavy traffic already extant in the neighborhood.

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. He clearly stated that the ANC was opposed to the special exception.

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) There is no recognition in the Evans' letter of the fact that the signers of the petition supporting the so-called "neighborhood agreement" were never told that this "agreement" had not been negotiated with a single neighbor and was the unilateral creation of Mr. Gell, attorney for the applicants.

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

Every Public Body and Elected Official Opposes the Gallery

1. The ANC, Dupont Circle Citizens' Association, two City Council Members, and the OP all oppose the special exception. They all agree that the proposed gallery would detract from the residential character of the neighborhood.

The Uncontradicted Facts are that the Neighborhood is Already Threatened

2. The number of parking spaces available to residents is greatly reduced due to the number of commercial facilities that have replaced housing. Indeed the number of parking meters that have replaced unmetered space on R Street and 21st Street is so great as to have considerably reduced available parking. Every commercial facility that draws traffic increases the parking problem that already exists.

3. The Phillips Collection and the Cosmos Club already draw large numbers of people and cars. All cars going to the Phillips must travel down 21st Street, and they must either enter 21st Street from Florida Ave. or from R Street. The traffic is a problem, and any additional commercial facility will exacerbate the traffic problem.

The Subject Property and Surrounding Area

4. 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)

5. 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) The Brown Gallery will remain in the same place, meaning that the there will be two galleries in what once was a residential corner building that anchored the block at the corner.

6. As Mr. Suisman explained at the November 12, 2001 hearing and demonstrated with a chart, the number of commercial properties in the neighborhood is substantial. There are commercial properties on both corners of Connecticut and R and also Florida and R. There is the Phillips Gallery and the Cosmos Club at 21st and Q and a commercial building on the corner of Florida and 21st. There are galleries on R Street, including the Robert Brown Gallery, and also on 21st Street. There are also commercial entities on R such as Teaism, and on 21st (Cosmos Club parking entrance).

7. 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) The neighbors who supported the Phillips Gallery (and who were represented by Mr. Gell) uniformly oppose the special exception in this case for 1629 21st Street. These neighbors invested substantial time and expense in mediation with the Phillips and developed considerable expertise regarding the impact of commercial expansion on the neighborhood. No neighbor who was involved with the Phillips in any substantial way supports the special exception in this case.

8. Although 65 neighborhood residents signed an agreement restricting the operations of the gallery and supporting the variances, the applicants failed to explain what the residents were told about the so-called "neighborhood agreement." (Transcript, October 29, 2002, at 285, Exhibit Nos. 49 and 58) The person who subsequently withdrew her support explained that she was led to believe that the agreement had been accepted by the opponents of the gallery. (Transcript, November 12, 2002, at 188) Among the 34 neighbors signed petitions in opposition to the gallery were all of the principals in the negotiations that successfully controlled and limited the expansion of the Phillips. (Exhibit Nos. 41, 54)

9. The Phillips agreement received substantial publicity. The entire neighborhood was aware that the agreement was negotiated by neighbors. When the applicants circulated a petition asking for support of a "neighborhood agreement," they did not tell those signing that the "agreement" did not exist and that an agreement had been proposed by the applicants, voted on by a group of neighbors, and rejected.

The Proposed Gallery Use

10 Ms. Marinkovich and Mr. Burton want to relocate their art gallery at 1506 21st Street to the subject property. They want more space and clearly want to be able to accommodate more customers, as their proposed conditions demonstrate.

11. In order to address each articulated concern Ms. Marinkovich hasrecommended the conditions, none of which is adequate to protect the residential character of the neighborhood. They are these.

a. All gallery events will end at 9:00 p.m. or earlier and none will be catered. However, food may be served whether catered or not, and the resulting trash that accrues when attendees leave carrying food is not planned for.

b. The applicants assert that alcohol will not be served at events open to the public and only beer and wine will be served at invitation-only events. As OP notes, beer and wine are alcoholic beverages. And beer bottles are one of the principal deposits found on neighbors' lawns and property when beer is served at galleries.

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. This means that 18 different events may occur at this gallery alone during a year.

d. Gallery events will be restricted to 40 guests. Although the opponents have pointed out that the applicants have never made clear whether this is 40 guests total during a day or 40 at one time, the applicants refuse to clarify the matter and refuse to explain how they will enforce the limit.

e. There will be no banner or other sign except a one square foot nameplate. Of course, there is no nameplate now, and applicants do not claim that they will not advertise their gallery or seek to maximize business. So, the absence of a banner or sign is not evidence that the neighborhood will not be adversely affected.

f. Invitations to gallery events will contain information about Metro and nearby parking garages. But, the applicants have failed completely to demonstrate with any evidence that most attendees of galleries seek to drive and always seek to park close to the galleries. There is no parking lot within a block of the proposed gallery. The uncontradicted evidence is that gallery customers tend to block driveways and to park illegally.

g. Two of the three parking spaces on the premises will be maintained for use of clients or guests of the Gallery. There is no evidence, however, that any customer will have any knowledge of these spaces. And, the applicants have never suggested that they will make the spaces known to customers.

Loss of Galleries and Increase in Other Commercial Entrants

12. 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) Meanwhile, the Phillips has expanded and its potential growth more than compensates for the loss of galleries.

13. During the time that the galleries have slightly decreased in number, other commercial entrants have entered the neighborhood or increased in size. Nora Restaurant greatly increased its size at R and Florida (with the support of those who oppose the special exception in this case). Starbucks and Teaism have taken hold on the East Corner of R Street near Connecticut. A new restaurant is being built on R at Connecticut across

from Starbucks and Teaism. Thus, the totality of the commercial impact on the neighborhood has increased during the period since 1993.

Traffic and Parking Impacts

14. Approximately 400 visitors a day come to the Phillips with double that number on weekends. The neighbors who negotiated a genuine agreement with the Phillips took pains to assure that the number of vehicles using 21st Street would be limited. Any increase in the traffic for another gallery will simply increase the burden on the neighborhood, as OP found and as no witness contradicted.

15. Applicant controls three parking spaces on site. If, as applicant claims, two of these always will be available to gallery visitors -- (Transcript, October 29, 2002, at 252) – it is clear that any deliveries to the gallery will result in trucks and cars being illegally parked in front, blocking traffic and disturbing the neighbors.

16. Mr. Frame who lives at 1642 21st Street, across the street from the subject property, testified that there are already difficult parking problems in the neighborhood that require him and other neighbors have to ask guests to 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, agreed and 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. Applicants have offered no explanation as to what it means to limit events to 40 people – 40 a day, 40 at one time, etc. Nor do they offer any means of enforcing the limitation.

17. Although there is a Metro Station at the corner of Connecticut Ave and Q Street, there is a two block walk from that station to the proposed gallery. Although the applicants suggest that parking is available at the Hilton Embassy Row Hotel on Mass. Ave between 20th and 21st Streets, and at the Westin at 21st Street and Massachusetts Ave., these lots are not always available to persons not staying at the hotels. Moreover, they are two blocks from the proposed gallery. The Universal North Building at Florida and Connecticut Aves and the Colonial Parking Garage at 20th St. and Mass. Ave. are even farther away. (Transcript, November 12, 2002, at 237, 246)

Noise, Trash, and Other Impacts

18. 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) But, not a single neighbor came forward to challenge the fact that trash is a problem when gallery events are held.

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.

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, notes that the ANC considered this matter twice and carefully assessed the so-called "neighborhood agreement" before deciding to opposed the special exception, and thus finds that the ANC's recommendation cannot possibly be rejected. The Board gives it the substantial weight to which it is entitled and observes that the ANC recommendation is supported by every governmental agency and official and neighborhood group that has considered the matter.

Objectionable conditions

The Board concludes under Subsection 361.2 that the proposed art gallery, in 1,200 square feet of the subject property, is likely to have an adverse effect on the neighborhood for the reasons cited by the opponents, the ANC, and OP. The gallery poses problems for adjoining and nearby property because of noise, pedestrian and vehicular traffic. None of the self-imposed conditions proposed by the gallery satisfy the reasonable concerns of the opposing neighbors, the ANC and OP.

The opponents offered clear and convincing testimony 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) The opponents have not claimed that drunkenness is the problem. Rather, the problem is traffic, noise and trash. The fact that the neighbors chose to live in peace with the galleries that currently exist – without complaining to D.C. officials – is no reason to burden them with another gallery that will increase the problems that they endure.

The Office of Planning had occasion to review carefully the proposed conditions offered by the gallery. So did the ANC. Both found that those conditions either failed to deal adequately with the traffic, noise, trash, and parking problems or that the conditions were vague and unenforceable.

Although the applicants claim that the District should be able to enforce all conditions, that claim is unreasonable. It would require that the District station at least one person in the gallery 18 times a year – all day until 9 p.m. The District cannot afford such monitoring, and it is unreasonable to attack the officials in OP for recognizing the reality associated with enforcement.

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). Although the applicants focus on the net loss of galleries, they fail completely to recognize that the ANC is concerned with all commercial ventures and their effect on the neighborhood. The applicants presented no evidence to challenge the fact that commercial ventures as a whole have put the neighborhood at a tipping point. Indeed, the paid expert for the applicants failed to address the impact of other commercial ventures on the neighborhood.

Although the applicants claim that the ANC was not concerned with parking, traffic, trash, noise, light, or other similar effects, the applicants misunderstand the ANC concern. The tipping point is about not only the number of commercial ventures in the neighborhood, but its impact on the people living there. It is the parking, noise, traffic and trash that changes the character of the neighborhood. There was no need for the opponents to describe in detail for the ANC what all of the neighbors experience daily in the neighborhood. The fact that the ANC was willing to recommend that the applicant establish the gallery as a home occupation is conclusive evidence that the ANC was concerned not simply about a gallery – but about the impact that a commercial gallery open to the public would have on the neighborhood. There would be little traffic, noise, trash etc. associated with a home occupation. The fact that the applicants are not satisfied with a home occupation underscores the reasonableness of the ANC's concerns.

Based on the findings of fact, having given great weight to the ANC recommendation, and having considered the Office of Planning reports, the opposition to the special exception by two members of the City Council, the opposition by the Dupont Circle Citizens Association, the Board concludes that the proposed project would have an adverse effect on the residential character of the neighborhood. Accordingly it is hereby **ORDERED** that the application is **DENIED**.

SUBMITTED BY THE OPPONENTS OF THE SPECIAL EXCEPTION