GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16920 of William Bass, pursuant to 11 DCMR § 3104.1, for a special exception to establish an art gallery (1st floor and a portion of the 2nd floor) within an existing apartment house under section 361 at premises 1629 21st Street, N.W., zoned DC/D/R-5-B. (Square 93, Lot 122)

HEARING DATES: October 1, 2002, October 29, 2002, November 12, 2002, November 26, 2002

DECISION DATE: January 14, 2003

DECISION AND ORDER

The applicant in this case is William Bass, ("Applicant") the owner of the property that is the subject of this application. The Applicant proposes to lease the subject property to Andrea Marinkovich, who will use a portion of the property as an art gallery. Ms. Marinkovich currently operates an art gallery nearby at 1506 21st Street, N.W., but would like to re-locate her gallery to the subject property in order to increase its size. Ms. Marinkovich proposes to use the third and part of the second floor of the subject property as a residence, and the rest of the second floor and all of the first floor for her gallery. The basement of the subject property already houses an art gallery, named Brown's Art Gallery.

On June 20, 2002, the Applicant filed an application with the District of Columbia Board of Zoning Adjustment ("Board") requesting a special exception to operate an art gallery at the subject property, pursuant to § 361 of Title 11 of the District of Columbia Municipal Regulations ("DCMR").

The Board scheduled a public hearing on the application for October 1, 2002. The hearing was postponed until October 29, 2002, at the request of the Applicant, who desired more time to discuss issues of concern with the community. The Applicant's request for postponement was concurred in by several persons who indicated they were seeking opposition party status and by Advisory Neighborhood Commission ("ANC"), 2B, within whose jurisdiction the subject property is located. The hearing went forward on October 29, 2002, but was continued until November 12, 2002. Due to the lateness of the hour on November 12, 2002, no part of the hearing transpired, but it was continued until November 26, on which date it was concluded. After the conclusion of the hearing, the Board decided that additional information was needed from the parties and the

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District of Columbia Office of Planning ("OP") prior to making its decision. After receipt of such information, the Board held a public decision meeting on January 14, 2003, and for the reasons stated below, voted 4-1-0 to grant the application, subject to certain conditions.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated June 20, 2002, the District of Columbia Office of Zoning ("OZ") notified the following individuals/organizations of the filing of the application: OP, the City Councilmember for Ward 2, ANC 2B, and the ANC 2B member for Single Member District 2B02. Subsequently, on June 28, 2002, OZ referred the application to the District of Columbia Department of Transportation. Pursuant to 11 DCMR § 3113.13, the OZ published notice of the hearing on the application in the District of Columbia Register and on July 31, 2002, mailed notices to the ANC, the Applicant, and to all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Further, the Applicant's affidavit of posting indicates that on September 12, 2002, Ms. Marinkovich placed 4 zoning posters on both the 21st Street, N.W. and the R St., N.W. Street frontages of the subject property, in plain view of the public.

Requests for Party Status. There were 5 party status requests, one of which was timely, and 4 of which were filed late, but accepted by the Board. At the October 29, 2002 hearing, the Board granted party status to Vincent Hurteau, Morton Schussheim and Solange Muller MacArthur, who were initially represented by Mr. Hurteau, but on and after November 26, 2002, were represented by Stephen Saltzburg. The Board denied party status to Carol M. Ridker and Stephen Saltzburg.

Applicant's Case. The Applicant presented Ms. Marinkovich's testimony, as well as that of her partner, Mr. Royce Burton. Both Ms. Marinkovich and Mr. Burton testified that the operation of their gallery in the Applicant's building would have no adverse impact on the neighborhood. Ms. Marinkovich testified that she will be living on the premise and that the gallery will not cause any objectionable noise, pedestrian or vehicular traffic. She testified that once a week, the gallery receives a delivery from a framing shop, and that the driver parks his vehicle and carries the framed art to the gallery. She also testified that, although the gallery will have approximately 8 to 10 special events per year, these events will not be catered, engendering no negative impacts from deliveries, and will be small, with a maximum of 40 attendees, most of whom will not be attending simultaneously. Mr. Lindsley Williams, an expert in land use planning, submitted a detailed report and testified on behalf of the applicant. He opined that the opening of Ms. Marinkovich's gallery would have no objectionable impacts on the neighborhood whatsoever. The Applicant and a close neighbor, Mr. Michael Frame, also testified as witnesses in support of the application.

Government Reports. On September 25, 2002, OP submitted a late report on the application, which was accepted by the Board. OP recommended denial of the application because of the imbalance between residential and commercial uses in the neighborhood. OP was concerned with the potential adverse impacts of the gallery, including, a loss of residential space, the loading/unloading of catering and art delivery trucks, and up to 15 on-site special events per year, with a maximum of 100 guests per event. In an October 21, 2002, Supplemental Report, OP continued its opposition to the application, even after taking into account reduced guest count at special events. In a December 27, 2002 Amendment to its October 21, 2002 Supplemental Report, OP listed, but was not swayed by, the Applicant's proffered conditions, and reiterated its recommendation that the application be denied.

ANC Report. By letter dated September 24, 2002, ANC 2B indicated that it voted at a regularly scheduled meeting, with a quorum present, to "protest" the application. In its letter, the ANC did not go so far as to oppose the application because it was still negotiating with the Applicant. The ANC, however, made clear its opposition through the hearing testimony of its representative, Mr. Micone. Mr. Micone stated that ANC 2B concurred with OP's conclusion that the opening of the gallery in the Applicant's building would adversely affect the present character and future development of the surrounding area.

Parties and Persons in Support. There were no parties in support of the application, however, Ms. Anne Corbett, of the Cultural Development Corporation, testified as a person in support. Three local residents, Ms. Ellyn Ambrose, Mr. David Hatfield, and Ms. Ira Pinto, who also runs an art gallery, also testified as persons in support of the application. Several letters and a petition in support were entered into the record.

Parties and Persons in Opposition. There were three parties in opposition, Messrs. Vincent Hurteau and Morton Schussheim and Ms.Solange Muller-MacArthur, but they joined as one party for purposes of efficiency. The opposition party was initially represented by Mr. Hurteau, but was represented by Mr. Stephen Saltzburg on and after November 26, 2002. By letter dated October 1, 2002, the Dupont Circle Citizens Association stated its opposition to the application. A petition and several letters in opposition were received into the record, including letters from
Phil Mendelson and Jack Evans, District of Columbia Councilmembers. Without withdrawing his opposition, however, Councilmember Evans also sent a second letter indicating that the Board should consider the position of those in support of the application.

Hearing. The public hearing on the application began on October 1, 2002, but was postponed until October 29, 2002, at which time the Applicant presented his case, calling 4 fact witnesses and 1 expert witness. The hearing was then continued until November 12, 2002, but due to the lateness of the hour at which it could have been taken up, it was

again continued to November 26, 2002, when the opponents put on their case, calling 4 fact witnesses. The hearing concluded on November 26, 2002.

Decision Meeting. At the public decision meeting on January 14, 2003, the Board voted 4-1-0 to grant the application, subject to certain conditions, for the reasons stated below.

FINDINGS OF FACT

Applicant's Property

1. The subject property is located in Square 93, bounded by R Street, N.W. to the north, 21st Street, N.W. to the west, Connecticut Ave., N.W. to the east, and Hillyer Place, N.W., to the south.

2. The subject property is located in a DC/D/R-5-B combined zone district. It is therefore within an R-5-B residential zone, within the Diplomatic Overlay zone district, which is located within the Dupont Circle Overlay District.

3. The property is a three story plus basement row house, built prior to 1958, and attached on both sides to similar row houses. It currently houses a three-unit apartment building and has an existing art gallery in the basement level.

4. The property has a one-car garage, with two off-street parking spots adjacent to it. The two spots will be available for gallery clients. The gallery will occupy approximately 1,200 square feet in the subject building.

5. 11 DCMR § 361 permits an art gallery as a special exception in an R-5-B district if approved by the Board, subject to its provisions and those of § 3104.

6. The property is owned by the Applicant, who proposes to lease it to Ms. Andrea Marinkovich. She proposes to live in the third floor and part of the second, and to use the remaining space on the second floor and the entire first floor for art gallery purposes.

The Proposed Art Gallery

7. Ms. Marinkovich has, for the last 9 years, operated a small art gallery at 1506 21st Street, N.W. She proposes to move into Applicant's building in order to increase the size of her gallery.

8. The proposed art gallery, Burton Marinkovich Fine Arts, (hereinafter referred to as the "gallery") will be operated by Ms. Marinkovich and her partner, Mr. Royce Burton. The gallery will have one employee, a paid intern, who works from 20 to 32

hours per week. Ms. Marinkovich works at the gallery approximately 10 hours per week, with Mr. Burton on site during the rest of the time the gallery is open.

9. The gallery will receive one delivery of framed art per week. There will be no loading or unloading associated with this delivery. The deliveryperson will park his vehicle and carry the art to the gallery.

10. The gallery will ship purchased art to clients via a commercial shipper, but this will not involve any loading or unloading at the gallery site.

11. The gallery will be a low-key operation which will not attract much pedestrian or vehicular traffic to the neighborhood. Its hours will be 10:00 a.m. to 6:00 p.m., exclusive of evening special events.

12. The gallery will not attract impulse buyers, as an average individual sale will range from $6,000 to $10,000, although some sales may be as low as $50.00.

13. The gallery will host special events, specifically private, "by invitation only" events and events open to the public, such as "First Friday" gallery walks. The First Friday events have been occurring in the neighborhood for approximately 10 years. They are open to the public and people are encouraged to stroll through the neighborhood and visit the open galleries. They occur 10 times each year, on the first Friday of the month, from 6:00 to 8:00 p.m. Private events will take place in the evening, between the hours of 6:00 and 9:00 p.m. and will be by invitation only. It is anticipated that during each private event, a maximum of approximately 100 people would attend, with possibly 30 to 40 people at the gallery at any one time.

14. At special events, the gallery will serve light fare and beverages, including beer and wine, but not including hard liquor. No events at the gallery will be catered.

15. The gallery will have unobtrusive security lighting directed at the Applicant's building.

16. The gallery will not make any architectural or structural changes to the exterior of the property and will continue to use the current doorway to the ground floor of the premise. Nor will the gallery make any significant changes to the interior of the structure which would in any way preclude its future use as a wholly residential building.

17. The gallery will display one small, unobtrusive sign on the exterior façade of the building.

18. The Board credits the testimony of Ms. Marinkovich, Mr. Burton, and the

Applicant's zoning expert, Mr. Williams, that the gallery will create no objectionable conditions in the neighborhood.

19. The Board finds that the gallery is not likely to become objectionable to adjoining and nearby property because of objectionable noise, pedestrian and vehicular traffic, hours of operation, or other objectionable conditions.

The Surrounding Area

20. The area in which the subject property is located has diverse uses within it, including, on the same block, two other art galleries and a building used by the Republic of Chad.

21. There are approximately 10 art galleries, including the Phillips Collection, currently operating within about a 2-block radius of the subject property. There has, however, been an overall net decrease in the number of galleries in the neighborhood within the last 10 years, with approximately 5 closed galleries re-converted to residential use, as well as an increase of over 1,000 units of housing within the Dupont Circle area between 1990 and 2000.

22. The subject property is located 1 block west of Connecticut Avenue and within reasonable walking distance of a Metro station.

23. There are several commercial parking garages available to the public within reasonable walking distance of the subject property.

24. The Board finds that the opening of the gallery will not change the character of the neighborhood from residential to commercial and that it will not in any other way adversely affect the present character or future development of the surrounding area.

CONCLUSIONS OF LAW

The Board of Zoning Adjustment is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. D.C. Official Code § 6-641.07)g)(2) (2001); 11 DCMR § 3104. Special exceptions are deemed to be compatible uses in the zones in which they are allowed and if the Board finds that the special exception application satisfies the conditions imposed by the regulations, the application must be granted. *See, e.g., First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment,* 432 A.2d 695, 698 (D.C. 1981).

The Applicant is seeking a special exception pursuant to 11 DCMR §§ 3104 and 361 to open an art gallery in an R-5-B zone district. The requirements imposed by § 361 can be grouped into three categories. Sections 361.2 and 361.5 concern any potential adverse affect on the surrounding area and nearby properties due to objectionable conditions, such as noise or pedestrian or vehicular traffic. Section 361.4 mandates that the gallery provide adequate off-street parking to accommodate occupants, employees and visitors. Lastly, §§ 361.3 and 361.6 direct the Board to consider and control the physical design of the structure housing the gallery and the operation of the gallery itself if necessary to protect adjacent and nearby properties. Pursuant to these last two sections, the Board has conditioned the granting of this special exception, as set forth below.

The bulk of the testimony at the hearing centered on potential adverse impacts to the neighborhood generated by the gallery. The testimony of Ms. Marinkovich, Mr. Burton and the Applicant made it clear that the gallery was a use of low-scale intensity, which, if run responsibly, would have no adverse impact on adjacent or nearby properties. There was no testimony as to potential problems with signage, noise or light generated by the gallery. The major adverse impacts feared by the opposition, the ANC and OP were loss of residential space, leading down a slippery slope toward a change of the residential character of the neighborhood, and parking and traffic congestion.

Loss of Residential Space and Alleged Change in Neighborhood Character

The Board finds that the negligible loss of residential square footage as a result of the opening of the gallery does not militate against the granting of the special exception. There is no loss of a residential building, merely a change of use of some of the square footage within the building. The gallery is not making any changes to either the exterior or the interior of the building which would somehow prevent or make more difficult the future conversion of the building back to full residential use.

The Board notes that the immediate neighborhood recently lost two small apartment buildings with the expansion of the Phillips Collection, which is located just one block from the proposed gallery. The expansion was very controversial in the community and may have sensitized it to any more gallery use within the neighborhood. There is no evidence, however, that one more small gallery will lead to loss of residential character and somehow lead to a *de facto* commercial re-zoning of the area. Whether the Zoning Commission may later decide to rezone this area is not a relevant issue for this Board and would, in any event, be a speculative inquiry.

Section 350.1 permits, in an R-5 zone, "those institutional and semi-public buildings that would be compatible with adjoining residential uses." Therefore, R-5 zoning provides for a mixed-use neighborhood and the Applicant's building is a mixed-use building. Further, in 1988, the Zoning Commission, in Order No. 558, specifically declined to end

the ability of galleries to locate in residential zones, making them instead subject to the special exception process and thereby legally deeming a gallery a compatible use within such zones. In fact, Order No. 558 states that the Commission "is not persuaded that an art gallery is a hostile use in residential zones simply because it is not classified as a residential use." Zoning Commission Order No. 558, at 3 (1988).

During the hearing and in the OP Report, there was much concern that the neighborhood had reached a "tipping point," in which the balance between residential and non-residential uses had somehow tipped away from the residential and that the opening of this gallery either would be the cause of this "tipping" or would further "tip" the balance. The Board, in any special exception analysis, looks to present and potential future impacts, individual, as well as cumulative, and here perceives OP's "tipping point" concerns as going to the "present character and future development of the surrounding area," as stated in §361.5. After carefully reviewing and considering the record, and duly weighing the concerns expressed by OP and the ANC, the Board concludes that the opening of this small gallery will not adversely affect the present character or future development of the surrounding area in the manner suggested.

Parking

In this case, there is no parking required by Chapter 21 of the zoning regulations. The residential portion of the building does not require off-street parking because it is a pre-1958 building. *See,* § 2100.1. The gallery portion of the building does not require off-street parking because it is less than 3,000 square feet in size. *See,* § 2101.1. Instead, § 360.4 requires that the gallery provide adequate off-street parking. Section 360.4's mandate of adequate off-street parking is to ensure, in the context of the special exception, that parking for the gallery will not have an adverse impact on the neighborhood. The subject property has one parking space in the garage and two adjacent spaces. Ms. Marinkovich testified that two of these spaces would be reserved for use by visitors to the gallery. The Board concludes that this is adequate off-street parking to meet the needs of the gallery. The two spaces are adequate, and are augmented by the gallery's proximity to several local public garages and a Metro station.

The ANC's Recommendation

The Board is required to give "great weight" to both OP's recommendation and to the issues and concerns raised by the ANC. D.C. Official Code §§ 6-623.04 and 1-309.10(d) (2001). The Board must articulate why the ANC does or does not offer persuasive advice, discussing each of the ANC's issues and concerns. *Id.* The Board seriously considered the positions of both OP and the ANC and has found them unpersuasive. Both OP and the ANC were concerned with the "tipping point" issue, which was unsubstantiated by the record.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for the special exception under §§ 3104 and 361 for the operation of an art gallery in an R-5-B zone district. The Board further concludes that the special exception can be granted in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map. It is therefore **ORDERED** that the application be **GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS:**

1. All gallery events shall end at 9:00 p.m. or earlier.

2. Any deliveries made for gallery events shall be made between the hours of 9:00 a.m. and 4:00 p.m.

3. There shall be no on-site food preparation at the gallery.

4. No alcoholic beverages shall be served at events open to the general public, but beer and wine may be served at private, "by invitation only" events.

5. There shall be no more than 10 gallery events per year that are open to the general public, including those events known as "First Friday" gallery walks.

6. There shall be no more than 8 private, "by invitation only" gallery events per year.

7. Private, "by invitation only" gallery events shall be restricted to a maximum of 40 guests.

8. There shall be no banners or signs on the exterior of the gallery, except a one-square-foot nameplate.

9. Invitations to the gallery shall contain information about the proximity of a Metro station and nearby parking garages.

10. Two of the three parking spaces on the premises shall be maintained solely for the use of clients and guests of the gallery.

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., John G. Parsons, and David A. Zaidain, to grant. Anne M. Renshaw, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each voting Board member has approved the issuance of this Order granting the application, with conditions.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: APR 1 1 2003

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED,

REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16920

As Director of the Office of Zoning, I hereby certify and attest that on APR 1 1 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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