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October 15, 2002

NORMAN M. GLASGOW, JR.
202-419-2460

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VIA HAND DELIVERY
Members of the Board of Zoning Adjustment
District of Columbia Office of Zoning
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: Board of Zoning Adjustment Case No. 16924
Jemal's Wheel/1701 Kalorama Road, N.W.

Dear Board Members:

This letter is submitted on behalf of the applicant in the above-referenced case as requested by the Board of Zoning Adjustment (the "Board") at its October 8, 2002, public hearing. At that hearing, the Board postponed this case to December 10, 2002. The Board, however, raised a question as to whether relief from the height permitted under the Reed-Cooke Overlay should be requested in the nature of a special exception or a variance. The applicant submits this letter in support of the position that a special exception is the appropriate relief to be requested.

The property at issue is zoned RC/C-2-B and is located in the Reed-Cooke Overlay District. The applicant proposes to construct an apartment house with a height of sixty-five feet. The underlying zone district permits a maximum height of sixty-five feet. 11 DCMR § 770.1. The Overlay, however, reduces the permitted height to a maximum of forty feet in all underlying zones. See 11 DCMR § 1402.1. The same Overlay requirement also provides that, in the RC/C-2-B District, the Board may approve a maximum of fifty feet with appropriate set-backs from the street, plus roof structures, subject to determination by the Board that the project will provide a certain amount of low or moderate income household units. 11 DCMR § 1402.1.

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Case No. 16924
Exhibit No. 35

Board of Zoning Adjustment
District of Columbia
CASE NO.16924
EXHIBIT NO.35

Alternatively, Section 1403.1 of the Zoning Regulations provides as follows: "An exception from the requirements of **this chapter** shall be permitted only if granted by the Board of Zoning Adjustment as a special exception after a public hearing and subject to the following criteria. . ." 11 DCMR § 1403.1 (emphasis added). Chapter 14 is entitled "Reed-Cooke Overlay District." The plain language[1] of the Regulations provides for special exception relief when an applicant seeks an exemption from the requirements of Chapter 14. There is no stated limitation as to what that relief may be, only that it be from a "requirement of this chapter." In the present case, the applicant requests an exemption from the height provision set forth in Section 1402, which is a "requirement of this chapter."

Accordingly, the applicant has requested a special exception under Section 1403 from the height requirements set forth in the Overlay District. No variance is necessary. First, the proposed height is that permitted by the underlying zone district (C-2-B). Second, the applicant is not proceeding under the exception provision set forth in Section 1402.1 and, therefore, is not required to seek a variance from that provision to request a height in excess of fifty feet. When more than one method of relief is possible, an applicant has the right to choose under which to proceed. In this case, the applicant has chosen to proceed with a special exception as permitted under Section 1403.

In Board of Zoning Adjustment Case No. 16914, the Board recently addressed a similar issue. In that case, the applicant requested a variance from the maximum permitted height of roof structure under the Uptown Arts-Mixed Use Overlay District. Both the Office of Planning, the Board and the applicant agreed that the relief requested should be a special exception under Section 1906, a provision which is almost identical to Section 1403. The present case is no different.

Furthermore, there are numerous examples of the Board permitting the applicant to chose the relief under which it wishes to proceed. For instance, with respect to an addition to a one-family dwelling, an applicant may choose to proceed with a special exception under Section 223 or with a variance from the individual section of Chapter 4 with which the addition does not comply.

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[1] When construing the Regulations, the rules of statutory construction dictate that one look to the plain language of the statute. When the language is unambiguous and does not produce an absurd result, the Board should not look past its plain meaning. *See Citizens Association of Georgetown v. D.C. Board of Zoning Adjustment*, 642 A.2d 125, 128 (D.C.App. 1994).

Similarly, the Zoning Regulations provide several means by which to obtain approval for location of parking spaces on a site. An applicant may seek a special exception under Section 213 for a parking lot, a special exception under Section 214 for accessory parking spaces or a special exception under Section 2116.5 for location of parking spaces. In these cases, the Board allows the applicant to proceed in a manner most appropriate and best-suited for its case.

Likewise, in this case, nothing in Section 1402 requires the applicant to request a variance from that section and nothing in Section 1403 precludes the applicant from requesting a special exception under that section. Thus, the applicant has the right to choose under which section it proceeds.

Finally, in the recent order for Board of Zoning Adjustment Case No. 16869 and effective September 23, 2002, the Board stated at page 3: "An applicant may apply for a special exception to exceed the requirements of the Reed-Cooke overlay only up to the matter of right limits." A copy of that order is attached hereto as Exhibit A. In the present case, the applicant is doing exactly that: requesting a special exception to exceed the height permitted under the Overlay up to the maximum height permitted as a matter of right, which is sixty-five feet in the C-2-B District.

We therefore believe that the Board should appropriately consider this application as a request for special exception relief. Should you have any questions or need additional information, please do not hesitate to let us know.

Sincerely,

Norman M. Glasgow, Jr.

Christine Moseley Shiker

cc: Maxine Brown Roberts, Office of Planning (Via Hand Delivery)
Alan Bergstein, Office of Corporation Counsel (Via Hand Delivery)

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16869 of King's Creek, LLC, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, a variance from the non-conforming structure provisions under subsection 2001.3, and a variance to exceed the height requirements under section 400 to construct an addition to an existing building for a mixed use (residential and retail) development in an R-5-B District at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103).

Hearing Date: April 30, 2002
Decision Dates: June 4, 2002, August 6, 2002

DECISION AND ORDER

Kings Creek, LLC, the owner of Lot 803 in Square 2563, filed a self-certified application with the Board of Zoning Adjustment on March 5, 2001, pursuant to 11 DCMR § 3103.2, for a variance from the floor area ratio requirements under section 402, a variance from the lot occupancy requirements under section 403, a variance from the non-conforming structure provisions under subsection 2001.3, and a special exception pursuant to section 1403.1, to construct an addition to an existing building for a mixed use (residential and retail) development at premises 2329 Champlain Street, N.W. (Square 2563, Lot 103). On June 4, 2002, after a public hearing, the Board granted the application by a vote of 4-1. For the reasons stated below, the Board determined that a height variance, and not a special exception, was required. Therefore, on August 6, 2002, at its regularly scheduled public meeting, the Commission voted 4-0 to reopen the record and to reconsider its decision to grant the height relief requested. At that meeting, the Board granted the application for a height variance by a vote of 4-0-1, with one member not present, not voting.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated March 7, 2001, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; Advisory Neighborhood Commission (ANC) 1C, the ANC for the area within which the property that is the subject of the application is located; the ANC Commissioner for the affected single-member district; and the Ward 1 Councilmember, of the application.

The Board scheduled a public hearing on the application for April 30, 2002. Pursuant to 11 DCMR § 3113.13, the Office of Zoning on March 12, 2002, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 1C notice of the hearing.

The applicant submitted an affidavit of posting, indicating that 3 zoning posters were posted on the site, on March 12, 2002.

Applicant's Case. Representing the applicant at the hearing was the law firm of Griffin, Farmer & Murphy, LLP. At the hearing for this case, the applicant presented testimony from expert witnesses and exhibits depicting the details of the proposed project.

Public Agency Reports and Memoranda. The Office of Planning ("OP") submitted a report dated April 23, 2002, that expressed concerns about the height of the applicant's project but supported the project in all other respects. On April 26, 2002, OP submitted a supplemental report stating its support of the height for the proposed project. OP based its support on the design features of the project, including the setbacks, and the fact that setbacks, and the corresponding height increase, is necessary to mitigate the adverse effect on air and light for the surrounding properties that building on that lot would otherwise have.

ANC Report. In its report received May 2, 2002, ANC 1C indicates that on April 16, 2002, at a scheduled and duly-noticed public hearing with a quorum present, ANC 1C unanimously supported the application. The ANC stated that the project was a welcome addition to the neighborhood. The ANC further noted the Applicant's efforts to solicit neighborhood comment on the project. The ANC supported the effort to provide additional light, air and outdoor space in the neighborhood.

Request for party status. There were no requests for party status

Persons in Support of the Application. Councilmember Jim Graham, in a letter dated March 8, 2002, urged this Board to approve this application, noting that the application met the expressed goals of the Reed-Cooke Overlay. The Councilmember also stated that the project would enhance the ambiance and reduce heat effects in his recommendation for approval. He noted that the Applicant had incorporated his suggestion for setbacks to avoid the creation of a "canyon" effect on Champlain Street.

Persons in Opposition to the Application. There were no persons in opposition to the application.

Darnell Bradford El, Chairman of the Reed-Cooke Neighborhood Association testified hat he did not have a position on the application but that he was concerned with the "process". He requested that the matter be continued to allow further review by community residents. Under cross examination, Mr. Bradford El stated that he had not attended any of the previously held meetings between the community and the Applicant. In response, this Board left the record open for the Reed-Cooke Neighborhood Association to provide comments. However no additional comments were received.

Closing of the Record. The record closed at the conclusion of the public hearing on April 30, 2002, but was left open for the Applicant to provide a memorandum on whether the height relief requested was a special exception or a variance under the Zoning Regulations. This memorandum was submitted and received in timely manner.

Decision Meetings. At its decision meetings on June 4, the Board voted 4-1-0 to grant the application.

After June 4th decision, the Board determined that a variance, and not a special exception, was required for approval of the project's height. The applicant stated that the subject property was within the Reed-Cooke overlay, and therefore the applicant was applying for a special exception under § 1403.1 to exceed the height requirements. However, the subject property is not in the Reed-Cooke overlay by virtue of § 1400.1, which provides that portions of the listed squares "that are zoned non-residentially as of January 1, 1989" are included in the overlay. While the applicant's square, 2563, is included in the list provided for in the regulation, the square was zoned residentially on the January 1, 1989, date. Therefore, the applicant's square is not included in the overlay.

In addition, even if the applicant's property was within the overlay, a special exception for the height requested is not provided for in the regulations. The applicant requesting a special exception to exceed the 40-foot height requirement of the Reed-Cooke overlay for a 69-foot high structure, well in excess of the 50-foot matter of right height in an R-5-B district. An applicant may apply for a special exception to exceed the requirements of the Reed-Cooke overlay only up to the matter of right limits. To allow otherwise would allow the overlay to create a less stringent height requirement by offering a special exception where a variance was otherwise required, which was plainly not the Zoning Commission's intent when it established the overlay. See 11 DCMR § 1400.4 (when there is a conflict between the overlay and the underlying zone, the more restrictive requirements apply).

At its August 6, 2002, regularly scheduled public meeting, the Board granted the application for a height variance by a vote of 4-0-1.

Findings of Fact

1. The subject property is located in the R-5-B District on the east side of Champlain Street, N.W., north of its intersection with Kalorama Road, N.W.

2. The subject property is a 9,652 square feet lot occupied with a two-story building with a footprint of 9,395 square feet. Lot occupancy is 97.3 percent. The height of the existing structure is 31.5 feet. The total existing building area is 18,401 square feet.

3. The subject site is improved with a stone, steel, concrete and brick structure that was erected as an automobile garage in 1924. The site is currently used as retail, office and storage space, but is vacant on the second floor.

4. The existing building is in need of rehabilitation, as represented by the applicant at the public hearing.

5. The subject site was originally zoned CM. The site was re-zoned by the Zoning Commission to R-5-B in 1987.

6. The R-5-B Zoning District permits developments of moderate height and density. The nearby Reed-Cooke Overlay District is designed to protect existing housing, provide for new residential development, and encourage small-scale business development that does not adversely affect the residential uses.

7. The surrounding area has a wide variety of buildings including auto repair shops, electroplating facilities, open parking lots, two story single family residential buildings and apartment houses, some of which are between five and seven stories. Directly to the west of the subject site is a mixed use development, known as the Lofts of Adams Morgan that contains 57 residential units, 4,000 square feet of retail space and has a height of 56 feet.

8. The Applicant proposes a mixed-use development on the subject site. The existing building on the site will be retained in its entirety and four additional levels with 13 residential apartments will be constructed. The existing retail use on the first floor will be retained while the second floor will be renovated for parking and residential use. The improvements will add 19,539 square feet for a total of 37,940 for the entire structure.

9. The applicant will provide 13 parking spaces for the residential units.

10. The Applicant has agreed, in consultation with representatives of neighborhood interests and ANC 1C, to provide at least one "affordable" residential unit in the project.

11. The Applicant testified that the existing structure, while not a designated landmark, was a unique architectural style that had substantial significance in the neighborhood. It further stated that one of its main goals was to ensure the continued presence of the Brass Knob, an existing tenant, because of its long time and much-desired presence in the neighborhood.

12. As explained by the applicant's architect, the proposed structure represents an attempt to meet the challenges of the site and maximize the residential character of the immediate neighborhood, while minimizing its impact on the surrounding neighborhood.

13. The structure was designed with a series of setbacks that minimized the visual impact of the addition from the street while providing the maximum amount of light and air for both the residential units and the abutting street. The height of the proposed structure compatible with the height of the development immediately across the street to the west.

14. The Applicant will provide additional outdoor space for each unit in a manner that adds to the neighborhood aesthetic.

15. The architectural design of the units and overall project is innovative and of significant merit.

16. The Office of Planning noted the requests for relief would not cause any "substantial detriment to the public good" and would not substantially impair the intent, purpose or integrity of the zone plan embodied in the Zoning Regulations or Map "because the proposal fulfilled the intent of increasing residential use and the height was mitigated by the setbacks that allowed light to the street and the units themselves." In its testimony, the Office of Planning noted that the Applicant had met with community representatives and organizations and received their approval and agreed with their various proposals.

Variance from §§ 403 and 2001.3

17. Section 403.2 allows a maximum lot occupancy of 60% for developments in the R-5-B district.

18. The existing building has a lot occupancy of 97.2% and is therefore nonconforming as to lot occupancy.

19. The addition will increase the lot occupancy, due to a proposed overhang included in the structure, to 99%.

20. Section 2100.3(a),(b) & (c) together provide that an addition to a nonconforming structure may be made, provided the structure is conforming as to lot occupancy, the addition conforms to structure requirements, and the addition does not increase the nonconforming aspect of the structure.

21. The addition, to a nonconforming structure, will not conform to lot occupancy requirements, other structure requirements, will increase an existing nonconformity, and create a new nonconformity, and therefore a variance from §§ 403 and 2100.3(a), (b) & (c) is required.

Variance from §§ 402 and 2001.3(c)

22. The maximum allowable FAR in a R-5-B district is 1.8, pursuant to § 402.

23. The existing building has a FAR of 1.9 and is therefore nonconforming with respect to FAR.

24. The applicant proposed an additional 2.0 FAR, for a total of 3.9 FAR.

25. Section 2100.3(c) provides that the "addition or enlargement itself shall not increase or extend any existing, nonconforming aspect of the structure. . .".

26. The addition will increase the FAR of the overall structure and therefore variances from §§ 402 and 2100.3(c) are required.

Variance from § 400.1 height requirements

27. The height limit for buildings in an R-5-B is 50 feet (11 DCMR § 400.1)

27. The proposed structure will be 69.6 feet in height and therefore a variance from § 400.1 is required.

Conclusions of Law

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. The applicant is seeking variances from §§ 400.1, 402, 403, and 2100.3 for an increase in FAR, lot occupancy, height, and to construct an addition to a nonconforming structure. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

The Board is authorized to grant variances where "by reason of exceptional narrowness, shallowness, or shape of a specific property. . . or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or conditions" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property. . ." D.C. Code § 6-641.07(g)(3), 11 DCMR § 3103.2. Where an applicant seeks an area variance, as here, the above standard of "practical difficulties" applies, with the "undue hardship" standard applying only to use variances. Palmer v. Board of Zoning Adjustment, 287 A.2d 535 (D.C. App. 1972).

Additionally, variance relief can be granted only "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map". Id.

In reviewing a proposed variance, the Board is required under D.C. Official Code § 6-623.04 to give "great weight" to OP recommendations. The Board is also required under D.C. Official Code § 1-309.10(d) to give "great weight" to the affected ANC's recommendations. Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(a) (2001)), the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns.

The applicant's property is exceptional in two respects, both of which give rise to practical difficulties. First, as noted by the ANC 1C and the Office of Planning, the site is currently occupied by a historic structure. The applicant and community stress the importance of preserving this structure because of its aesthetic appeal and because it adds to the architectural variety of the area. However, the structure is underutilized, being vacant on its second floor. Any addition to the structure, because of its existing nonconformity as to lot occupancy, would require a variance from § 2100.3 of the Zoning Regulations. Any reconstruction on the site as a matter of right would therefore require demolition of the existing structure in whole or in part. Demolition of the structure

would be a loss to the community at large because of the structure's value to that community.

The site it is also unique because it is surrounded by structures that have created a canyon effect. This canyon effect has served to deprive the street and the subject property of light and air and therefore creates a practical difficulty. To overcome this difficulty, the applicant proposes to extend the building upwards, taking advantage of the slope of the site, to provide more light and air to the units. Also, in order to avoid contributing to this canyon effect, the applicant is adding significant setbacks to the third and fourth, fifth, and sixth stories. The setbacks increase in size with the vertical rise of the building. Strict application of the zoning regulations would therefore result in an adverse impact to this neighborhood. Therefore, granting to permit the applicant to exceed allowable FAR and height limits is appropriate.

The Board therefore finds that these circumstances constitute an "exceptional situation", and that, as a result of these circumstances, the strict application of the zoning regulations would result in peculiar and exceptional practical difficulties upon the owner of the property.

As noted by ANC 1C and the Office of Planning, the applicant's proposed project will not be detrimental to the public good. One parking space is provided for each new housing unit created by this project, minimizing any impact on parking in the area that might arise from the increased density. Also, the proposed project will utilize the existing rear entrance to the building as its primary means of parking access. Thus, there will be no interference with pedestrian traffic. The height and density of the proposed project is, due to topography and existing structures, compatible with the heights and densities of other buildings and developments in the immediate area. Moreover, the applicant's proposal, due to high quality and innovative design, will serve to benefit the greater public, while adding much needed housing stock to the District.

The variances will not be detrimental to the zone plan where the underlying R-5 zone is intended to "permit a flexibility of design", 11 DCMR § 350.1, and contains numerous multi-unit apartment buildings.

For the reasons stated above, the Board concludes the applicant has met its burden of proof. It is hereby **ORDERED** that the application is **GRANTED.**

Public Meeting of June 4, 2002

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis Etherly, Anne M. Renshaw, David M. Levy, to approve variances from §§ 402, 403, and 2001.3, Peter G. May to oppose).

Public Meeting of August 6, 2002
VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis Etherly, Anne M. Renshaw, David A Zaidain, to approve a variance from § 400.1, Peter G. May, not present not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: SEP 2 3 2002

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C.LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 14 IN TITLE 2 OF THE D.C. CODE. SEE D.C. CODE SECTION 2-1402.67 (2001). THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER. NOTE IN SECTION 2-1401.01 OF THE D.C. HUMAN RIGHTS ACT. THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITY, 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. DISCRIMINATION IN VIOLATION OF THE

ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16869

As Director of the Office of Zoning, I hereby certify and attest that on SEP 2 3 2002 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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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning