GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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**Application No. 16927 of the Public Welfare Foundation and Manna, Inc.,** pursuant to 11 DCMR § 3103.2, for a variance from the lot area and lot width requirements under § 401, a variance from the lot occupancy requirements under § 403, a variance form the rear yard requirements under § 405, a variance from the parking space location requirements under subsection 2116.1, and a variance from the building on alley lots provisions under subsection 2507.2, to allow the construction of 10 single-family row dwellings in the R-4 District at premises rear 1300 block of Temperance Court, N.W. (Square 274, Lots 57-61, and 804 through 820 (1 through 12 per sub.)).

**HEARING DATE:** October 22, 2002
**DECISION DATES:** December 10, 2002, January 14, 2003, February 4, 2003, April 1, 2003

**DECISION AND ORDER**

There are two applicants in this case. One is the Public Welfare Foundation ("Foundation"), owner of the property which is the subject of this application. The other is Manna, Inc. ("Manna"), holder of an option to purchase the property in order to develop housing thereon. The Applicants hoped to construct affordable housing on the subject property. Because they believed that lots greater than a certain size would not allow them to offer affordable housing, they proposed to subdivide the subject property into lots smaller than the minimum lot size mandated by the Zoning Regulations for an R-4 zone district. The lot sizes chosen also made compliance with other area requirements impossible. The applicants now seek variances, not because there is anything unique about the subject property itself, but because they claim that strict compliance with the Zoning Regulations makes the provision of single family affordable housing projects impossible in an R-4 zone, where this property happens to be located. Thus, the applicants' difficulty does not arise from the property itself, but from an alleged conflict between the economics of affordable housing and the area requirements of the zoning regulations. For this and other reasons stated below, the Board must deny the application. The appropriate forum to resolve the applicants' dilemma is the Zoning Commission, which could fundamentally change the area requirements allegedly impeding the provision of affordable housing, or permit this Board, by special exception, to do so in particular cases. But that type of broad regulatory relief is not within the Board's jurisdiction to give.

**PROCEDURAL HISTORY**

BZA
Case No. 16927
Exhibit No. 46



Board of Zoning Adjustment
District of Columbia
CASE NO.16927
EXHIBIT NO.46

In a memorandum dated June 17, 2002, the Office of the Zoning Administrator of the District of Columbia notified the Board that zoning relief would be necessary for the Applicants' proposed construction. On June 27, 2002, the Applicants filed the appropriate application with the Board, requesting the zoning relief necessary to bring their project to fruition.

On October 22, 2002, the Board held a public hearing on the application. After the hearing, the Board determined that, prior to making its decision, additional information was needed from the Applicants, the District of Columbia Office of Planning ("OP") and the District of Columbia Department of Transportation ("DDOT"). Between the hearing and the scheduled date of the public decision meeting, December 10, 2002, the Board received a report from DDOT, a supplemental report from OP and two further submissions from the Applicants. The two reports, filed late, were accepted by the Board, but their lateness hampered the Board's review of them. Moreover, in their two submissions, the Applicants indicated that they were considering changing their design, thereby changing their application and the type of relief they needed. The Board, therefore, put off its decision on the application and requested further clarification from the Applicants, including information as to any changes in the application and how they affected the relief necessary. The Board also requested a report from the District of Columbia Department of Fire and Emergency Medical Services ("Fire Department") concerning the accessibility to emergency vehicles of the proposed row house development. The decision meeting was re-scheduled for January 14, 2003.

At the request of the Applicants, the January 14, 2003 public meeting was re-scheduled to February 4, 2003. During the February 4, 2003 decision meeting, OP put into the record a report it had received from the Fire Department which requested a prohibition on parking in the alley bounding the subject property to the east. After extensive discussion on February 4, 2003, the Board, on its own motion, continued the case until April 1, 2003. The Board was particularly concerned with issues of density, parking, accessibility for emergency vehicles, and vehicular and pedestrian safety. The Board indicated that the Applicants needed to make further changes in the project to address these issues. The Applicants did so and re-submitted the project to the Board. Even with these further changes, however, the Board could not overcome serious reservations about the application and voted 3-0-1 to deny it. (The seat of the fifth Board member, a mayoral appointee, was vacant at the time the vote was taken.)

## PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated July 16, 2002, the District of Columbia Office of Zoning ("OZ") notified the Council Member for Ward 1, Advisory Neighborhood Commission ("ANC") 1B, the ANC member for Single Member

District 1B02, OP and the District of Columbia Department of Public Works (actually DDOT), of the filing of the application. Pursuant to DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on August 27, 2002, mailed notices to ANC 1B, the Applicants, and to all owners of property within 200 feet of the subject property, advising them of the date of the hearing. Several of the hearing notices to nearby property owners were returned to OZ, but the Applicants' affidavit of posting indicates that on October 7, 2002, they placed, in plain view of the public, one zoning poster at 13th St., near U St., N.W., and 2 zoning posters in the 1900 block of Temperance Alley, a.k.a. Temperance Court.

Requests for Party Status. There were no requests for party status.

Applicants' Case. Mr. Larry Kressley, Executive Director of the Foundation, testified as to the Foundation's community development activities. Mr. George Rothman, president of Manna, testified generally as to the need for affordable housing and in some detail about the Temperance Row project, including discussing the community meetings at which the project was presented. The project's architect, Mr. Carl Skooglund, testified concerning the proposed site plan, the building elevations and the floor plans. Mr. Nate Gross, the Applicants' city planning consultant, testified as to the lot sizes chosen by the Applicants and the difficulties of building within the constraints of 4 perimeter alleys, all less than 20 wide. Mr. Skooglund, and particularly Mr. Gross, attempted to address the need for the multiple variances requested. A Ms. Martha Davis, with Manna, also testified in response to a question asked by a Board member.

Government Reports. The District of Columbia Department of Housing and Community Development provided a memorandum dated October 9, 2002, supporting the Applicants' project. In a February 28, 2002 report, the staff of the Historic Preservation Review Board approved the Applicants' design in concept, with a direction that the Applicant work with staff on the final design. On October 15, 2002, OP submitted its first report on the Applicants' project, which recommended approval of the relief requested, subject to minor design revisions to satisfy the Historic Preservation Review Board. On December 3, 2002, DDOT submitted a report to the Board which supported the variance from the required off-street parking, but did not support the planned access to three of the row houses from the 10-foot wide rear alley which forms the eastern perimeter of the property.

OP then filed a Supplemental Report with the Board on December 3, 2003, which listed questions referred to DDOT and the Fire Department as a result of the Board's October 22 hearing. OP's Supplemental Report further conditioned OP's approval of the project on the answers to these questions and on a redesign of the three eastern row houses to provide vehicular access from the frontal 25-foot alley rather than from the rear 10-foot alley, as highlighted by DDOT.

On February 4, 2003, the Board received a report from the Fire Department, which stated that the Department had no objections to the project, as long as each unit had sprinklers installed in it. The report, however, went on to express concern about the functioning of emergency response apparatus if vehicles were parked in the "east alley," *i.e.,* the rear 10-foot alley which also concerned OP and DDOT. The Fire Department requested that no parking be permitted in this alley.

After vehicular access to the three (later revised to two) eastern row houses was changed to the central 25-foot alley, DDOT filed a Supplemental Report with the Board on March 25, 2003, supporting the application as revised. This Supplemental Report noted that the Applicants were considering working with the residents and DDOT to make the alley a one-way circulation system and to install appropriate signage, as the alleys are too narrow for two-way circulation.

ANC Report. By letter dated October 1, 2002, ANC 1B indicated that it voted at a June 10, 2002 meeting, with a quorum present, to support the application. The letter, however, also addressed "several issues of concern" with the application. The size of the row houses, pedestrian and emergency access and the proposed setback from the alley and existing row houses along 13th Street were all areas of concern. In the ANC letter and at the ANC meeting, the view was also expressed that "the project would more appropriately have been developed along 12th Street, the current location of the Public Welfare Foundation's parking lot (with the parking lot moving to the proposed location for these row houses)"

Parties and Persons in Support. There were no parties or persons in support of the application.

Parties and Persons in Opposition. Mr. Philip Spalding, a resident of 13th Street, N.W., who lives approximately one block from the proposed project, testified in opposition to the location of the project. Mr. Spalding testified as to concerns about access for both emergency vehicles and trash trucks. Mr. Spalding's biggest concern, however, was the alley-locked location of the project. He stated several times that the project should have been proposed for the 12th Street location of the Foundation's current parking lot, which is approximately one block east of the proposed development site and fronts on 12th Street.

Hearing. The public hearing on the application was held, and completed, on October 22, 2002.

Decision Meetings. The Board held its first decision meeting on the application on December 10, 2002. The Applicants, however, informed the Board of possible design changes in the project which could affect the relief required. Therefore, the Board put off

its decision and scheduled a new decision meeting for January 14, 2003. The January 14th decision meeting was re-scheduled to February 4th at the request of the Applicants. On February 4, 2003, the Board, on its own motion, continued the meeting until April 1, 2003, asking the Applicants, in the mean time, to address certain critical issues. After reviewing Applicants' new information, the Board, on April 1, 2003, finally decided to deny the application by a 3-0-1 vote. (The seat of the fifth Board member, a mayoral appointee, was vacant at the time the vote was taken.)

## FINDINGS OF FACT

1. The subject property is unimproved land located in the center of Square 274 in the Shaw Neighborhood of Ward 1, in the Northwestern Quadrant of the District of Columbia.

2. The property is actually comprised of two separate pieces of land, separated by a 25.25-foot wide public alley, called Temperance Court. To the west of Temperance Court is a long, rectangular parcel, 47.50 feet east to west by 200 feet north to south. To the east of Temperance Court is a shorter, wider, square parcel, 57.50 feet east to west by 57.14 feet north to south. Together, the two parcels include 12,785.55 square feet.

3. Square 274 is bounded by U Street, N.W. to the north, T Street, N.W. to the south, 12th Street, N.W. to the east, and 13th Street, N.W. to the west. The two subject parcels, however, are located within the center of the square, and are bounded by 15.25-foot wide public alleys to the north and south, a 10-foot wide through public alley to the west,[1] and a 10-foot wide dead-end public alley to the east. Neither parcel has any street frontage, and they are therefore "alley lots" as defined in 11 DCMR § 199.1.

4. The two parcels have access to public streets through the central 25.25-foot wide alley and the east-west-running 15.25-foot wide alleys bounding them on the north and south.

5. The subject property is zoned R-4.

6. To the west and south of the site, respectively, are the rear yards of a continuous row of three-story row houses that front on 13th Street and two-story row houses that front on T Street. To the north, just across the northern 15.25-foot wide alley, is the western entrance of the U Street/Cardozo Metrorail Station, with its plaza and surplus land, proposed to be improved with an office building. Due east of

[1]The Applicants have set back their fence row along the western perimeter alley by two feet, creating a de facto 12-foot wide alley, but the legal measurement of the alley width is 10 feet.

this land is a low-rise commercial building and then the True Reformer Building. Just south of the northern 15.25-foot wide alley, and abutting the northern edge of the smaller eastern parcel of the subject property, is a one-story, brick utility building owned by the Washington Metropolitan Area Transit Authority. To the east of this utility building is the Foundation's parking lot along 12th Street.

7. The owner of the property is the Public Welfare Foundation, which acquired it, and other nearby property, sometime before spring, 2001. By that time, the Foundation had renovated the True Reformer Building as its headquarters. The True Reformer Building is located diagonally across the northern 15.25-foot wide alley from the subject property.

8. At least as early as 1960, part of the subject property had been used as a parking lot. (*See,* Board Order No. 5908, dated May 25, 1960.) In 1987, the Duron Paint Store then located in the True Reformer Building, was granted approval in Board of Zoning Adjustment Case No. 14574, to use the subject property as accessory parking. The paint store parking lot, however, was never constructed or officially established. By order dated April 1, 1998, the Board next granted a special exception to the former owner of the True Reformer Building, Temperance Market, LLC, to use the subject property (in its entirety) as a parking lot. Again, no official parking lot was established, and although the property is currently used to park cars on, it is, for all intents and purposes, vacant land.

9. For the use of its employees, the Foundation maintains its own surface parking lot located just to the northeast of the subject smaller eastern parcel. (This parking lot is currently in use and does not include any of the property which is the subject of this application.) The parking lot abuts the southern edge of the northern 15.25-foot wide alley and is directly across the alley from the True Reformer Building. The parking lot has approximately 85 feet of street frontage on 12th Street, N.W.

10. The Foundation did not need to use the subject property as a parking lot and therefore consulted the community to determine what was the best use for the property. After this consultation, the Foundation decided to build affordable housing on the site.

11. The Foundation solicited proposals for the development of the site and selected that of Manna, Inc., its partner in this project.

12. The Foundation plans to convey the site to Manna free of charge and has committed a grant of additional funds to support the project.

<u>The Applicants' Original Design</u>

13. There currently exist on the site 22 lots, each measuring 11 feet wide by 47.5 or 57.5 feet long.[2] The Applicants intended to subdivide these into 12 new lots, most measuring 18 or 20 feet in width. The center lot on the eastern side of Temperance Court would measure 17.14 feet in width. The north lot on the western side would measure 39 feet in width, with 20 feet taken up by the footprint of the row house and the southern lot on the western side would measure 29 feet, with, again, 20 feet taken up by the footprint of the row house situated on that lot.

14. The Applicants planned 9 lots to the west of Temperance Court, each 47.50 feet long and 3 lots to the east of Temperance Court, each 57.50 feet long.

15. On each of the 9 lots to the west of Temperance Court, the Applicants originally proposed building 1 small row house fronting on the western side of Temperance Court. On each of the 3 lots to the east of Temperance Court, the Applicants originally proposed building 1 small row house fronting on the eastern side of Temperance Court.

16. Each row house would be two stories high, at 33 feet, 3 inches in height, and would have a 6.5-foot front-yard setback.

17. The Applicants proposed making Temperance Court a one-way alley, making parallel parking in the alley a possibility.

Relief Necessary for Applicants' Original Design

Rear Yard

18. The minimum required depth of a rear yard in an R-4 zone district is 20 feet. (*See,* 11 DCMR § 404).

19. Each of the 9 row houses situated to the west of Temperance Court had 10.5-foot deep rear yards, and each required variance relief from rear yard provisions. The eastern row houses, situated on lots 10, 11 and 12, each had a rear yard of over 20 feet, therefore no rear yard relief was required for these three lots.

Lot Occupancy

[2]In discussing the measurement of lots, the measurement of "width" is the applicable north-south measurement, and the measurement of "length" is the applicable east-west measurement.

20. The maximum lot occupancy for a row dwelling in an R-4 zone district is 60%. (*See,* 11 DCMR § 403).

21. Units numbers 2, 3 and 5, on lots 2, 3 and 5 each had a lot occupancy of 66.66%, thereby requiring variance relief from lot occupancy requirements.

22. Units numbers 1 and 9 were one-family, semi-detached dwellings because each of them had one side yard. (*See,* definition of "Dwelling, one-family, semi-detached," in 11 DCMR § 199.1).

23. The maximum lot occupancy for a semi-detached dwelling in an R-4 zone district is 40%. (*See,* 11 DCMR § 403). According to the record, both Units 1 and 9, on lots 1 and 9, complied with this maximum lot occupancy requirement, and so did not require variance relief.

Lot Width

24. The minimum lot width for a row dwelling in an R-4 zone district is 18 feet. (*See,* 11 DCMR § 401).

25. Unit number 11, on lot 11, had a lot width of 17.14 feet. Lot 11, therefore, required variance relief from minimum lot width provisions.

Lot Area

26. The minimum lot area for a row dwelling in an R-4 zone district is 1,800 square feet. (*See,* 11 DCMR § 401).

27. Unit number 9, on lot 9, had a lot area of 1377.5 square feet, triggering the need for variance relief from minimum lot area requirements.

28. Units numbers 2, 5 and 8, on lots 2, 5 and 8, each had a lot area of 855 square feet. They each needed relief from minimum lot area requirements.

29. Units numbers 3, 4, 6 and 7, on lots 3, 4, 6 and 7, each had a lot area of 950 square feet, and so needed variance relief from minimum lot area requirements.

30. Units numbers 10 and 12, on lots 10 and 12, each had a lot area of 1150 square feet, triggering the need for variance relief from minimum lot area requirements.

31. Unit 11, on lot 11, had a lot area of 985.55 square feet, and therefore needed variance relief from minimum lot area requirements.

Building on Alley Lots

32. Single-family dwellings may not be constructed on lots which abut alleys less than thirty feet in width or on lots which do not have alley access to a street through alleys at least thirty feet in width. (*See,* 11 DCMR § 2507.2).

33. Neither Temperance Court, nor any of the 4 perimeter alleys bounding the subject property are thirty feet or more in width, therefore variance relief from the building on alley lots provisions was required.

Parking[3]

34. Sections 2101.1 and 2116.1 of the zoning regulations require, respectively, in an R-4 district, one off-street parking space for each new residential unit and that the parking space be located on the same lot as the residence it is intended to serve.

35. Applicants originally proposed 10 off-street parking spaces for the 12 units of the project. The project as a whole therefore needed variance relief from the one-space-per-unit requirement of § 2101.1

36. Five of the parking spaces to be provided were to be located immediately to the north of lot 1, and two were to be located immediately to the south of lot 9. Lots 1 through 9, therefore, did not provide a parking space on the lot itself, triggering the need for variance relief from the requirements of § 2116.1. Lots 10, 11 and 12 did not require relief from § 2116.1 as they were each to have one parking space in the rear yard.

<u>The Applicants' First Revision of the Original Design</u>

37. The Applicants revised their original design by proposing two and one-half additional feet of paved alley width behind the three eastern row houses and by moving the location of the parking space for the southernmost of these three row houses from the southern boundary of the lot (lot 12) to its northern boundary. This made lot 12's parking space adjacent to the parking space on the next lot to the north, lot 11, thus improving vehicle maneuverability.

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[3]The Applicants first requested a special exception under § 2116.5, which referred them to § 2117.9. Subsections 2117.9(a) and (b) apply only to row dwellings with street frontage. Subsection 2117.9(c) does not specify whether it, too, applies only to row dwellings with street frontage, but it must be read in the context of the rest of § 2117.9. In this context, the Board reads § 2117.9(c) as applying to row dwellings with street frontage, making it inapplicable here. Instead, it was determined that the Applicants most appropriately needed variance relief from § 2116.1, which states that a required parking space be located on the same lot with the building it is intended to serve.

38. The Applicants further revised their original design by removing the near-alley portions of fences between each of the three eastern row house lots. (lots 10, 11 and 12)

The Applicants' Second Revision of the Original Design

39. The Applicant reduced the number of row houses proposed from 12 to 10, by eliminating one row house from the western row and one from the eastern row. After the second revision, the final configuration of the project is: 9 lots with 8 row houses on the western parcel of land, each fronting on the western side of Temperance Court, and 2 lots with 2 row houses on the eastern parcel, each fronting on the eastern side of Temperance Court. The western lots and units are numbered 1 through 8, north to south, and the eastern lots and units are numbered 9 and 10, north to south.

40. The group of five parking spaces situated at the northern end of the western row was eliminated. Instead, 10 parking spaces are now located at the southern end of the western row, in a new parking lot area, which is 45 feet wide and 47.5 feet long. The Applicants will implement a sticker system to denote authorized vehicles and will post "no parking" signs to attempt to prohibit use of this area by the public.

41. The eastern row of row houses now consists of two units, numbers 9 and 10. Unit 9 has one parking space on it, at the northern end of its lot, which is accessible only from Temperance Court. Unit 10 (old unit 12) no longer has a parking space in its rear yard, therefore all parking spaces proposed for the project are accessible from Temperance Court.

42. Pedestrian access along the northern 15.25-foot wide alley will be denoted by a striped, three-foot-wide marked area on the surface of the alley, an approach with which DDOT concurs.

Revised Relief Necessary for Applicants' Second Revision of the Original Design

Rear Yard

43. The minimum rear yard depth in an R-4 zone district is 20 feet. (*See,* 11 DCMR § 404).

44. All the western row houses, (now numbered 1 through 8, north to south), have rear yards of 10.5 feet, and all require variance relief from rear yard requirements. The

two eastern row houses, (now numbered 9 and 10, north to south), with rear yards of more than 20 feet, do not require such relief.

Lot Occupancy

45. Units numbers 1 and 9 each have 1 side yard and each is, therefore, a one-family, semi-detached dwelling. (*See,* definition of "Dwelling, one-family, semi-detached," in 11 DCMR § 199.1).

46. The maximum lot occupancy for a semi-detached dwelling in an R-4 zone district is 40%. (*See,* 11 DCMR § 403).

47. Unit 1, on new lot 1, has a lot occupancy of greater than 40%, triggering the need for variance relief from maximum lot occupancy provisions.

48. The lot occupancy of unit 9, on new lot 9, was not provided by the Applicant, therefore it is uncertain whether is needs variance relief from maximum lot occupancy provisions for one-family, semi-detached dwellings.[4]

49. The lot occupancy of Unit 8, on new lot 8, is also unknown, but from the site plan provided by the Applicants, it does not appear to need variance relief from lot occupancy requirements.

Lot Width

50. The minimum lot width for a one-family, semi-detached dwelling in an R-4 zone district is 30 feet. (*See,* 11 DCMR § 401).

51. Unit 1, on new lot 1, a semi-detached dwelling, has a lot width of 21.5 feet, and therefore needs variance relief from minimum lot width requirements. Unit 9, on new lot 9, is also a semi-detached dwelling, but has a lot width of 33 feet and 1 and 3/4 inches, and therefore does not need variance relief from lot width requirements. Unit 8, on new lot 8, is also a semi-detached dwelling, but has a lot width of 66.5 feet, and so does not require variance relief from lot width requirements.

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[4]The Applicant, in its Post-Hearing Submission No. 4, states that "[l]ots 1 and 10 now require a variance from lot occupancy requirements ... [t]hese variances derive from the fact that semi-detached dwellings are limited to 40 percent lot occupancy rather than the 60 percent allowed for row dwellings." It appears from the site plan attached to this submittal, however, that it is actually Units numbers 1 and 9, and not Units 1 and 10, that are semi-detached dwellings. Unit 10 appears from this plan to be a row dwelling, subject to the greater 60% lot occupancy maximum. The Applicant did not supply the Board with the lot occupancy of Unit 10, therefore the Board cannot determine whether Unit 10 needs lot occupancy relief, even from this more lenient **requirement.**

52. All the other Units, 2 through 7 and 10, are row dwellings, and as such have a minimum lot width requirement of 18 feet, which they meet.[5]

Lot Area

53. The minimum lot area for a row dwelling in an R-4 zone district is 1,800 square feet. (*See,* 11 DCMR § 401).

54. Units numbers 3 and 6, on new lots 3 and 6, each have a lot area of 950 square feet. They each need variance relief from lot occupancy requirements.

55. Units numbers 2, 4, 5 and 7 on new lots 2, 4, 5 and 7 each have a lot area of 855 square feet, thereby requiring variance relief from lot occupancy requirements.

56. Unit 10, on new lot 10, has a lot area of 1,380 square feet, also requiring variance relief from lot area requirements.

57. The minimum lot area for a semi-detached dwelling in an R-4 zone district is 3,000 square feet. (*See,* 11 DCMR §401).

58. Unit 1, on new lot 1, a semi-detached dwelling, has a lot area of 1021.25 square feet, and so requires variance relief from the minimum lot area requirements.

59. Unit 9, on new lot 9, a semi-detached dwelling, has a lot area of approximately 1897.5 square feet, and so needs variance relief from minimum lot area requirements.

60. Unit 8, on new lot 8, a semi-detached dwelling, has a lot area of 3,055 square feet, and so does not require variance relief from lot area requirements.

Side Yard[6]

61. A semi-detached dwelling in an R-4 zone district must have a side yard of at least 8 feet. (*See,* 11 DCMR subsection 405.2)

62. Unit 1, on new lot 1, a semi-detached dwelling, has a side yard of 1 and 1/2 feet, thereby requiring variance relief from side yard requirements.

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**[5]Again, Applicant, in its Post-Hearing Submission No.4, states that Unit 10 is a semi-detached dwelling. Looking at the site plan attached to this submittal, this does not appear to be the case. Unit 10 is a row dwelling and Unit 9 is a semi-detached dwelling.**

**[6]Side yard relief was not requested by the Applicant, but the Board has determined that it would be required.**

63. Units 8 and 9, on new lots 8 and 9, both semi-detached dwellings, both have side yards of more than 8 feet, and so do not need relief from side-yard requirements.

64. The other Units, 2 through 7, and 10, are row dwellings, which by definition, do not require side yards. (*See,* definition of "Dwelling, row," in 11 DCMR § 199.1)

Building on Alley Lots

65. The relief required remains unchanged. *See,* Findings of Fact numbers 32 and 33.

Parking

66. The project, as re-revised, provides 11 parking spaces for 10 units, thus the need for variance relief from § 2101.1 has been removed.

67. Section 2116.1 requires that one parking space per unit be located on the same lot with the unit. Unit 9, on new lot 9, now complies with this requirement, and so does not need variance relief from this section. All of the parking spaces for the other 9 new units, however, will be located on part of new lot 8, at the southern end of the western row of row houses. Therefore, these units, *i.e.,* new units 1 through 8 and new unit 10, still need variance relief from § 2116.1.

Public Detriment and Impairment of the Zone Plan

68. Due to the narrowness of the alleys involved here, fire trucks and other large vehicles, including trash and recycling trucks, may have difficulty accessing the proposed row dwellings. This difficulty would present a public health and safety hazard, not only to the occupants of the proposed row dwellings, but also to adjacent property owners.

69. The introduction of 10 new row dwellings would add pedestrian and vehicle traffic and parked cars to the alleys, adversely affecting alley access, causing traffic and parking congestion and potentially causing unsafe conditions.

70. The density of development proposed by the Applicants is too great for the limited amount of land involved and the alley-locked location of the building site, resulting in potential overcrowding and potentially unhealthy conditions.

71. Section 2507 restricts the use of alley lots and disfavors high-density construction thereon by permitting (other than non-residential uses) only one-family dwellings and only when the 30-foot alley width requirements are met.

## CONCLUSIONS OF LAW

The Board is authorized to grant variances from the strict application of the zoning regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" 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. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2. 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.* An applicant for an area variance[7] must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The Applicants in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicants, and that the granting of the variances would not impair the public good or the intent and integrity of the zone plan and regulations.

The First Test -- Extraordinary or Exceptional Situation or Condition ("Uniqueness")

Based on the record herein, the Board is constrained to conclude that the Applicants failed to show any extraordinary or exceptional situation or condition of the subject property. When determining whether a property is unique for variance purposes, "[t]he critical point is that the extraordinary or exceptional condition must affect a single property." *Gilmartin v. District of Columbia Board of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990). This point is "critical" in order to avoid demands from similarly-situated property owners, "approval of [whose] requests would in effect be amending the Zoning Regulations, thereby undermining the function of the Zoning Commission whose task it is to make the basic legislative judgments in drafting regulations." *Palmer, supra,* 287 A.2d at 539. Such a multiplicity of similar demands would frustrate the whole point of a variance as a "safety valve" to avoid possible unfair and/or unconstitutional consequences which may arise in certain individual instances when the use of private property is regulated by zoning. *See, e.g., Goreib v. Fox,* 274 U.S. 603, 607 (1927). A variance, therefore, as an exception to the rule, must not be

[7]The Applicants argued their variance requests as if all the relief sought went to area requirements. However, the prohibition against single family dwellings on these types of alley lots is better analyzed as a use variance, because it results in the complete prohibition of a use in these circumstances. However, since the Applicants have not succeeded in meeting the "practical difficulty" test, there is no need to undertake the stricter analysis required for a use variance.

granted lightly and must arise out of an exceptional condition affecting a particular property, and not all or most similarly-situated properties.

The Applicants' representative states that the exceptional condition of the property "is created by a combination of factors, including the H-shaped alley system, the small size of the existing alley lots, and the limitations imposed by the Historic Preservation Regulations." (Transcript of October 22, 2002 Public Hearing, (hereinafter referred to as Oct. 22 Trans.), at 258; S*ee also,* Applicants' Pre-Hearing Statement at 7, Exhibit No. 9). None of these factors, however, even if considered in the aggregate, make the subject property unique.

The alley system certainly is not unique in Washington, D.C., a city with many similar alley systems. The Applicants themselves make this clear in their Exhibit C, attached to Exhibit No. 42. Exhibit C presents copies of 9 maps of squares in the Shaw neighborhood. All of these maps depict alley systems with 10- and 15-foot wide alleys. The Applicants state that these alley systems are "typical" and that "[t]he 10-foot wide alley is the most common, followed by a few 10-foot and 15-foot alleys and an occasional 20-foot or wider alley." It is difficult, if not impossible, to claim that the alley system in question here is simultaneously "unique" and "typical."

Applicants' third factor fails for the same reason. The Historic Preservation Regulations apply equally to all properties within historic districts. *See,* D.C. Official Code § 6-1101, *et seq.* (2001). The application of those regulations here is no different from their application to any other site within any historic district in Washington, D.C. As the Court of Appeals said in *Capitol Hill Restoration Society v. District of Columbia Board of Zoning Adjustment,* 534 A.2d 939, 940 (D.C. 1987) the inclusion of a property in a historic district:

> is not a condition which uniquely affects the lot at issue.
> If this fact were sufficient to justify a finding of uniqueness,
> then each and every parcel of land within the ... Historic
> District would be entitled to a variance on this basis.

Applicants' second stated reason for uniqueness, the small size of the existing alley lots, is irrelevant here, as the Applicants are free to re-subdivide the existing lots into larger lots. The property is vacant and the Applicants are not constrained in their creation of larger lots by any existing improvements or by any legal impediments, such as easements on the land.

Because the Applicants' representative stated that the property's uniqueness "included" the three above-discussed factors, the Board looks for further factors creating an extraordinary or exceptional situation or condition. One such factor presented by the

Applicants is the narrow width of the perimeter alleys involved here, which creates the need for variance relief from § 2507.2. Section 2507.2 mandates that a single-family dwelling shall not be constructed on an alley lot which abuts a less-than-30-foot-wide alley or which does not have access to a street through alleys at least 30 feet wide. First, as stated earlier, the width of the perimeter alleys is common throughout the Shaw neighborhood. It is not unique to this property. Second, this property is not unique *because* the alleys do not conform to the 30-foot width requirement. The mere proximity of this property to an alley less than 30-feet in width proves nothing more than that a variance is needed to undertake the use desired.

The subject property is comprised of a long rectangular parcel to the west of Temperance Court and a square parcel to its east. Together, the two parcels encompass 12,785.55 square feet. Neither parcel is particularly angular or oddly-shaped in any way. Neither parcel is affected by a gradient change or other unusual topographical feature. Both parcels are unexceptional, unimproved lots. It is true that the parcels do not have street frontage, but, as explained above, this is not unique, and as explained below, this actually works against the granting of the variances requested, as lack of street frontage impairs the intent, purpose and integrity of the zone plan. The Board therefore concludes that the Applicant has failed to make a convincing showing of an extraordinary or exceptional situation or condition of its property.

The Second Test -- Practical Difficulties

Nor have the Applicants made a convincing showing of any practical difficulties arising out of the property itself -- unique or not. The only real practical difficulty encountered by the Applicants is their desire to fit 10 units on a land area that is, under the zoning regulations, too small to sustain that many units. There has been no credible showing that a matter-of-right use, or even a less dense use, cannot be made of the property. At the hearing, the Board questioned why the Applicants did not subdivide the land into conforming, or more conforming, lots. In answer, the Applicants' representatives stated that larger lots with, presumably, more open space, would be more expensive to build (for example, because of the increased number of exterior walls), and would be out of character with the surrounding neighborhood. (Oct. 22 Trans. at 259 and 273). Although the Board is permitted to consider economic factors in a variance analysis (*See, Tyler v. District of Columbia Board of Zoning Adjustment,* 606 A.2d 1362, 1366-1367 (D.C. 1992)), the Board also "has no authority to grant a variance in order to assure the economic viability of the use of a particular property in a particular manner." *Silverstone v. District of Columbia Board of Zoning Adjustment,* 396 A.2d 992, 994 (D.C. 1979). In the instant case, the Board is unconvinced that a less dense development would be economically infeasible or that the economic burden rises to the level of practical difficulties required for the granting of a variance.

Nor is the Board persuaded by the Applicants' second reason for choosing small lots -- that larger lots would be out of character with the neighborhood[8]. The Applicants' representative stated that widening the lots to be conforming "would make them out of character with the greater U Street historic district and probably not approvable by HPRB. That's not a definite, but in our opinion it would be out of character...." (Oct. 22 Trans. at 258). The Applicants have not brought a larger-lot design to the HPRB and therefore are only speculating that it would not be approved. The fact that these are alley-bound lots dictates that larger lots may work better to maintain a higher quality of life. The alleys, particularly the perimeter alleys, are narrow, restricting the flow of light and air and potentially giving the appearance of overcrowding. Larger lots with more open space would benefit the inhabitants and avoid such an appearance. Further, larger lots would help overcome the problem of parking space location. With fewer units on larger lots and a parking space on each lot, the need for variance relief from § 2116.1 would be obviated. (*See,* Finding of Fact No. 68).

The Applicants' representative stated that if they were to build on conforming lots they could build 5 units to the west of Temperance Place and 1 unit to the east. (Oct. Trans. at 236). Nowhere do the Applicants explain satisfactorily, however, why such a conforming development could not be built so as to be "in character" with the surrounding neighborhood. The Applicants' assertion of the existence of practical difficulties is not enough; there must be proof of their existence in the record. There is nothing in the record pointing to any real practical difficulty in abiding by the zoning regulations.

Finally, it is the Zoning Regulations, and not the design preferences of a particular applicant, that determines what lot size is appropriate for properties within the R-4 zone district. The fact that the applicant would prefer smaller lots than allowed in order to achieve aesthetic conformity does not rise to the level of practical difficulty.

Therefore, based on the facts before it, the Board concludes that there is no practical difficulty arising out of the strict application of the zoning regulations.

The Third Test -- Effect on Public Good and Intent, Purpose and Integrity of Zone Plan

A variance can only be granted "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." D.C. Official Code § 6-641.07(g)(3) (2001); 11 DCMR § 3103.2. Although the Board feels that the provision of "affordable housing" is certainly a meritorious undertaking and that the Applicants are attempting to benefit their community, it concludes that the project, as proposed, could negatively

[8]Although made in the context of a practical difficulty analysis, the Applicants' desire to create small lots to blend in with adjacent similarly sized lots belies their uniqueness contention.

affect the public good and would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations.

The alleys surrounding the proposed project are too narrow to sustain the increased pedestrian and vehicular traffic which would be associated with the project. While the provision of one parking space for each row dwelling meets the requirements of the zoning regulations, multiple-vehicle homes and guest parking would generate additional traffic and parking congestion in these narrow alleys and in the neighborhood. The Board is also concerned with the safety of pedestrians in these narrow alleys and the ability of trash trucks and emergency vehicles to access structures abutting these alleys. The Board is not unmindful that DDOT supported the application as revised and that the Fire Department had no objection to the project, except to request that parking not be allowed in the eastern 10-foot dead-end alley. The Board, however, concludes that, even if fire trucks can access these dwellings, the negative impacts on the public good which will likely arise from the presence of these row dwellings crowded into two interior lots cannot be avoided.

Section 2507 rather severely restricts construction on alley lots, particularly the construction of dwellings. No structures for "human habitation" shall be constructed on alley lots except a single-family dwelling on a lot which abuts, and has access to a street through, alleys at least 30 feet wide. Subsection 2507.3 goes on to say that nonresidential structures on less than 30-foot wide alleys shall not be converted to residences and further, that single-family dwellings already existing on less than 30-foot wide alleys may not be altered if the cost of such alteration exceeds one-half the value of the structure. Subsection 2507.4 limits the height of a structure on an alley lot in an attempt to retain the flow of air and light to and around alley structures. The restrictions articulated in § 2507 are unchanged since § 7507 of the 1958 Zoning Regulations first enunciated them. The 1958 regulations sought to address problems with alley dwellings, many of which lacked sufficient air and light and had become slums.[9] The construction of "affordable housing" on alley-bound, interior lots may lead to the same conditions originally targeted by § 7507 in 1958. Relegating "affordable housing," to alley-bound, interior lots does not properly integrate it or its inhabitants into the community. Clearly, the construction of dwellings on alley lots, and any significant density of construction of such dwellings, is disfavored by the zoning regulations. The Board therefore concludes that the Applicants' proposed project would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations.

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[9] *See,* the HPRB Report on the Applicants' project: "[a]lleys have provided a location for affordable housing in Washington since the city's inception. However, by the early 20th century, their often cramped, substandard and unsanitary conditions made them a target of progressive reformers who worked successfully to abolish alley dwellings -- and often the alleys themselves -- in many areas of the city." HPRB Staff Recommendation and Report, at 1.

ANC and OP Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). The Board has seriously considered the report of ANC 1B. Although the ANC voted to support Applicants' project, its letter also highlighted several important concerns, such as access to the property, alley setbacks and the size of the row dwellings. The alley-bound siting of the project, when a more suitable site with street frontage (also belonging to the Foundation) was available, was also mentioned as a concern. Taking into consideration not only the ANC's final recommendation, but also the issues its letter raises, as well as the findings of fact and conclusions of law set forth above, particularly the Board's determination that the Applicants have failed to meet the three variance tests, the Board is not persuaded by the ANC's recommendation. Similarly, the Board has carefully considered OP's report and recommendations, but cannot agree that this project meets the variance tests or that it will not substantially impair the intent, purpose and integrity of the zone plan. In fact, the OP report seems to base its approval recommendation largely on the facts that the lots here are "small," "shallow" and abutting "narrow" alleys. The Board finds that these facts militate against granting the many variances requested for this project. The Board finds it difficult to believe that the zone plan, as embodied in the regulations, sanctions this density of development on such "small," "shallow" lots on "narrow" alleys.

**CONCLUSION**

The Board regrets that its decision may delay this project. It appreciates the good motives behind the endeavor and general community sentiment in favor of its going forward. But the zoning regulations exist first and foremost to protect the public health and safety. The prohibition against residential uses on these types of alley lots, the requirement for on-site parking, and the other minimum area requirements that this project fails to meet cannot be waived simply because a project seeks to achieve important social goals. As the Zoning Commission has stated: "A variance must not be granted lightly and never on the basis that a project is popular or has exceptional merit." *Sua* Sponte Review *of Board of Zoning Adjustment Application No. 16869 of King's Creek, LLC*, Z.C. Case No. 02-37/16869 (2003).

At the beginning of this order, the Board noted that the problems identified by the applicant go beyond the confines of a particular lot, but relate to an apparent conflict between what the zoning regulations require and the flexibility that this affordable housing provider claims to need. The evaluation and resolution of this claimed conflict requires the type of zoning policy analysis that can only be undertaken through rulemaking by the Zoning Commission. This Board is without jurisdiction to do so.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application, pursuant to 11 DCMR § 3101.2, for a variance from the lot area and lot width requirements under § 401, a variance from the lot occupancy requirements under § 403, a variance from the rear yard requirements under § 405, a variance from the parking space location requirements under subsection 2116.1, and a variance from the building on alley lots provisions under subsection 2507.2, to allow the construction of 10 single-family row dwellings in the R-4 District at premises rear 1300 block of Temperance Court, N.W. (Square 274, Lots 57-61, and 804 through 820 (1 through 12 per sub.)).

It is therefore **ORDERED** that the application be **DENIED.**

**VOTE:** **3-1-1** (Geoffrey H. Griffis, David A. Zaidain and Anthony J. Hood, to deny; Curtis L. Etherly, to grant, with the fifth member, a mayoral appointee, not present, not voting.)

**BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT**
Each voting Board member has approved the issuance of this Order denying the application.

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

**FINAL DATE OF ORDER:** AUG 15 2008

UNDER 11 DCMR 3103.1, "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." rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

**BZA APPLICATION NO. 16927**

As Director of the Office of Zoning, I hereby certify and attest that on AUG 15 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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rsn

**ATTESTED BY:**

**JERRILY R. KRESS, FAIA**
**Director, Office of Zoning**