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D.C. BOARD OF ZONING
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Geoffrey H. Griffis, Chairperson
D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Re: Board of Zoning Adjustment Application No. 16927
Temperance Row – Public Welfare Foundation and Manna, Inc., Applicants
Motion for Reconsideration

Dear Mr. Griffis and Members of the Board:

The Applicants in this case – the Public Welfare Foundation and Manna, Inc. -- have reviewed the Board of Zoning Adjustment's (the "Board") Order in Case 16927 issued August 15, 2003, which denied the Application. The Applicants hereby requests that the Board reconsider its decision and grant approval to the application. This statement sets forth the respects in which the Applicants believe the decision is erroneous and the reasons for reconsideration and approval, pursuant to the Zoning Regulations at 11 DCMR §§ 3126.2 –3126.4.

1. **"Economics of Affordable Housing."** The "Decision and Order" section on page one of the Order states a fundamental reason for the Board's denial, namely, that the Applicant's case is based on economics and therefore lacks merit.

The Order states, "Because [the applicants] 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 . . . The applicants now seek variances, not because there is anything unique about the subject property itself, but because they claim that strict compliance . . . makes the provision of single family affordable housing projects impossible in an R-4 zone . . . 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."

BZA
Case No. 16927
Exhibit No. 49

Applicants' Response:

- The Applicants offered absolutely no written or oral testimony stating that the variance request was based on the economics of affordable housing. No one on the applicants' team stated that lots "greater than a certain size" would preclude provision

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of affordable housing, or that relatively more lots were needed because this is an affordable housing project.

- The statements in the order attribute motive and intent to the Applicants, which in the absence of any testimony, cannot be known by the Board: "The applicants believed that lots greater than a certain size would not allow them to offer affordable housing . . ." "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 . . ." (emphasis added) The Applicants had no such belief and made no such allegation.

- Further, on p. 15 under "The Second Test – Practical Difficulties" the Order states. " . . . the Applicants' representatives stated that larger lots . . . would be more expensive to build (for example because of the increased number of exterior walls.)"

- Only two minor responses to questions during the October 22, 2002 public hearing come even close to statements about economic feasibility, and they were not part of the Applicant's variance case:

  1. From the public hearing transcript, p. 259:

  Chairperson Griffis: And you're saying that one [subdivision plan] has already been submitted and that it doesn't get as many houses or bang for the buck.

  Mr. Gross: There's that.

  "There's that" is almost an offhand statement and does not constitute testimony by the Applicants that economic feasibility was offered as a basis for variance approval. It is the Chairman who brought up the number of houses related to "bang for the buck."

  2. Responding to the Chairman's suggestion that semi-detached houses with parking in the side yards might be preferable to a group row dwellings with parking spaces consolidated at the end of the row, Applicant's architect Carl Skooglund responded:

  Mr. Skooglund: Our intent was to try to make as much of a block of houses as possible. . . . Not the least of which reason is to keep from building so many exterior walls. Exterior walls are more costly to construct. And it is a small development. . . .

  Chairperson Griffis: Yes. Well, I think you're absolutely correct. It would add cost.

  Again, the factor of cost comes up only in response to a question from the Board, but is not presented as part of the Applicants' case for a variance. Mr. Skooglund actually cited the small number of units in the development as a reason why it would not be cost-efficient to construct additional exterior walls.

Constructing a group of row dwellings in an R-4 zone is the normal and customary development pattern. A developer of market-rate housing would also prefer building row houses over semi-detached houses, in part because of the efficiency of less exterior wall construction.

In summary, the Applicants made no reliance at all on economic feasibility as a basis for the requested variances. The Order mistakenly places great reliance on this false assumption.

2. Exceptional Condition of the Property. The Applicant's case for the exceptional condition of the property, creating a practical difficulty in using the property, derives first and most importantly from the combination of the H-shaped alley system and the small lots. Currently the property is divided into 22 very small lots, rather than the 10 proposed in the application. *The uniqueness derives from the fact that the small existing lots are surrounded by alleys, so that the land area, but most importantly the depth of the lots, cannot be increased. The Applicants never stated that narrow alleys per se are exceptional or part of our variance case.*

Width of Existing Alleys as Variance Basis. On p. 15, second full paragraph, the Order distorts Exhibit C of Applicant's submission in Exhibit No. 42 in the record. The Order states that the narrow alleys depicted on a series of maps were purported by the Applicant to show a unique condition related to the variance. This is plainly false. The maps were submitted as part of the January 30, 2003 post-hearing submission, under the heading, "Parking Spaces – Lots 10, 11, 12." The submission was solely for the stated purpose of demonstrating that cars can and do access parking pads and garages from narrow alleys. *This evidence clearly was not offered as part of the Applicants' exceptional condition case.*

As stated above, it is the fact that alleys surround the east parcel and the west parcel that creates the exceptional condition. The condition of an H-shaped alley system that completely encompasses small lots is extremely rare in the District of Columbia.

In the last full paragraph on p. 15, the Board states: " . . . the Applicants are free to re-subdivide the existing lots into larger lots." In fact, the constraints of a shallow depth of 47 feet on the western parcel and 57 feet on the eastern parcel, together with other area requirements such as a 20-foot rear yard, severely limit the subdivision potential. Because of the shallow lot depth imposed by surrounding alleys, larger lots can only be created by increasing the width of the lots to a great extent. Wide, shallow lots, together with a 20-foot rear yard requirement, results in detached or attached houses that are also wide and shallow. These would be completely out of character with surrounding residential development and the character of development that the Historic Preservation Review Board expects in this neighborhood. The Order dismisses this willingness to cooperate with the historic preservation process as "speculation" as to what

might be acceptable to the HPRB. Applicant was not speculating. Applicant worked with the HPRB staff since the project's inception and understood what would be acceptable to the HPRB. That is why the project received HPRB conceptual approval early in the development process.

On November 19, 2002 the Applicant submitted a detailed analysis of the R-4 development potential on the east and west parcels. This was in response to the Board's request for information as to why more conforming development could not be pursued. A copy of this analysis is attached as *Exhibit A*. In summary, the analysis shows that on the eastern parcel, no residential development is allowed as a matter of right, not even one detached house. On the western parcel the only available development options are: two detached houses or three houses consisting of a center row dwelling flanked by a semi-detached house on either side.[1] *Thus, the maximum matter-of-right development (leaving aside § 2507 requirements) is three attached houses.* This is very little use potential, and will tend to leave the property unimproved without variance relief. As the Order notes on p. 16, ". . . the Board is permitted to consider economic factors in a variance analysis." (Emphasis added.)

3. Thirty-Foot-Wide Alley Requirement. The Order states on pp. 15-16, "[An exceptional condition] presented by the Applicants is the narrow width of the perimeter alleys involved here, which creates the need for variance relief from § 2507.2." The Order reiterates that narrow alleys are common in the Shaw neighborhood and then states, "Second, this property is not unique *because* the alleys do not conform to the 30-foot width requirement." (Emphasis in original.) The Applicants are not arguing that narrow alleys are the basis for the exceptional condition, as indicated above in Item 2. The Applicant's request for a variance from this provision is based on the constraints inherent in the property itself. The § 2507 regulation was the focal point of the Board's April 1, 2003 decision meeting to deny the Application, and the discussion at that meeting sheds light on this issue. The discussion of this issue was convoluted, we believe, because this regulation is of a highly unusual type.

The alley is public space and not regulated by zoning. An applicant to the BZA may not request a variance for a reduced alley width, say from 30 feet to 24 feet, as one could apply for a side yard variance to provide three feet rather than eight feet. The question of how a variance from this standard is justified is thus somewhat confusing. In cases that have been approved, the test is that the property itself that is served by an alley or alleys less than 30 feet wide has exceptional conditions and constraints justifying variance relief. Then the key question is, If the proposed use is approved, will the

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[1] The Order references a statement in the Transcript to the effect that five lots could be created on the western parcel and one on the eastern parcel. That introductory statement was superceded by the written analysis with maps submitted on November 19, 2002, showing a maximum of three lots on the western parcel and none on the eastern parcel. It should be added that even these few houses are still not allowed as of right because of the width of alley restriction in 11 DCMR 2507.2.

alley(s) of less than 30 feet wide be adequate to serve the project in terms of vehicular movement, emergency access and parking?

The critical point is, the variance test must be met on the private property (the practical difficulty) as it cannot be met on the alley itself. In the Board's decision meeting on April 1, the issue was discussed as if the 30-foot requirement were immutable and that it was impossible for the applicant to meet the 30-foot requirement. Thus, the application had to be denied.

As stated previously, the Applicant believes the subject property is burdened by exceptional conditions that create practical difficulties in using the property. As to the reasonableness of the alley network to serve the project, we state again that this square has a network of east-west and north-south alleys, including four access points to two public streets, which collectively provide much better vehicular access than a single 30-foot-wide alley. Moreover, we cite the D.C. Department of Transportation's ("DDOT") recommendation to approve the project, discussed below.

4. One-Way Alley Network. On page 4, second paragraph, the Order states, "This [DDOT] Supplemental report noted that the Applicants were considering working with the residents and DDOT to make the alley[s] a one-way circulation system . . ." (Emphasis added.) The Applicants were not simply considering a one-way alley network; it was a requirement by DDOT in order for them to approve the project. In the Applicant's second meeting with DDOT, which resulted in the DDOT Supplemental Report dated March 23, 2003, there was a firm agreement between DDOT and the Applicants that the latter would attempt to reach agreement with property owners in the subject square to convert the extensive alley network to a one-way system.

In its written report, DDOT's wording is, "The applicant has indicated that he was going to work with the neighborhood ANC and the residents in the area to make vehicular circulation in the alley a one-way system because the alleys are too narrow for a two-way circulation system." (Emphasis added.)

In short, there is an agreement between DDOT and the Applicants that a one-way alley system will be pursued if this application is approved. And DDOT advised the Board in writing that it supports the Application with this condition.

5. Historic Preservation. The Order dismisses historic preservation regulations as a factor, noting that, "The Historic Preservation Regulations apply equally to all properties within historic districts." (Order, p. 15) It is, of course, the additional constraint of historic preservation regulation in conjunction with the zoning regulations and inherent limitations of the subject property that create the exceptional condition and practical difficulty. The Applicants stand by their contention that the housing should be in character with the residential pattern of the historic district and the row dwellings surrounding the site in Square 274. The Board has a long history of considering the intersection of historic preservation regulations in combination with zoning requirements as one basis for a variance.

The question is not whether historic preservation rules "apply equally" to all properties within historic districts, but how particular properties are "affected." The same is true of zone districts – equal application – but some unusual properties are affected in a peculiar way and need variance relief. What we do know is that the HPRB granted conceptual approval to a specific plan.

6. Effects on Public Good and Integrity of Zone Plan. Under "Findings of Fact" numbered 68 through 71 and under the same heading on pp.17-19 in the "Conclusions of Law" section, the Order alleges several adverse effects that would result from approval of the Application. The Findings itemizes the issues for discussion, as follows:

#68. *Service and Emergency Vehicles.* The Order states that because of narrow alleys, fire and trash pickup trucks will have difficulty accessing the row dwellings, creating a public health and safety hazard. Response: The Board here substitutes its judgment for the reports of the relevant expert agencies. The Fire Department provided three reports indicating it has no problem serving the proposed small subdivision, and DDOT recommended approval. The Order states no substantive reason as to what the specific public health or public safety problem might be. The Order never references the central alley, Temperance Court, which is 25 feet wide, which is in excess of DDOTs present-day standard requirement of 20-foot-wide alleys. As the Applicants' documentation on community meetings reflects, the residents of the townhouses along 13th and T Streets were included in the several meetings about the project. Of the many residents in these primarily multi-unit townhouses, only one individual showed up to testify at the public hearing. The others were apparently satisfied by the proposed development.

#69. *Pedestrian and Vehicular Traffic.* This finding refers to the addition of pedestrian and vehicular traffic and parked cars, thereby creating unsafe conditions and creating traffic and parking congestion problems. Again, DDOT, the Fire Department and the Office of Planning made no such finding. The proposal is for a small number of units (10) with 12 dedicated parking spaces. Given the immediate proximity of the Metrorail station, Applicants' submission noted that vehicular trip generation in peak periods will be very minor indeed, conservatively in the range of four vehicular trips in the a.m. and the p.m. peak hour. Also, the Applicants submitted a copy of the Board's recent (1998) order approving a commercial parking lot of 77 spaces to occupy the entire interior of this block. The Applicants stated that the operation of this facility, with cars entering and leaving all day long and into the night, would create many times the vehicular traffic and pedestrian safety concerns than the minimal traffic to be generated by 10 small townhouses. The approved parking lot was so unpopular with residential neighbors that a group of them filed for reconsideration. In the current application for residential use there was no testimony in opposition and nothing in the record on which the Board can reasonably base its allegations of adverse traffic and pedestrian conditions.

#70. *Overcrowding and Density.* This finding states that the density of development is too great and will result in overcrowding and potentially unhealthy conditions. Response: The Office of Planning and the Historic Preservation Review

Board did not consider the proposed development "dense." The R-4 District allows conversion of existing buildings to apartments on a ratio of one apartment for each 900 square feet of land area. Although this is not a conversion project, by that standard, 14 dwelling units would be allowed on the site of 12,785 s.f. The land is clearly not "overcrowded." Nor will the small townhouses be overcrowded; they will typically be occupied by two-person households and will meet all building code requirements. The "unhealthy conditions" that would occur are only vaguely and partially specified. E.g., the Order states on p. 17, "Larger lots with more open space would benefit the inhabitants . . .." Does this mean suburbanites have the healthiest living conditions and apartment dwellers the least healthy conditions?

Quality of Development. The Order in various places criticizes the development as to density, overcrowding and limited light and air. The Applicants respond as follows. The proposed townhouses comply with the restrictive height limit imposed on alley lots, so that light and air are not compromised. Temperance Court is 25 feet wide (increased by front setbacks of three feet for the townhouses) and runs north-south. This is a more favorable orientation for sunlight exposure than an east-west alley. OP and the HPRB did not perceive a density/overcrowding issue. Further, the Order's strong implication (p.18) that this development will be a slum like the alley dwellings of old merely because it is affordable and fronts on an alley is fear mongering of the worst sort. It ignores the 21-year successful track record of the developer, the high quality of construction, the structuring of this as a home ownership development, and the careful screening and training of homeowners that will occur.

The Zoning Commission's more recent policy direction regarding alley use and reuse is reflected in the rezoning of Blagden Alley in 1996, in which case 41 alley lots were rezoned from R-4 to C-2-A in order to encourage residential or commercial use in the interior of the block. The goal was small-scale residential and commercial activity, resulting in improved public safety. Under public good and integrity of the zone plan, the Board does not acknowledge the Applicants statements that the presence of residents in the interior of this block will improve public safety compared with the existing dark and ominous conditions.

#71. *"High-Density."* The reference to "high-density construction" is extremely inaccurate. The city's Comprehensive Plan defines High Density Residential as "High-rise apartments are the predominant uses . . ." The R-5-E zone is identified as "high-density residential" in its preamble; this zone allows 90-foot apartment buildings that generate densities of 350 to 400 units per acre, which is hardly the case with this Application. Temperance Row, if approved and built, will be the lowest density housing in the immediate neighborhood.

7. All Agency Reports and Testimony in Support. Regarding the key questions for a development on alley lots -- the adequacy of access, light, air and general quality of life -- these were considered by all relevant public agencies, and without exception they approved the project. The design of Temperance Row addressed all these issues sufficiently to win support from the D.C. Department of Transportation, the Office of Planning, the Department of Housing and Community Development, the Fire

Department, the Historic Preservation Review Board and Advisory Neighborhood Commission ("ANC") 1B.

In the face of these approvals, which reflect expert, authoritative opinions from a variety of disciplines, the Board substituted its own judgement regarding the health, safety, and accessibility of this development, with a very minor amount of substantive basis for disagreeing with the agencies. None of these agencies found any of the adverse factors cited by the Board in its Order.

The Order, on page 4, places the testimony of neighborhood resident Philip Spaulding, under testimony in opposition. This is incorrect. Mr. Spaulding, even when asked directly by the Chair whether he was testifying in support or opposition, did not respond to the question. (Public Hearing Transcript, p. 294) He primarily expressed the preference that the project be built on the 12th Street frontage rather than on the alley lots. But when asked by the Chair whether he would support housing on 12th Street and in the interior of the block, Mr. Spaulding said, "But yes, I would approve of both [groups of] buildings if that were a possibility." (Transcript, p. 294) In fact, although he raised some concerns about the project, the above statement indicates support for the development on the subject property rather than opposition.

The Applicants, at the Board's request, submitted documentation of the multiple meetings the Applicants held with the community. These meetings involved invitations to the residents of the row dwellings along 13th Street and T Street, and some of these neighbors attended more than one meeting. Yet not one of them testified or sent a letter in opposition.

8. Distortion of the ANC Report. Regarding the report of ANC 1B, the Applicants emphasize that the ANC's vote was unanimous in support of the project. The Order, however, takes this unanimous vote in support and crafts a paragraph that makes the ANC's position sound negative. This is accomplished by highlighting "issues of concern" that were included in the ANC's letter to the Board. These issues were primarily questions raised from the audience at the ANC meeting and are the very issues one would expect to be discussed regarding the proposed development. But the vote was still unanimous in support of the project. Obviously, the arguments in favor were more persuasive than the potential concerns raised. The drafter of the letter just didn't happen to list them. He was not providing complete minutes of the ANC meeting, only the ANC's decision.

9. Zoning Commission Text Amendments. Under "Decision and Order" on p. 1, the Order states:

> *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 discretion to give.*

Applicants' Response:

The Applicant's land use consultant stated at the public hearing that a planned unit development is not feasible because of insufficient land area to qualify for the PUD process and that a requested map amendment presents a likely "spot zoning" problem. Thus, the Board is apparently asking the Applicants to propose text amendments to the Zoning Commission. Such amendments would need to be based on research of relevant conditions citywide, benefits and potential problems with the amendments in various locations – generally making a citywide, public interest case. This is an unfair burden to impose on the Applicants. It is perhaps better directed to the Office of Planning ("OP"). However, the OP, even after citywide research, may be hard pressed to find more than two or three comparable situations in the entire city as a basis for general legislation. A group of vacant alley lots completely surrounded by public alleys so that they cannot be enlarged is a rare condition. The Board need not worry about ". . . a multiplicity of similar demands" (Order, p. 14) arising from this case as a precedent. There are very few even roughly comparable properties in the city. To be eligible for variance relief, a property need not be the only instance in the city, or else many fewer variances would be granted.

Legislation with citywide effect should not be based on unusual or extreme cases, and the Applicants question whether the Zoning Commission would find merit in proceeding with amendments of such rare applicability. Legislation also represents substantial delay, when the Board has the opportunity to approve this Application now. The Board states that the issues in this case raise policy questions beyond its jurisdiction. Had the Applicants applied to the Commission, the response very likely would have been, "This is a particular and unusual case; you should seek relief at the Board of Zoning Adjustment."

Conclusion. For all of the reasons set forth in this statement, the Applicants respectfully request that the Board reconsider its decision to deny and instead grant approval.

Sincerely,
ARNOLD & PORTER

Nathan W. Gross, AICP

Jamie Z. Goodson

Cc: Advisory Neighborhood Commission 1B

Exhibit A: From Applicant's Post Hearing Submission of November 19, 2002

"**4. Conforming/More Conforming Development.** At the public hearing the Board asked the Applicant why it did not pursue conforming or more conforming development on the subject property. The answer, following, illustrates the uniqueness of the property's situation and the practical difficulties involved in developing this property under R-4 standards.

"The eastern row of three proposed lots has land dimensions of 57.50 feet east-west by 57.14 feet north-south, for a land area of 3,285.55 square feet. Row house development requires two party walls, effectively dictating a middle row dwelling and two flanking semi-detached houses. With a minimum lot area requirement of 1,800 s.f. for the row dwelling and 3,000 s.f. for each semi-detached dwelling, the land area required is 7,800 s.f. – more than twice the actual land area. The option of two semi-detached dwellings also fails, in that each lot must be at least 3,000 s.f. in area. Finally, a detached dwelling has a minimum lot area of 4,000 s.f., which is larger than the land area available. A flat is prohibited by § 2507.1, which only allows single-family dwellings on alley lots." [Thus, no residential development is allowed on the eastern parcel.]

"The western row of nine proposed lots has land dimensions of 200 feet north-south and 47.50 feet east-west, for a land area of 9,500 square feet. The western site could thus accommodate two optional developments: two detached dwellings or a middle row dwelling flanked by two semi-detached dwellings.

"These very low density development options occur because the total land area is small, and the existing alley system prevents the lots from being made deeper -- only wider. The eastern parcel cannot meet the minimum area requirements for any single-family residential use. On the western parcel, the wide lots and configuration of houses would be out of character with the character of the Greater U Street Historic District, in Applicant's opinion. If the detached houses, especially, were built, they would be relatively shallow, wide houses, given the 20-foot rear yard requirement, in contrast to the typical narrow, deep attached houses in the historic district.

"None of these lower density alternatives would eliminate the need for a variance from the requirement in § 2507 that single-family dwellings on alley lots have a 30-foot-wide alley reaching a street. We believe that the extensive alley network in Square 274, especially the well-distributed access at four points to 12th and 13th Streets, more than compensates for the lack of one alley that is 30 feet wide."