GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16973 of Bundy Development Corporation, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under § 403, a variance from the rear yard requirements under § 404, a variance from the Downtown Development ("DD") District's Chinatown provisions under § 1705, and variances from floor area ratio (FAR) requirements under §§ 402 and 1701 and Chapter 17, or in the alternative to a portion of the FAR variances sought, pursuant to 11 DCMR § 3104.1, a special exception from the roof structure set back provisions under § 411, to construct an apartment building in the DD/R-5-E District at premises 809 -- 813 6th Street, N.W. (Square 485, Lot 46).

HEARING DATE: February 11, 2003

DECISION DATE: February 11, 2003

DECISION AND ORDER DENYING REINSTATEMENT OF WITHDRAWN CASE

The applicant in this case is Bundy Development Corporation, and Ms. Pamela Bundy, its president ("Applicant"). On November 26, 2002, Ms. Bundy's authorized representative, Mr. Lindsley Williams, filed an application with the Board of Zoning Adjustment ("Board") for the zoning relief described above. Mr. Williams signed the application form as the "Applicant," which is defined on the form itself as "[t]he Owner of the Property for which the application is made or his/her authorized agent." Under this definition, only the owner of the subject property or his or her authorized agent may file an application for zoning relief with the Board.

On December 2, 2002, the Office of Zoning ("OZ"), pursuant to its normal procedures, notified the City Council Member for Ward 6, Advisory Neighborhood Commission ("ANC") 2C, the ANC members for Single Member Districts 2C04 and 6C09 (a re-districting was to take effect on January 1, 2003), the District of Columbia Office of Planning ("OP"), and the District of Columbia Department of Transportation ("DDOT") of the filing of the application. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on December 10, 2002, mailed notices to the Applicant, ANC 2C and all property owners within 200 feet of the subject property, advising them of the date of the hearing.

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EXHIBIT NO.28

On January 2, 2003, the Office of Zoning received a letter dated December 31, 2002, from Ms. Bundy explaining that, at the time Mr. Williams filed the application with the Board, she was not the owner of the subject property, but the contract-purchaser. Ms. Bundy stated that she assumed she had implicit authority to file the application. The actual owner of the property, however, upon receiving notice of the filing of the application, requested that Ms. Bundy withdraw the application because the purchase contract for the property lacked explicit authority for the contract-purchaser, *i.e.,* Ms. Bundy, to file for zoning relief. As of December 31, 2002, Ms. Bundy appeared loath to withdraw her application as she felt it might be possible to cure any deficiencies in it in a timely manner. She did, however, formally request that it be withdrawn in a separate letter, also dated December 31, 2002.

OZ was informed that settlement on the subject property and its transfer to Ms. Bundy as owner, was to occur on January 28, 2003. Based on this, OZ held off on officially withdrawing Ms. Bundy's application. Unfortunately, unforeseen circumstances prevented the occurrence of the settlement and transfer on January 28th, and on that day, OZ sent a letter to Ms. Bundy formally acknowledging her withdrawal request and officially withdrawing her application.

Two days later, on January 30, 2003, the settlement occurred and Ms. Bundy's entity, Chinatown East, LLC, became the fee simple owner of the subject property. The Applicant's Affidavit of Posting indicated that on January 31, 2003, it posted two zoning posters on the 6th Street frontage of the subject property. On February 3, 2003, Ms. Bundy corresponded with OZ again, and requested that her application be reinstated. She requested that the Board consider the question of reinstatement on February 4, 2003 and that if such reinstatement were granted, that the hearing on the case commence on February 11, 2003.

The Board addressed the motion for reinstatement at its February 11, 2003 decision meeting. The Board, by consensus, decided that the case could not be reinstated, but that the Applicant would have to file a new application, which would be heard on an expedited schedule.

FINDINGS OF FACT

1. 11 DCMR § 3113.3 states that the **owner** of property may file an application with the Board. Section 3113.4 states that an authorized agent may file an application on behalf of the **owner**. (Emphasis added.)

2. When, on November 26, 2003, Ms. Bundy's authorized agent, Mr. Williams, filed the application with the Board, Ms. Bundy was not the owner of the subject property, but was the contract-purchaser.

3. Upon learning of the filing of the application, the then-owner of the subject property protested to the Applicant and asked that the application be withdrawn.

4. The application was advertised under the name of "Bundy Development Corporation."

5. On January 30, 2003, Chinatown East, LLC, and not Bundy Development Corporation, became the fee simple owner of the subject property.

6. Section 3113.14 states that the applicant shall post the property with notice of the hearing at least 15 days in advance of the hearing.

7. The applicant posted the property on January 31, 2003, only 11 days before the hearing/decision date of February 11, 2003.

8. Section 3113.8 states that no later than 14 days before the hearing date, the applicant shall file with the Board information, reports, plans, etc. that it wishes to offer into evidence at the hearing.

9. The Applicant filed the report of its Land Use and Zoning Consultant and its architectural plans on February 3, 2003, only 8 days before the hearing date of February 11, 2003.

10. Section 3113.10 states that an applicant may withdraw an application at any time, but that the application fee shall not be refunded upon withdrawal. It also states that, without leave of the Board, a withdrawn application may not be accepted for filing again for at least 90 days after its withdrawal.

11. Section 3100.5 states that with certain exceptions, not relevant here, the Board may waive its procedural rules if the waiver will not prejudice the rights of any party and is not prohibited by law.

CONCLUSIONS OF LAW

Based on the record and the Findings of Fact laid out above, the Board concludes that the Applicant's motion for reinstatement must be denied. Even without its subsequent withdrawal, the application fails because it was not filed by the individual who owned the subject property at the time of filing. Moreover, upon learning of the filing, the then-owner protested and requested that the Applicant withdraw the application. In a sense, because the application was not properly filed in the first place, there was no application to withdraw, or to reinstate.

Even assuming that deficiencies in the application itself could be cured, the project would still have had to be re-advertised under the new owner's name, that of Chinatown East, LLC. Further, later deficiencies of too-late posting and too-late submittals to the Board could not be cured. The 14-day rule of § 3113.8 exists to allow OZ enough time to prepare materials for the Board and to allow the Board members sufficient time to review such materials. Applicant's late submittals negated both these purposes. Even more significantly, posting is an important part of notifying the community of the proposed project. The 15-day rule of § 3113.15 allows a sufficient time to permit the public to learn of, and possibly inquire about, or object to, the project.

The Board, pursuant to § 3100.5, may waive its procedural rules, but only if there is no prejudice to any party. This application was filed by a non-owner, advertised under the wrong name, and not posted for the required 15-day period. The Board finds that proceeding with the application on February 11 would have prejudiced the public in that, if a member of the public had inquired about the application between the time of its official withdrawal on January 28, 2003 and the February 11th hearing date, he/she would have been told that it had been withdrawn. If that person had intended to express opposition to the application, he/she would have been misled into believing that such opposition was no longer necessary, or indeed even possible. The Board finds that reinstating the application would prejudice the interests of members of the general public who are potential parties and therefore declines to waive any of its procedural rules herein.

The Board concludes that the Applicant must file a new application and start anew, with re-advertising and re-posting of the property. The Board will allow the Applicant to include the submittals already presented to be included in the new case file, to avoid costly and time-consuming duplication of effort. Pursuant to § 3113.10, the Applicant's fee will not be refunded, but also pursuant to that section, the Board grants the Applicant leave to re-file before the expiration of the 90-day period after the withdrawal of the first application. It is therefore **ORDERED** that the motion to reinstate the application is **DENIED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, David A. Zaidain, Anne M. Renshaw, Curtis L. Etherly, Jr., and Peter G. May, to deny.)

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 1 4 2003

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

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16973

As Director of the Office of Zoning, I hereby certify and attest that on AUG 14 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