BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF	*	
	*	
714 TENTH STREET, NE	*	BZA Application No. 16989
WASHINGTON, DC	*	
	*	
WILLIAM T. & NORMA G. BYRD	*	
APPLICANTS	*	

Application of William T. and Norma G. Byrd, pursuant to 11 DCMR § 3103.2 for a variance from the use provisions to allow office use within a two story row dwelling under Section 330.5, in the R-4 District at premises 714 10th Street, N.E. (Square 921, Lot 72).

Hearing Dates: March 18, 2003 and April 8, 2003

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FINDINGS OF FACT AND CONCLUSIONS OF LAW OF MARIE-CLAIRE BROWN AND PROPOSED ORDER

PROCEDURAL HISTORY

On September 14, 2002 William T. and Norma G. Byrd (hereinafter "Applicants" or "Byrds") submitted a contract for the purchase of 714 10th Street, N.E., a residential town home in an R-4 District to Gilbert Robles. The offer was accepted and the property was purchased by Applicants, as husband and wife, in or around October 2002. Subsequent to the purchase, Applicants sought to obtain a Certificate of Occupancy from the Department of Consumer and Regulatory Affairs (hereinafter "DCRA"), at which time they learned that the property was zoned Residential and the property could not be used as a commercial office unless a use variance was granted by this Board. This application followed.

BZA
Case No. 16989
Exhibit No. 35

Board of Zoning Adjustment
District of Columbia
CASE NO. 16989
EXHIBIT NO. 35

FINDINGS OF FACT

1. The subject property is located at 714 10th Street, N.E. in an R-4 zoned district with a legal description of Lot 72 in Square 912. (Application for Variance ("Application") and Certification of the Office of Zoning dated March 26, 2003).

2. Applicants relied exclusively on a document entitled "Public Record" in their decision to submit an offer to purchase the home at 714 10th Street, NE on September 14, 2002. (Application at 1-2).

3. The "Public Record" is not a document produced by the District of Columbia, a municipal corporation, but rather by Metropolitan Regional Systems, Inc, a private corporation. The document, on its face, expressly states that the information contained therein is deemed unreliable without verification. (Application Exhibits A and D).

4. There were neither expensive nor permanent improvements made to the property. (Transcript at 32).

5. The $60,000.00 investment made by Applicants towards the purchase of the home is not a permanent improvement. (Transcript at 34).

6. Application Exhibit B is not an official zoning record of the District of Columbia. (Transcript at 35), but rather Exhibit B is a transaction record. (Transcript at 36:21-24).

7. Applicants' real estate agent relied on the Multiple Listing Service, Inc.'s ("MLS") "Public Record" in advising Applicants that 714 10th Street, NE is zoned C-2-B. (Transcript at 39:1-6).

8. Applicants are the owners of a management consulting business and have five (5) to seven (7) employees. (Transcript at 42:24-43:1).

9. Applicants did not know of the zoning designations, but only communicated to their real estate agent what their requirements were. (Transcript at 43:8-18).

10. At the time of their visit to the property Applicant wanted to insure that the property was C-2-A. (Transcript at 43:25-44:4).

11. The real estate appraisal incorrectly stated that 714 10th Street, NE is commercially zoned C-2-B. (Transcript at 45:7-8).

12. The only "upgrades" to the property included changes to the telephone system and verification that there was enough voltage to operate multiple computers. (Transcript at 45:16-25).

13. The appraisal report prepared by Anthony Appraisers clearly states that this is a Uniform **Residential** Appraisal Report and uses residential comparables to establish the property value. (Emphasis added). (Application Exhibit D at cover page, page one and page two; Transcript at 48:2-5).

14. The appraiser was engaged by the mortgage lender based on the type of loan the Applicant applied for. (Transcript at 48:12-15).

15. Applicants have requested a rebate on the cost of the appraisal report. (Transcript at 49:9-13).

16. Applicants are unaware if any other propertied in the neighborhood are used as full use offices. (Transcript at 49:18-23).

17. There is nothing that prevents the property from being used for its intended purpose. (Transcript at 51:24-52:18).

18. **The real estate agent made the mistake**. (Transcript at 53:18).

19. Granting a use variance changes the zoning on the property. (Transcript at 55:6-9).

20. Estoppel requires an affirmative action of the municipal corporation. (Transcript at 58:11-14).

21. The expenditure for the new cable run by Verizon was less than One Thousand Dollars ($1,000.00) in total. (Transcript at 63:24-64:7, 73: __).

22. Applicants are unaware of the real estate agent's due diligence in determining the correct zoning of the property. They relied solely on a piece of paper (MLS Public Record) that the real estate agent showed them. (Transcript at 66:12-19).

23. On the advice of their CPA, the home was purchased by Applicants jointly as husband and wife, with the intent of renting it to their business. (Transcript at 68:6-20).

24. There is nothing unique about the property compared to other homes in the area. (Transcript at 69:6-15; 71:16-20).

25. Applicants never received any document bearing an official seal or other indicia of an official document that state the property is zoned c-2-B. (Transcript at 72:10-73:11).

26. The "Public Record" document exclusively relied on by Applicants in deciding to purchase the home qt 714 10th Street, NE clearly states that the information provided should not be relied upon without verification. (Application Exhibit A; Transcript at 77:9-19).

27. The District of Columbia tax assessment requested by the Board was never produced. (Transcript 86:1-3).

28. The D.C. Office of Planning ("DCOP") has determined that commercial use of the property is not consistent with the intent of the District's zoning plan. (Report of DCOP at 2).

29. Commercial use of the property is prohibited in the R-4 zone. (11 DCMR §3103; Report of DCOP at 3).

30. Commercial use of this property could result in substantial impacts on this residential neighborhood. (Report of DCOP at 5)

31. Permitting office uses in this residential neighborhood would negatively impact the viability of office space along the H Street corridor. (Report of DCOP at 5).

32. Affected neighbors who oppose this application for a use variance include Mary Kay Fanerella, Marvin Coles, and Carlos Reeder. Dr. Michael Fain of 706 10th Street, NE testified in opposition to the application.

33. The ANC6A Zoning and Licensing Committee voted unanimously to recommend that the ANC oppose the application. (Report of DCOP at 5).

34. The ANC opposed the application in its written report filed with the Board. The written report of the ANC shall be given "great weight." (DC Code § 1-309.10(d) 2001 Ed.).

CONCLUSIONS OF LAW AND OPINION:

The Board of Zoning Adjustment (hereinafter "the Board") has jurisdiction to hear this application and render a decision and order pursuant to D.C. Code § 6-641.07(g)

(3) (2001 Ed). Applicants have the burden of proof pursuant to 11 DCMR § 3119.2. In order to reverse to grant a use variance, Applicants must demonstrate by a preponderance of the evidence that (1) the property is unique because of some physical aspect or other extraordinary or exceptional situation or condition inherent in the property and (2) the strict application of the zoning regulations will cause undue hardship or practical difficulty to the Applicants and (3) granting of the variance will do no harm to the public good or to the zone plan.

Estoppel

Applicants have argued that the Board does not have to reach the issue of the use variance because the District of Columbia is estopped to deny the variance since Applicants relied in good faith on information provided by the District of Columbia in deciding to purchase this residential property.

The elements that must be shown in order to raise an estoppel against enforcement of a zoning regulation are: (1) that a party, in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. *Saah v. District of Columbia Board of Zoning Adjustment*, 433 A.2d 1114, 1116 (1981), *citing Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (1978). Further, reliance by the party must be justified. *Nathanson v. District of Columbia Board of Zoning Adjustment*, 289 A.2d 881,884 (1972).

Applicants have argued that the District of Columbia disseminated incorrect information as to the zoning to the Applicants and their agents; that Applicants relied on the incorrect information in good faith; that they purchased the property at 714 10th street,

NE in reliance on that incorrect information, and that they will suffer losses if the zoning is not changed.

Applicant Norma Byrd testified that:

> Before we placed the contract on the property, we went to the property. We inspected it. We looked at the real estate listing. We asked, are you sure that this is zoned C-2-A. She said no. This is C-2-B. We said how do you know that? That's when she showed us the document that said this is from the Multiple Listing.
>
> We looked at the document. Fine. We then placed a contract on the property.

Transcript 3/18/03 at 43:21- 44:4.

While the Applicants may have in good faith relied on the expertise of their real estate agent, the *Multiple Listing*, upon which Applicants relied in purchasing this property was neither prepared nor proffered by the municipal corporation at any time for any reason. Thus they cannot claim reliance on the affirmative actions of the municipal corporation. Applicant further testified that their first interaction with the District of Columbia was **after** they became the legal owners of this residential property, when they applied for a Certificate of Occupancy. Applicants cannot, therefore, meet the test for estoppel.[1]

[1] Even if Applicant had a valid argument as to their reliance on some affirmative action by the District, they have made neither expensive nor permanent improvements on the property, an element that must also be proven. Applicants have spent less than $1,000.00 on telephone wiring. The $60,000.00 down payment does not constitute an improvement on the property and would be inappropriate for consideration by this body and can certainly be recouped either through resale of the property, or as a claim for damages against the person(s) who misled them.

The Use Variance

In order for the Board to grant a use variance, Applicants must establish all three requirements, the uniqueness of the property, the undue hardship, and absence of harm to the public good or to the zone plan. The testimony is clear that there is nothing unique about this property. In fact, this property is surrounded by ten (10) other virtually identical homes, constituting Lincoln Mews East. Applicants cannot meet the first prong of this test and therefore the Board need not consider the remaining requirements.

Applicants, in reliance on misinformation provided by their real estate agent purchased a single family home in an R-4 zoned district. The evidence before the Board is insufficient to support the application for a use variance and the application must therefore be denied.

Respectfully submitted,

MARIE-CLAIRE BROWN
704 Tenth Street, NE
Washington, DC 20002
202-543-4904

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact, Conclusions of Law and attached Proposed Order were mailed postage prepaid this 23rd day of April, 2003 to Richard Schmitt, Esq., Kass, Mitek & Kass, LLC, 1050 17th Street, NW, Suite 1100, Washington, DC 20036.

Marie-Claire Brown

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ORDER

Upon consideration of the evidence presented, the Board of Zoning Adjustment hereby finds that Applicants William T. and Norma G. Byrd have failed to meet their burden of proof that the Board of Zoning Adjustment has adequate basis upon which to grant a variance from the use provisions to allow office use within a two story row dwelling under Section 330.5, in the R-4 district at premises described as 714 10th Street, NE, Washington, DC. Therefore, Application No 16989 is hereby DENIED.

ATTESTED TO: _____

FINAL DATE OF ORDER: _____

Copies to:

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