16989

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April 29, 2003

HAND DELIVERED

Ms. Sherri M. Pruitt
Secretary
D.C. Board of Zoning Adjustment
441 Fourth Street, N.W., Suite 210
Washington, D.C. 20001

Re: Application of William T. & Norma G. Byrd
Square 912, Lot 72
714 10th Street, NE
Continued Hearing Date: April 8, 2003

Dear Ms. Pruitt.

Enclosed please find the Applicants' Proposed Finding of Fact and Conclusion of Law.

Sincerely,

Richard P. Schmitt

Enclosures: Proposed Findings of Fact and Conclusion of Law, 20 Copies
cc: Office of Planning
ANC 6A
Marie-Claire Brown

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BZA
Case No. 16989
Exhibit No. 36

Board of Zoning Adjustment
District of Columbia
CASE NO. 16989
EXHIBIT NO. 36

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application No. 16989 of William T. and Norma G. Byrd, pursuant to 11 D.C.M.R. § 3107.2 for a use variance from the use provision in an R-4 District to allow use as office space at the premises at 714 10th Street, NE, (Lot 0072, Square 0912).

I. Summary of Evidence.

1. The Subject application was filed on January 7, 2003, by William T. and Norma G. Byrd to allow use of 714 10th Street, NE, (Lot 0072, Square 0912) as office space for their management consulting business, Business Promotion Consultants, Inc. (BPC). The Property is in an R-4 district.

2. Matters of right uses in the R-4 zone district include flats (i.e., two-family dwellings), row dwellings, one family semi detached dwellings and one family dwellings, and home businesses. The Property is separated by three lots and an alley from the H Street Corridor which is a C-2-B zoned district containing storefronts and retail businesses.

3. The Property includes a two (2) story contemporary town house which was formerly used as a residence from which the owner operated a computer consulting firm. The owner did not obtain a certificate of occupancy as either a home business or general office use.

4. The two Applicants, William T. and Norma G. Byrd both testified at the March 18, 2003 hearing as to the facts underlying the application for the right to use the Property as office space under the doctrine of estoppel or for a use variance to allow use as office space.

5. The Applicants first request that they be given a use variance on the sole basis that the District of Columbia is estopped from denying the use of the Property for general office space by leading them to believe that the Property was zoned C-2-B. The case of Saah v. District of Columbia Board of Zoning Adjustment, 433 A2d 1114 (D.C. Ct. App. 1981) sets forth the elements which must be shown to raise an estoppel. They are:

1. that a party, acting 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.

6. In the event that the Board determined that the Applicants were not entitled to the variance under the doctrine of estoppel, then the Applicants ask that the Board proceed under § 3100.1 of the Zoning Regulations (11 D.C.M.R.). The Board may approve a use variance, provided that the applicant meets the conditions specified in § 3107.2 of Chapter 31 of this title including that: (1) unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property," (2) undue hardship, and (3) no harm to the public or to the zone plan. Monaco v. District of Columbia Bd. of Zoning Adjustment, 407 A.2d 1091, 1096 (D.C.Ct. Ap.1979) as quoted in Downtown Cluster of Congregations v. District of Columbia Board of Zoning Adjustment, 675 A.2d 484 (D.C.Ct.Ap. 1996).

7. The Applicants testified that in July 2002, they retained the assistance of real estate agent LaJuan Poole, of Fairfax Realty, to locate a mixed-use property to house their consulting business. The Byrds instructed Ms. Poole that they were only interested in purchasing a property in the District of Columbia that was zoned 'mixed-use' and that was in a HUB Zone.

8. The Applicants' business is a management consulting business, Business Promotion Consultants, Inc. The Applicants have owned and operated the business since 1980. The business will have only seven (7) employees, including the Applicants. The extent of extra traffic expected to be generated will be minimal. Clients do not generally visit the business as meetings are routinely held at clients' offices. Because there will only be office work occurring, there will be no additional deliveries beyond mail and infrequent FedEx or UPS deliveries. The Applicants currently operate part of their business from their District of Columbia home, for which they have a home business license.

9. After viewing several properties recommended by Ms. Poole, the Byrds signed a contract of sale on a North Capital Street, NW property which was zoned C-2-A. The contract was made void when the Byrds learned that improvements had been made to the property, after the contract was ratified, which were in violation of the DC fire code.

10. Ms. Poole then showed the Byrds 714 10th Street, NE and confirmed for the Byrds that the Property was zoned C-2-B. Ms. Poole showed the Byrds a printout titled 'Public Record' which described the Property as zoned C-2-B. The printout, received into evidence, has a disclaimer at the foot of the page stating, "Information is believed to be accurate, but should not be relied upon without verification."

11. On September 14, 2002, the Byrds made an offer to purchase the Property for $299,000.00. The offer was accepted and settlement occurred on October 15, 2002.

12. Two weeks prior to settlement, while obtaining an application for a Certificate of Occupancy (C of O), William Byrd also obtained a "Property Information" printout on the Property from the Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs (DCRA), Room 2300, 941 North Capital Street, NE. The Property

Information printout stated that the Property was zoned C-2-B. There was no disclaimer on the computer print out given to William Byrd.

13. Also prior to settlement, the Byrds paid for and obtained an appraisal of the Property in order to obtain a commercial mortgage loan. The appraisal was performed by Kevin R. Hallums, Sr. and Michael Magnotti of Anthony Appraisers. The appraisal showed the Property was zoned C2B. A copy of a 'Public Record' print out sent to the Byrds by Anthony Appraisers after the application for the C of O was rejected was introduced into evidence.

14. Before signing the contract of sale the Applicants observed that the owner/occupant was using the Property as both a residence and office from which he operated the HUB Zone certified, home based business, WEB N LLC.

15. The Byrds purchased the Property for $299,000.00. The Byrds obtained a mortgage of $239,200.00 after making a down payment of $60,000.00. The terms of the Byrds' mortgage, deed of trust and property insurance are based on the Property being zoned for commercial use, not residential use. The cost of the appraisal was also based on the condition that the Property would have a commercial, not residential use.

16. Within two (2) weeks of purchasing the Property, William Byrd returned to DCRA to submit an application for a C of O. Once again the Applicants were given a copy of the same 'Property Information' printout, showing the Property zoned as C-2-B. However, after DCRA received and reviewed the C of O application, the Byrds were told that the Property was zoned R-5-D and the Byrds were referred to the Board of Zoning Adjustment (BZA) for further clarification.

17. At the BZA, the Byrds were told that the Property was zoned R-4.

18. On November 26, 2002, the Applicant William Byrd received a letter from the Zoning Administrator denying the Byrds' request for a C of O for general office space. Interestingly, the Zoning Administrator's records indicted the Property was in a R-5 district. The letter further informed Mr. Byrd that he could apply to the BZA for a use variance.

19. The Applicants testified that the investments they had made in the Property included the down payment, the assumption of the loan and the installation of wiring for telephones and high speed Internet connections; and that the purchase of the Property prevented them from purchasing another property for their business.

20. The Applicants testified that they did not own any rental properties and that their work time was devoted to their consulting business and they had no use for the Property other than as an office for their business.

21. Photographs of the Property and street views were introduced into evidence in support of this application for a variance. The photographs illustrate that the store fronts on H Street, N.E. can be seen from the front of the Property.

22. The March 18, 2003 hearing was continued; "[a]fter hearing the testimony, the Board determined that, in fact, there is inconsistency between the zoning designation of the site and the city's records. Three different zoning classifications were discussed and attributed to the site: R-4, C-2-B and R-5-D. The Board determined that additional research would be needed to clarify the site's zoning history and to decipher the correct zoning." The Board scheduled the hearing to be continued on April 8, 2003.

23. At the Board's direction the Applicants obtained a Certification of Zoning. The Certification was that the Property was in an R-4 district. The Certification was filed in the record.

24. At the April 8, 2003 continuation of the hearing, the following evidence and testimony was received.

25. The Property is located within the jurisdiction of ANC 6A. ANC 6A is automatically a party to these proceedings. By letter dated March 13, 2003, the ANC stated its opposition to the application. ANC 6A submitted a March 13, 2003 Letter, stating that at ANC 6A's March 13, 2003 regular meeting the seven commissioners voted 6-0-1 to oppose the application. The meeting was properly noticed and a quorum of five commissioners was in attendance.

26. A representative of the Office of Planning testified that the Office of Planning had submitted a recommendation, dated March 4, 2003, which in summary stated, that the Office found no evidence that would warrant this to be considered an exceptional condition of the specific piece of Property that would create a hardship. The commercial use of this Property and its location in the surrounding area, as well as for consistency, with the comprehensive plan would be a substantial detriment to the Zone Plan. The Report received into evidence did recognize that home occupations are a permitted use in an R-4 district, but the Applicants are not eligible because they will not live in the Property. The Office of Planning did not address the estoppel argument as that is considered to be a legal issue for the Board.

27. Marie-Claire Brown, who resides at 704 10th Street, N.E., Washington, D.C. 20002, applied for and was granted party status. Ms. Brown testified in opposition to the application stating that she did not want her property values lowered by a commercial business. Ms. Brown also stated that she feared that if the application was granted that massage parlors and pool halls could operate out of the premises.

28. Dr. Michael Fain, who rents 706 10th Street, N.E., Washington, D.C. testified in opposition to the application. He also expressed fears that businesses such as massage parlors or a funeral home could be operated out of the premises if a use variance was granted.

29. Letters of opposition were submitted by Mary E. Dilworth, 706 10th Street, N.E., Marvin Coles, 716 10th Street, N.E., and Mary Kay Fannerella, 700 10th Street, N.E.

30. No one, other than the Applicants, testified in support of the application.

II. Proposed Findings of Fact:

Based on the evidence of record, the Board finds the following.

31. The Applicants purchased the Property in reliance upon representations made by the District of Columbia Government that the Property was in a C-2-B zoned district.

A. The most important representation was made, prior to the closing on the Property, to William Byrd when he went to room 2300, 941 North Capitol Street, N. E. and upon inquiry about obtaining a C of O was given a computer printout indicating that the Property was zoned C-2-B. The computer printout did not contain any disclaimer as to reliance upon the information contained in the printout. William Byrd was not told or otherwise informed that he had to confirm the zoning of the Property in another office.

B. The Byrd's agent, their real estate agent made an inquiry as to the zoning of the Property prior to the Byrds signing of the contract of sale. That inquiry, made through a commercial service, which obtained its information from the District of Columbia, stated that the Property was zoned C-2-B.

C. The firm which performed the appraisal of the Property for the commercial loan, also obtained information that the Property was in a C-2-B District. The Applicants paid for the appraisal.

32. When the Property was viewed by the Byrds there was nothing to indicate that the Property might not be zoned C-2-B. The fact that the owner was operating a computer consulting business was not considered as confirming the zoning, as the Applicants knew that a home business could be operated out of a residence.

33. The Applicants acted at all times in a reasonable manner and in good faith.

34. Only after the Applicants' two agents made inquiries about zoning, and William Byrd had confirmed the zoning with the District of Columbia office which issues Certificates of Occupancy, did the Applicants go to closing on the Property.

35. Had the Applicants learned that the zoning was not as represented, they would have refused to proceed with the purchase, as they did with the North Capitol Street property.

36. The Applicants made valuable investments as a result of the information they requested and received from the District of Columbia. That investment included the $ 60,000.00 down payment, the assumption of liability for the mortgage of $239,200.00 and the installation of

upgraded telephone wiring to the building. The fact that the Applicants did not make any other investments once they realized there was a question as to the zoning, confirms the finding that the Applicants acted reasonably and in good faith.

37. The Byrds purchased the Property only to operate their existing consulting business.

38. The Byrds do not own any rental properties and are not in the rental business.

39. The Byrds do not have any use for the Property other than as an office for their business.

III. Conclusions of Law and Opinion:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the Byrds are seeking a use variance pursuant to the doctrine of estoppel so as to allow the use of 714 10th Street NE, (Lot 0072, Square 0912) as a general office. Granting such relief requires a showing that the elements set forth in Saah v. District of Columbia Board of Zoning Adjustment, 433 A2d 1114 (D.C. Ct. App. 1981) have been met. The elements are: that; 1) a party, acting 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.

The Byrds have proven that they acted in good faith at all times, meeting the first element.

The evidence shows that the District of Columbia caused information as to the zoning of the Property to be disseminated. The critical dissemination was when William Byrd inquired at Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs (DCRA), Room 2300, 941 North Capital Street, NE. The Property Information printout given to the Applicant stated that the Property was zoned C-2-B. There was no disclaimer on the computer print out given to William Byrd. This printout only acted to confirm the zoning information obtained by the Applicants' two agents; the real estate agent and an appraiser. Both are professionals, and both informed the Applicants in writing that the zoning was C-2-B. Cumulatively, all three show that the District of Columbia was disseminating incorrect information.

The Byrds purchased the Property investing $ 60,000.00 and giving a mortgage note for the balance of the $ 299,000.00 purchase price. The Applicants invested money to upgrade the telephone wires to the Property. The payment of the $ 60,000.00 and the signing of a mortgage note are expensive investments in the Property. While a purchase of a piece of real estate may not strictly be considered permanent, it is no less permanent than the construction of an improvement on land that may later be sold. The purchase of the Property was a significant long term investment.

The fourth element is a weighing of the equities. The equities favor the Byrds. They purchased the Property in good faith after making reasonable inquiry of the District of Columbia. The District of Columbia affirmatively represented to the Byrds at least once that the Property was in a C-2-B zoned district. The District of Columbia put into circulation incorrect information which was used by the Byrds' real estate agent and by the appraiser when those professionals advised the Byrds that the Property was zoned C-2-B.

The Byrds and all citizens of the District of Columbia have a right to expect accurate information from the District of Columbia Government. The District of Columbia is the source of the information.

The District has a right and a duty to enforce the Zoning Code. However, in order to have that right the District of Columbia in the first instance must disseminate accurate zoning information. The evidence in this case overwhelmingly shows that the District of Columbia failed to do so. The District of Columbia has disseminated incorrect information which the District of Columbia knew would be relied upon by potential purchasers of properties when determining whether to make a purchase for a specific use. The District of Columbia's interest and the interest of its citizens must yield to the realities of the situation and the prevention of further harm to those who acted in good faith.

The Board has considered the opposition by the ANC 6A and Ms. Brown, however, the equities to be considered are between the Applicants and the District of Columbia.

In considering the equities, we considered the amount of impact the Applicants' business will have on the immediate neighborhood. The square within which the Property sits contains lots zoned C-2-B, R-4, and R-5.

We also take into account the use the Byrds planned for the Property, which was office space for their consulting firm. We are satisfied, that based upon the fact that the Byrds have operated Business Promotion Consultants, Inc. since 1980, that their description of the type of business and the activities which will be carried on within the Property are accurate as opposed to being based upon conjecture or speculation. A consulting firm could be conducted as a home business in the Property. A consulting firm, when compared to other uses, will not seriously impact the neighborhood. The Applicants' business is one without a large amount of foot traffic, such as a medical office or a photocopying business. If the Applicants' planned use of the Property was different, our findings of the equities may be different.

We are also mindful of the distance to the C-2-B zoned properties, three lots and an alley away. The photographs of the Property introduced into evidence show that the use of this Property will not change the street scene appreciably if at all.

On the Applicants side of the balance, without the variance, the Byrds will not be able to consolidate the operations of their consulting business in one facility, will suffer a substantial financial loss, will not be able to focus on growing their business base within the District of

Columbia, and may not be able to continue to operate within the District of Columbia. The alternative of leasing the Property as a residential property and leasing other office space is not financially practical.

The equities in this case are close but given the evidence in this unique matter, we find that the Applicants have met the four elements to raise an estoppel. Because we have determined that the District of Columbia is estopped from enforcing the zoning restriction, we need not determine whether the Applicants are entitled to a use variance.

Proposed Alternative Finding.

Based on the foregoing findings of fact and evidence of record, the Board concludes that the Byrds are seeking a use variance pursuant to 11 D.C.M.R. § 3107.2 so as to permit the use of 714 10th Street NE, (Lot 0072, Square 0912) as a general office.

Granting such relief requires a showing by the Applicants that their situation meets the requirements set forth in Downtown Cluster of Congregations v. District of Columbia Board of Zoning Adjustment, 675 A.2d 484. The Applicants must meet three requirements for a use variance: (1) unique physical aspect or "other extraordinary or exceptional situation or condition of a specific piece of property," (2) undue hardship, and (3) no harm to the public or to the zone plan.

The Applicants have shown an extraordinary or exceptional situation at to a specific piece of property.

The Byrds purchased the Property based upon incorrect information disseminated by the District of Columbia government.

The evidence shows that the District of Columbia caused incorrect information as to the zoning of the Property to be disseminated. The critical dissemination was when William Byrd inquired at Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs (DCRA), Room 2300, 941 North Capital Street, NE. The Property Information printout given to the Applicant stated that the Property was zoned C-2-B. There was no disclaimer on the computer print out given to William Byrd. This printout only acted to confirm the zoning information obtained by the Applicants' two agents; the real estate agent and an appraiser. Both are professionals. Both informed the Applicants in writing that the zoning was C-2-B. Cumulatively, all three show that the District of Columbia was disseminating incorrect information to the Applicants.

The zoning classification of a lot in the District of Columbia can be considered a characteristic or part of a property. The zoning determines what use can be made of the property or what improvements can be made to structures on the lot. The Applicants purchased the Property only after receiving information from the District of Columbia as to the zoning. That information was incorrect, and the Board is aware that the information in the

District of Columbia's records as to the zoning on this particular lot is confusing. The confusion over the zoning of this Property renders this an extraordinary of exceptional situation as to this specific piece of Property.

We have accorded great weight to the opposition of ANC 6A. The ANC opposes the application. However, given the unique situation in this case, which the ANC may not have fully appreciated, we find that there is an extraordinary of exceptional situation in this case.

The Byrds have met the second requirement, as to undue hardship.

The Byrds have no other use for the Property other than as office space for their consulting business. The Byrds cannot apply for use of the Property as a 'home-based business' because the Byrds already have a 'home based business' license to operate their business out of their permanent residence in the District of Columbia.

Without the variance, the Byrds will not be able to consolidate the operations of their consulting business in one facility, will suffer a substantial financial loss, will not be able to focus on growing their business base within the District of Columbia, and may not be able to continue to operate within the District of Columbia. The alternative of leasing the Property as a residential property and leasing other office space is not financially practical.

Without the variance the Applicants will be forced to either take on the extra work of renting office space and renting out the Property. There is no certainty that the Applicants can rent the property and obtain a positive cash flow or sell and recover the costs incurred.

Granting the application will not cause harm to the public or the zone plan.

The business to be conducted in the Property is a management consulting business. The business will have only seven (7) employees, including the Byrds.

The Applicants presented evidence to show that the extent of extra traffic will be minimal. Clients do not generally visit the business. Meetings are routinely held at clients' offices. Because there will only be office work occurring, there will be no additional deliveries beyond mail and infrequent FedEx or UPS deliveries. The Applicants testimony as to their business was based upon their operation of the business since 1980.

The Applicants testified that there will be no increase in noise. Office activity will occur between 8:30 AM and 5:00 PM, Monday through Friday. When residential neighbors are most likely to be at home, in evenings and on weekends, the Property will not be in use.

The small increase use of the Property as opposed to a home business use, will not cause harm to the public. In making this determination, we have also taken into consideration the close proximity to the C-2-B area in the same square.

Granting the application will not cause harm to the zone plan.

The use of the Property as office space will not significantly impact the street scene. The Property is within three lots and an alley of a C-2-B District.

The photographs introduced into evidence show that, first, the commercial scenery of H Street is visible from the front of the Property, and second, the Property appears to be 'town house' office space. The commercial buildings along H Street influence the street scene. Furthermore, directly behind the Property is a seven (7) story apartment house that also dominates certain views from the street. The utilization of the Property as office space will not be inconsistent with the surrounding neighborhood. The variance for this one lot, justified only by the unique and exceptional circumstances, will not cause harm to the zone plan.

The Office of Planning's report opposes the issuance of a use variance. We have taken the substance of the report into consideration. The report confirms the placement of the Property as close to the H Street corridor. Given the unique situation in this case, we find that the Applicants arguments outweigh those made by the Office of Planning. If the Property was situated further from a commercial zone, or the proposed use was different, our decision may be different. Furthermore, we believe that a situation like this one is unlikely to be repeated and our decision in this application will not have an impact on the zoning plan.

Moreover, in this unique instance, the equities of the situation must be taken into account. The Byrds purchased the Property based upon affirmative representations by the District of Columbia government to lawfully use the Property as office space. Given the minimal intrusion created by a management consulting business, this Board determines that a use variance is justified in this unique situation.

VOTE:

By Order of the D.C. Board of Zoning Adjustment.

Final Date of Order