GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 16989 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 § 330.5, in an R-4 district at premise 714 10th Street, N.E. (Square 912, Lot 72).

HEARING DATES: March 18, 2003, April 8, 2003
DECISION DATE: May 6, 2003

DECISION AND ORDER

The applicants in this case are Mr. William T. and Mrs. Norma G. Byrd, (the "Applicants") husband and wife, the owners of the property that is the subject of this application ("subject property"). The Applicants purchased the property on October 15, 2002, intending to use it as an office for their management consulting business, but they did not intend to reside at the subject property.

The Applicants applied to the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for a certificate of occupancy, but their application was denied. The Zoning Administrator ("ZA"), an employee of DCRA, wrote to the Applicants and informed them that because the subject property is located in an R-5-D zone district, their proposed office use is not a matter-of-right use. He explained that the Applicants needed variance relief from the Board of Zoning Adjustment ("Board"). On January 7, 2003, they filed the appropriate application with the Board requesting use variance relief.

On March 18, 2003, the Board held a public hearing on the application, during which there was lingering uncertainty as to the correct zoning on the subject property. Therefore, the Board continued the hearing until April 8, 2003, and requested that, before that date, the Applicants have the District of Columbia Office of Zoning ("OZ") officially certify the zoning. The zoning was properly certified as R-4 and the hearing continued and concluded on April 8th. On May 6, 2003, the Board held a public decision meeting and voted, 4-0-1, to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memoranda dated January 14, 2003, the Office of Zoning notified the Council Member for Ward 6, Advisory Neighborhood Commission ("ANC") 6A, the ANC member for Single Member District 6A02, the

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District of Columbia Office of Planning ("OP") and the District of Columbia Department of Transportation of the filing of the application. Pursuant to § 3113.13 of Title 11 of the District of Columbia Municipal Regulations ("DCMR"), OZ published notice of the hearing on the application in the District of Columbia Register and on January 23, 2003, OZ mailed notices to the Applicants, ANC 6A and all owners of property within 200 feet of the subject property, advising them of the hearing date. Further, the Applicants' affidavits of posting indicate that on March 3, 2003, they had posted a zoning poster on the front door security gate of the subject property and that on March 5, 2003, this poster, after having been torn down, was replaced, and a second poster put up in the yard. Both posters were in plain view of the public.

Requests for Party Status. There were two requests for party status in this case, one from Ms. Marie-Claire Brown and one from Mr. Carlos Reeder, both residents of the neighborhood wherein the subject property is located. Mr. Reeder's request was received only one day before the hearing date and he did not appear to testify at the hearing. The Board did not grant his request, but did grant party status to Ms. Brown, who appeared at, and participated in, the hearing.

Applicants' Case. The Applicants both testified on behalf of the application. They explained that they did not intend to live at the subject property, but that they had spent a good deal of time and money searching for the best property in which to re-locate and expand their home-based business. They testified that they had been told by both their realtor and DCRA that the subject property was zoned C-2-B, and was therefore a suitable location for their office use. They testified that the previous owner had been running a home occupation from the subject property, but that he also lived on the property. They stated that they had made a $60,000 down payment on the property and had made some minor improvements in order to prepare it for office use. They had not yet, however, moved into the property and the property was vacant at the time of the hearings on the application. The Applicants made both traditional variance arguments and an equitable estoppel argument, claiming that the District was estopped to deny them the use variance.

Government Reports. On March 4, 2003, the Office of Planning submitted a report recommending denial of the requested use variance. OP opined that the Applicants could not make the use variance tests, *i.e.,* that there was nothing unique about the property and there was no undue hardship caused by the application of the zoning regulations. The property was appraised as a residential unit and retains this value as a residential property. It can therefore be put to any conforming use with a fair and reasonable return. OP also stated that the requested commercial use would impair the intent of the zoning regulations and the integrity of the Comprehensive Plan for the National Capital ("Comprehensive Plan").

ANC Report. By letter dated March 13, 2003, ANC 6A indicated that it voted 6-0-1, at a regularly scheduled meeting with a quorum present, to oppose the application. No ANC representative testified at the hearing on the application.

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

Parties and Persons in Opposition. Ms. Marie-Claire Brown appeared as a party in opposition. Dr. Michael Fain testified as a person in opposition to the application. There were also several letters in opposition received into the record. Generally, the opposition was concerned about the potential negative impacts of a commercial use on the residential character of the neighborhood.

Hearing. The public hearing on the application was held on March 18, 2003 and continued until April 8, 2003, on which date it was completed.

Decision Meeting. At the public decision meeting on May 6, 2003, the Board voted 4-0-1 to deny the application.

FINDINGS OF FACT

1. The subject property is located in Ward 6, at premise 714 10th Street, N.E. and is improved with a two-story row dwelling.
2. The subject row dwelling is one in a continuous line of 11 row dwellings, collectively know as "Lincoln Mews East" and does not differ from these other row dwellings in any significant way.
3. The subject row dwelling could be used as a residence or sold as a residence.
4. The subject property is in an R-4 zone district, as certified by the Office of Zoning on March 24, 2003. The R-4 district allows dwellings, including row dwellings, and conversions of pre-1958 buildings into apartment houses, and some institutional uses, but no office uses. *See,* 11 DCMR § 330.
5. All the other row dwellings in the continuous line of dwellings of which the subject property is part are used as residences. The line of dwellings fronts on 10th Street, N.E., running north and south between G and H Streets, N.E.
6. To the east across 10th St., N.E. and to the south across G St., N.E., the R-4 zone continues. Just behind the subject property to the west is an R-5-D zone and to the north of the subject line of row dwellings is a C-2-B zone. This C-2-B zone runs along H St., N.E. and is referred to as the "H Street Commercial Corridor."
7. The subject property is designated as Moderate Density Residential on the Comprehensive Plan.
8. On October 15, 2002, the Applicants purchased the subject property, intending to use it as office space for their currently-home-based management consulting business. The business employs 7 people, including the Applicants.

9. The parking, loading and trip generation of the proposed use would be greater than those attributable to a single-family use and are therefore incompatible with the neighborhood.
10. During the purchase process, the Applicants' realtor and appraiser both erroneously informed them that the subject property was zoned C-2-B.
11. The information the Applicants received from their realtor stated, in fine print, "[i]nformation is believed to be accurate, but should not be relied upon without verification."
12. At some point before final closure on the subject property, the Applicants received a "Property Information" print out of a database record from DCRA, which stated that the subject property was zoned C-2-B. The Applicants did not, however, receive a certification of the zoning of the property from the Office of Zoning, the only office with the authority to officially certify zoning. *See,* 11 DCMR § 106.3.
13. The Applicants had an appraisal of the dwelling done, the cost of which was based on the condition that the property would have a commercial use. The appraisal, however, was performed as a residential appraisal and memorialized in a report entitled "Uniform Residential Appraisal Report." All the "comparables" used in the appraisal report were residential properties.
14. The seller of the subject row dwelling lived in it and operated a home occupation in it, pursuant to 11 DCMR § 203.
15. The Applicants did not intend to live at the subject property and have not yet moved into the dwelling.
16. The Applicants have not altered the subject property in any way which would preclude its use for a use permitted in the R-4 zone district. They verified that there was sufficient voltage to operate multiple computers, and upgraded the telephone lines, but made no other changes to the interior or the exterior of the property.
17. The purchase price for the subject property was $299,000. The Applicants put down a $60,000 deposit and took out a mortgage for the balance. They also expended something less than $1,000 on the subject property, upgrading the phone lines, to prepare it for office use.
18. After they purchased the subject property, the Applicants applied at DCRA for a certificate of occupancy. The Applicants were informed by the ZA, in his letter of November 26, 2002, that their application was denied because the property was zoned residential and that, therefore, they would need variance relief to permit their requested office use.

CONCLUSIONS OF LAW

This case involves a request for a use variance. The Board is authorized to grant a variance 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 a use variance must make the greater showing of "undue hardship," as opposed to the lesser showing of "practical difficulties," which applies in area variance cases. *Palmer v. 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 "undue hardship" to the Applicants, and that the granting of the variance would not impair the public good or the intent and integrity of the zone plan and regulations.

In determining uniqueness and undue hardship the Board is directed to look at the property, including the physical land and the structures thereon, but it can also consider "subsequent events extraneous to the land." *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978); *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987). The Court of Appeals has opined that the Board must be able to consider such events in order "to weigh more fully the equities in an individual case." *National Black Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687, 690 (D.C. 1984). *See also, Downtown Cluster of Congregations v. Board of Zoning Adjustment,* 675 A.2d 484 (D.C. 1996) (market conditions); *French v. Board of Zoning Adjustment,* 658 A.2d 1023 (D.C. 1995) (previous chancery use); *Tyler v. Board of Zoning Adjustment,* 606 A.2d 1362 (D.C. 1992) (economic factors); *Gilmartin v. Board of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990) (easement); *United Unions v. Board of Zoning Adjustment,* 554 A.2d 313, 317-318 (D.C. 1989) (historic preservation requirements); *National Black Child Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687 (D.C. 1984) (changes in zoning regulations); *Capitol Hill Restoration Society v. Zoning Commission,* 380 A.2d 174 (D.C. 1977) (private restrictive covenant); *Clerics of St.Viator v. Board of Zoning Adjustment,* 320 A.2d 291 (D.C. 1974) (societal changes).

The category of "events extraneous to the land" has been broadly interpreted by the Court of Appeals. Under this category fall events which have no immediate relationship to the property, such as the "extraordinary drop in enrollment of seminarians" found to be the uniqueness leading to undue hardship in *Clerics of St. Viator, supra.* Also under the category of "events extraneous to the land" fall events which have a more direct connection to the property in question and arise out of the "zoning history" of the property. The Court of Appeals has held that this zoning history "can be taken into account in the uniqueness facet of the variance test" because "those past actions [of government officials] are the critical factors" which have helped to cause the "present predicament." *Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091, 1097 and 1098

(D.C. 1979). *See also, Beins v. Board of Zoning Adjustment,* 572 A.2d 122, 129 (D.C. 1990). In the instant case, the Applicants claim that their "present predicament" was caused partially by DCRA, who allegedly told them that the subject property was zoned C-2-B. The Applicants further claim that, reliance on this information resulted in undue hardship in that they expended money on a down payment and some minor improvements of the property.

The Applicants also put forth an estoppel argument based on DCRA's action, but the Board finds that it is not necessary to reach estoppel.[1] Instead, there is a middle ground, which does not rise to the level of estoppel, carved out by the Court of Appeals and into which DCRA's action falls. Under the Court of Appeals' reasoning above, DCRA's action, which arises out of the "zoning history" of the property, is an "event extraneous to the land," which could form the basis of a finding of extraordinary or exceptional situation or condition resulting in undue hardship. Therefore, it will be fully explored. First, however, we will briefly examine the concept of "events extraneous to the land" and how the Court of Appeals interprets zoning history in a variance analysis.

"Events extraneous to the land," and specifically, zoning history, have been held to constitute uniqueness in both area and use variance cases. In *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978), an area variance case, one large lot in an R-1-A zone district was subdivided into three smaller lots, one of which was numbered 17. The subdivision was properly recorded. Subsequently, Lot 17 was enlarged to include an additional strip of land, and this subdivision was also recorded. The owner of Lot 17 applied for, and received, a building permit to construct a single-family dwelling on Lot 17. The landowner never constructed the dwelling, but sold Lot 17 to another individual on the condition that the property was suitable for construction of a single-family residence. When this second landowner applied for a building permit, he was denied on the ground that Lot 17 failed to conform to the lot width requirements of an R-1-A zone. The new landowner was then granted an area variance by the Board, which was challenged in court primarily on the ground that the above scenario did not amount to an "extraordinary or exceptional situation or condition" for variance purposes.

The Court disagreed with this assertion, citing the fact that both subdivisions and building permits are subject to review and must be in accordance with the zoning regulations. *Id.* at 1235. The Court therefore reasoned that the zoning authorities had three times implicitly determined that the lot width of Lot 17 was in accordance with the zoning

[1]The Board heard the Applicants' estoppel argument during the proceedings herein. It is not clear, however, that estoppel is applicable here because, first, the action of the District government that the Applicants claim to rely upon was an action by a DCRA staff person, and, second, the action that Applicants complain of is the ZA's refusal to issue them a certificate of occupancy for the subject property. DCRA, however, was not a party to the proceeding before the Board and therefore, did not have a chance to defend against Applicants' claim of estoppel. Estoppel would have been appropriate in a timely appeal of the refusal of DCRA to give the Applicants their requested certificate of occupancy.

regulations -- at the time of the first subdivision, the second subdivision and the granting of the building permit. *Id.* at 1238. The Court declined to precisely define the term "extraordinary or exceptional situation or condition," but held that the above scenario, without more, fell within the ambit of the term.

In *Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091 (D.C. 1979), use and area variances were upheld based almost entirely on events extraneous to the land, including, most importantly, "past actions of the zoning authorities." *Id* .at 1097. In *Monaco,* it was agreed among the landowner, the Zoning Commission and the Architect of the Capitol that the landowner, instead of requesting a zone change, would proceed by means of a series of variance requests. The landowner proceeded with its building plans in three parts and obtained variances for all three. After the first two parts were constructed, funds ran dry and the last part of the plan was postponed. The variance lapsed. Subsequently, the landowner applied to the Board for new variances for the third part of the building plan. These variances were granted, but appealed to the Court of Appeals on the ground that none of the facts before the Board, including the past zoning history, were a sufficient basis on which to grant a variance.

The Court disagreed and upheld the variances, clearly stating that the

> [landowners'] hardship stems from ... their reliance on actions of the zoning authorities. Thus, we conclude that good faith, detrimental reliance on the zoning authorities' informal assurances may be taken into account in assessing [landowners'] undue hardship under variance law.

Id. at 1101. Thus, in *Monaco,* the past actions of the zoning authorities constituted an extraordinary or exceptional situation or condition out of which arose the landowner's undue hardship.

Extraordinary or Exceptional Situation or Condition -- Uniqueness

In the instant case, the Applicants claim that certain events extraneous to the land constitute the uniqueness of the subject property. They base their uniqueness argument on the facts that they were told by DCRA, their realtor, and their appraiser that the subject property was zoned C-2-B, and that, relying on this information, they assumed a mortgage and expended money on a down payment and some minor improvements of the property. There is nothing else about the subject row dwelling or the property on which it sits that makes it unique compared to the rest of the row dwellings in the line. The property is one in a line of 11 almost identical row dwellings.

DCRA apparently gave the Applicants a "Property Information" print out of a database record showing the zoning of the subject property as C-2-B. The Applicants were also

told by both their realtor and their appraiser that the zoning was C-2-B. As far as the record shows, the realtor and appraiser relied on information found in the "Metropolitan Regional Information Systems, Inc." ("MIRS"). The Applicants argue that, because these sources retrieved information which, at some point, must have been provided by the District, this should be considered an act of the zoning authorities for purposes of uniqueness.

The Board agrees that the actions of DCRA, the realtor and the appraiser were "events extraneous to the land" which can be considered in determining whether there is uniqueness here.
The Board, however, finds that such "events" do not constitute the uniqueness necessary in the granting of a use variance. DCRA is not the proper agency to certify zoning. The Office of Zoning is the correct agency to perform this task. *See,* Finding of Fact No. 12. As far as the actions of the realtor and the appraiser, they appear merely to have been misinformed, and perhaps they should have verified the information they received. *See,* Finding of Fact No. 10. Further, assuming the Applicants properly relied on the erroneous information they received, the justifiability of such reliance is undermined by the facts that the row dwelling is located in the middle of a line of residences and the appraisal was done as a residential appraisal. *See,* Finding of Fact No. 13. In any event, even if these "events extraneous to the land" constitute an extraordinary or exceptional situation or condition, the Applicants have failed to meet the last two variance tests -- undue hardship and no impairment of the neighborhood and the zone plan.

Undue Hardship

The Applicants have failed to show any undue hardship. The Board concludes that the Applicants are not harmed by the strict application of the residential zoning for the subject property. This is not said cavalierly. The Board is well aware of the time and expense that the Applicants put into finding and purchasing the property. The Applicants, however, can sell the subject property if they choose not to keep it, presumably at a price comparable to the price they paid for it, thereby avoiding a loss of their $60,000 deposit and the money spent on telephone line upgrades. Or, of course, the Applicants, as owners of the property, can choose to retain ownership and use the property, whether for occupancy or income, for any other use permitted in the zone. The Applicants have not reconfigured the property in any way to make it unmarketable as a residence, nor have they even moved into the property. The row dwelling is vacant, and the Applicants have made no showing that it cannot be rented, used as, or sold as, a residence, therefore, the Applicants have failed to show the requisite undue hardship. *See, e.g., Bernstein v. Board of Zoning Adjustment,* 376 A.2d 816, 819 (D.C. 1977). ("It must be shown that strict application of the Zoning Regulations would preclude the use of the property for any purpose to which it may reasonably be adapted.") *See also, Salsbery v. Board of Zoning Adjustment,* 357 A.2d 402 (D.C. 1976).

Effect on Neighborhood and on Intent, Purpose and Integrity of Zone Plan

A use variance allows a use that is otherwise not permitted in a certain zone, unlike an area variance, which merely allows an already-permitted use to be built to a different size. A use variance, therefore, can change or negatively affect the character of the zone. *See, Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The subject row dwelling is in the interior of a line of row dwellings, all used as residences. Office use would alter the character of this line of dwellings merely by virtue of the fact that it is not a residential use. Neighborhood impacts unavoidably attendant to office uses, such as the comings and goings of 7 employees, deliverymen and other individuals associated with the use, would result in traffic and parking problems for the neighborhood. *See,* OP Report at 4-5. "It is well established that a variance may not be granted, even to alleviate a bona fide serious hardship to the owner, if the granting thereof would adversely affect the surrounding neighborhood." *Clerics of St. Viator, supra,* at 294-295, citing 2 *Anderson, American Law of Zoning* § 14.40. The Board concludes that the use of the subject row dwelling as office space would have a negative effect on the residential character of the neighborhood.

Lastly, the Board concludes that granting the Applicants a use variance would impair the intent and purpose of the zone plan as embodied in the zoning regulations and map. The subject property is in an R-4 zone, which does not permit matter-of-right office uses. The R-4 zone permits dwellings, particularly row dwellings, conversions of pre-1958 buildings into apartment houses, subject to certain conditions, and some institutional uses. 11 DCMR § 330. The primary purpose of the R-4 designation is "the stabilization of remaining one-family dwellings." 11 DCMR § 330.2. The granting of a use variance to allow office use right in the middle of a series of row dwellings could lead to the "destabilization" of these dwellings, in direct contradiction to the primary purpose of the R-4 zone. Further, the H Street Commercial Corridor is not far from the subject property. Permitting the Applicants an office use in the R-4 zone, so close to the Corridor, could undermine the viability of office space available therein. *See,* OP Report at 5.

"Great Weight" and the ANC's and OP's Recommendations

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). Both ANC 6A and OP recommended against the granting of the use variance requested by the Applicants. The Board agrees with these recommendations.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicants have failed to satisfy the burden of proof with respect to the application for a use variance to allow an office use within a two-story row dwelling in an R-4 zone, under § 330.5. It is therefore **ORDERED** that the application be **DENIED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, David A. Zaidain, Curtis L. Etherly, and Carol J. Mitten, to deny. The fifth member, 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: OCT - 6 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. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPLICATION NO. 16989

As Director of the Office of Zoning, I hereby certify and attest that on OCT - 6 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:

Benny L. Kass, Esq.
Richard P. Schmitt, Esq.
1050 17th Street, N.W., Suite 1100
Washington, D.C. 20036

Marie-Claire Brown
704 10th Street, N.W.
Washington, D.C. 20002

Chairperson
Advisory Neighborhood Commission 6A
815 F Street, N.E.
Washington, D.C. 20002

Commissioner 6A08
Advisory Neighborhood Commission 6A
815 F Street, N.E.
Washington, D.C. 20002

Sharon Ambrose, City Councilmember
Ward Six
1350 Pennsylvania Avenue, N.W., Suite 102
Washington, D.C. 20004

Denzil Noble, Acting Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 N. Capitol Street, N.E.
Washington, D.C. 20002

Ellen McCarthy, Deputy Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein, Esq.
Office of Corporation Counsel
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001

rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning