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John T. Epting
(202) 663-8879
john.epting@shawpittman.com

November 19, 2003

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By Hand Delivery

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

Re: BZA Application No. 17034 – Appeal of ANC 2E

Dear Chairperson Griffis and Members of the Board:

During public hearing on November 18, 2003 in the above-captioned matter, the Board of Zoning Adjustment requested additional information from intervenors Strategic Georgetown, LLC and Georgetown 32nd Street, LLC. In response to the Board's request, enclosed please find twenty copies each of the 1957 wall check and the written testimony of Armando Lourenco.

If there is any further information that the Board requests kindly have your staff contact either of the undersigned.

Very truly yours,

John T. Epting

Ashleigh Horne

cc: ANC 2E – by first class mail

Document #: 1364148 v.1

BZA
Case No. 17034
Exhibit No. 22

Board of Zoning Adjustment
District of Columbia
CASE NO. 17034
EXHIBIT NO. 22

ARMANDO LOURENCO'S TESTIMONY NOTES
BZA Appeal # 17034 - November 18, 2003

Good evening Chairman Griffis and Members of the Board.

My name is Armando Lourenco and I am a private consultant on building and land-use regulatory matters. Immediately prior to my working as a private consultant, I served as the Administrator of Building and Land Regulation Administration, of the Department of Consumer and Regulatory Affairs.

I also served as the Acting Zoning Administrator of the District of Columbia, from July 1998 to August 1999.

Prior to that, from 1990 to 1994, I was the Program Manager of the Permit Processing Division of BLRA and, in that capacity, I interacted almost daily with the Zoning Administrator on matters related to the issuance of building permits and Certificates of Occupancy.

As a result of my past experience and my background as a regulatory officer in land use matters in the District of Columbia, I am very familiar with the Zoning Regulations and their implementation.

I was retained by the property owners of the subject properties to review the Zoning Administrator's ruling of July 12, 2001 as well as all the pertinent aspects of the development history of the lots in question, to assess the validity of the ruling and the ability of the lots to qualify for application of the ruling. **I concluded that the ruling of the Zoning Administrator is valid and that the current lot owners are entitled to develop their respective properties in accordance with it.**

The properties in question – lots 19, 20 and 21 in square 1270 – are located in Georgetown in the 1500-block of 32nd Street. The lots are zoned R-3 and are proposed to be developed with row dwellings.

From what can be ascertained from the documents filed with BZA, the following conclusions can be drawn: (a) these lots were recorded in May 1881; (b) a wall check of the Episcopal Home building foundation walls, performed in April 1957, confirms that the lots existed in their present configuration before April 1957; and (c) the garages previously existing on these lots had been removed by then.

Under appeal now is the ruling of the Zoning Administrator, Mr. Michael Johnson who, by letter of July 12, 2001, ruled that the lots could be developed as a matter of right, to erect row dwellings. The Appellant's arguments are aimed at five different aspects of the Zoning Administrator's ruling:

1st – The Appellant claims that the lots **were not unimproved** on November 1, 1957.

2nd – The Appellant argues that, on the date the ruling was issued, the lots **were in the same ownership**.

3rd – The Appellant claims that the Zoning Administrator's finding that the lots meet the minimum lot width of §401.3 is incorrect because the width of 20.5 ft was incorrectly measured along the street frontage.

4th – The Appellant argues that the Zoning Administrator erred in applying the discretionary adjustment of §407.1 to the exceptional case of a lot covered under §401.2.

Finally – The Appellant claims the Zoning Administrator failed to make the finding that the 2% discretionary adjustment granted was "deemed by the Zoning Administrator not to impair the purpose" of the Zoning Regulations.

Let's examine these five arguments in light of the text of the Zoning Regulations and the existing records on these lots.

1st – The argument that the lots were not unimproved on November 1, 1957 is inconsistent with the available records. We know from the records on file that **on November 1, 1957 there was ongoing construction** on the site of the future Episcopal Church Home, which included lots 19, 20 and 21.

In effect, the records show that the basement walls were surveyed in April 1957. This wall check also shows that **the garages formerly located on the lots had been removed** and that the lots were vacant. It was not until **December 10, 1957** – i.e., 5½ weeks past the date limit specified in §401.2 – that an application for Certificate of Occupancy (Exhibit C) was submitted to the Department of Licenses and Inspections – the predecessor of DCRA. Much can be learned from that application (Exhibit C).

Given the natural aspiration of a building owner to use a building as soon as it is possible to obtain the Certificate of Occupancy that sanctions its completion, the date of intake of the Certificate of Occupancy application is a good estimate of the earliest date the owner considered construction to be completed.

We can therefore establish that from well before April 1957 and until December 10, 1957, if not later, lots 19, 20 and 21 were part of a construction site.

Under the Zoning Regulations, the true litmus test of the existence of a legally established use on a lot is the issuance of the Certificate of Occupancy that sanctions completion of the improvements on the lot. This principle is well established in the combined provisions of §101.5, §3203.1 and §3203.4.

> [§101.5 forbids the use or construction of a building except in compliance with 11 DCMR; §3203.1 forbids the use of any structure until a C of O is issued for it; and §3203.4 forbids the issuance of a C of O for a structure being erected until construction is completed "to the point of availability of occupancy for use."]

This has been a consistently accepted standard used in the enforcement of the Zoning Regulations and in the vesting of grandfathered rights. In the case of the improvements erected in part on lots 19, 20 and 21, the Certificate of Occupancy number B9123 (Exhibit D) was not issued until January 14, 1958.

One must conclude that lots 19, 20 and 21 were unimproved in early 1957, were still unimproved on November 1, 1957 and remained unimproved until January 14, 1958. That is almost 11 weeks past the relevant date specified in §401.2. **THE APPELLANT'S FIRST ARGUMENT IS, THEREFORE, INCORRECT.**

[2nd] – The Appellant's second argument is also without merit. Arguing that the Zoning Administrator's ruling is invalid because it addressed a condition that was not yet effective, negates one of the fundamental roles of the office of the Zoning Administrator.

One can not deny the ability of the Zoning Administrator to clarify, for any member of the public who requests an interpretation, how the Zoning Regulations will be applied once certain conditions are met. This is a normal function of the Zoning Administrator, that occurs almost daily. How else can the Zoning Administrator discharge his or her duties?

What should the Zoning Administrator have done in the present case? Respond: *"I can not issue a ruling at this time; go sell your properties and then come back and I will give you a ruling"*? The absurdity of such a position is manifest.

The **Zoning Administrator's ruling** (Exhibit A) **is clearly a conditional one**, as he writes that *"it is my understanding that at the time of development (...) the lots will be owned (...) by separate companies/entities (...)."* Clearly, if that condition is not fulfilled, the ruling is not applicable. To that extent, the Zoning Administrator's ruling is correct and clearly construed.

The ownership status of the lots at the time the ruling is requested or issued is irrelevant. The regulations do not restrict when rulings may be requested or issued. Until an application to erect a structure on such a lot is submitted, the actual evaluation of the lot in light of §401.2 does not take place. Therefore, until the Zoning Administrator has to review and approve such an application [*"at the time of development"*], the test on separate ownership of the adjoining lots **is premature.**

Therefore, we are of the opinion that **THE APPELLANT'S SECOND ARGUMENT IS INVALID.**

[3rd] – As to the Appellant's third argument, the lot width argument, it is, at best, irrelevant. Granted, the first sentence of the second paragraph of the Zoning Administrator's letter has an obvious composition problem. The Appellant speculates that the Zoning Administrator had a lapse and wrote "20 percent" instead of "20 feet." An equally plausible possibility is that the Zoning Administrator was the victim of an involuntary wordprocessor mishap that wiped out part of a sentence, and the reference to 20 percent was intended but misstated within the incomplete sentence.

> [I note that just adding the words ***"below that"*** between *"20 percent"* and *"set forth"* would correct the sentence and make it accurate.]

More important than speculating on what may have occurred during the editing of the letter, is to establish what the lot width requirement is and whether the Zoning Administrator's conclusion is erroneous or correct. §401.2 allows certain lots – among them lots 19, 20 and 21 – to be narrower, by as much as 20 percent, than what would otherwise be dictated by §401.3.

To that extent, although the Zoning Administrator's sentence is flawed, his conclusion that the "subject properties meet the minimum lot width" is correct because, for lots under the purview of §401.2 – such as lots 19, 20 and 21 – the minimum lot width is 16 ft, not 20 ft.

Dwelling on whether the lot width is 20.5 ft, as shown on the Surveyor's plat, or 19.22 ft – as measured using the Appellant's proposed methodology – **IS IRRELEVANT FOR THE CASE AT HAND.**

[4th] – The Appellant's fourth argument does not stand the simplest scrutiny. The Appellant sustains that the Zoning Administrator should not apply the discretionary adjustment allowed by §407.1 to anything other than the areas or widths specified in the table of §401.3. This is an arbitrary interpretation that the text of the regulations disavows.

In effect, the minimum area and width of a lot in a residential district are regulated by the various subsections within §401:

- Some lots are subject to the restrictions of §401.1.
- Others are regulated by the provisions of §401.2.
- Others – the majority – are regulated by §401.3.
- A few lots may benefit from the provisions of §401.4.
- Other miscellaneous provisions are also contained in §401.5, §401.6 and §401.7.

§407.1 states in relevant part: *"The Zoning Administrator is authorized to permit a deviation not to exceed two percent (2%) of the **area requirements of §§401** and 403 of this chapter."* §407.1 does not mention §401.3 or any other subsection of §401. One has to conclude that the area requirements of §401.2 are also covered under this minor flexibility authority granted to the Zoning Administrator, because it applies to all area determinations done under any of the subsections of §401.

Therefore, this fourth argument results from the Appellant's flawed reading of §407.1 and, as such, **SHOULD BE DISREGARDED.**

[5th] – Finally, the claim that the Zoning Administrator failed to make a finding that would be required by §407.1(b) is not supported by the facts.

First, the regulations authorize the Zoning Administrator to permit certain deviations provided the Zoning Administrator deems that those deviations "do not to impair the purpose of the otherwise applicable regulations." The Zoning Regulations do not require the Zoning Administrator to state such specific finding in his or her rulings.

The Zoning Administrator is not mandated to grant the deviations considered in §407.1. Since it is a discretionary power, it is inferred that if the Zoning Administrator chooses to exercise that authority and rules to grant a deviation, he or she has to have deemed that in doing so the purpose of the otherwise applicable regulations was not being impaired. Otherwise he would have ruled against granting the deviation, based on §407.1(b).

Secondly, the tone of the Zoning Administrator's letter already denotes his concern with not impairing the intent of the regulations. As the Zoning Administrator, that is his first enforcement duty and there is no reason to doubt his commitment to it.

The Zoning Administrator starts by noting that the subject lots had been recorded since 1881. This means that the existence of the lots and their size have been in the public domain for well over a century and are not a newly created feature in Square 1270.

Further, the Zoning Administrator acknowledged that the properties are in a zoning district R-3 where the proposed row dwelling structures are a permitted use.

Furthermore, the proposed development will have to meet the other requirements of the Zoning Regulations for R-3, and nothing in the Zoning Administrator's letter contemplates any exception from those rules. That is the essence of the purpose of the Zoning Regulations, as stated in §101.1, i.e. (paraphrasing):

- to prevent undue concentration of population;
- to prevent overcrowding of land;
- to regulate the distribution of population, business and industry so as to foster recreational, educational and cultural opportunities; and
- to further economy and the delivery of public services.

Consequently, considering the Zoning Administrator's letter as a whole, it is evident that he considered the effect of his discretionary decision on *"the purpose of the otherwise applicable regulations."* **And that is all that was required of the Zoning Administrator by §407.1(b).**

<u>IN CONCLUSION</u>, it is my opinion that the Appellant has failed to make a credible case on any of the five arguments advanced in the appeal. Therefore, the appeal should be denied for lack of basis on the text or intent of the regulations and for lack of other substantiation.

Thank you for the opportunity to address this Board on this matter. If the Board has any questions for me, I will be happy to answer them.

m 907—E. D.

Surveyor's Office
DISTRICT OF COLUMBIA

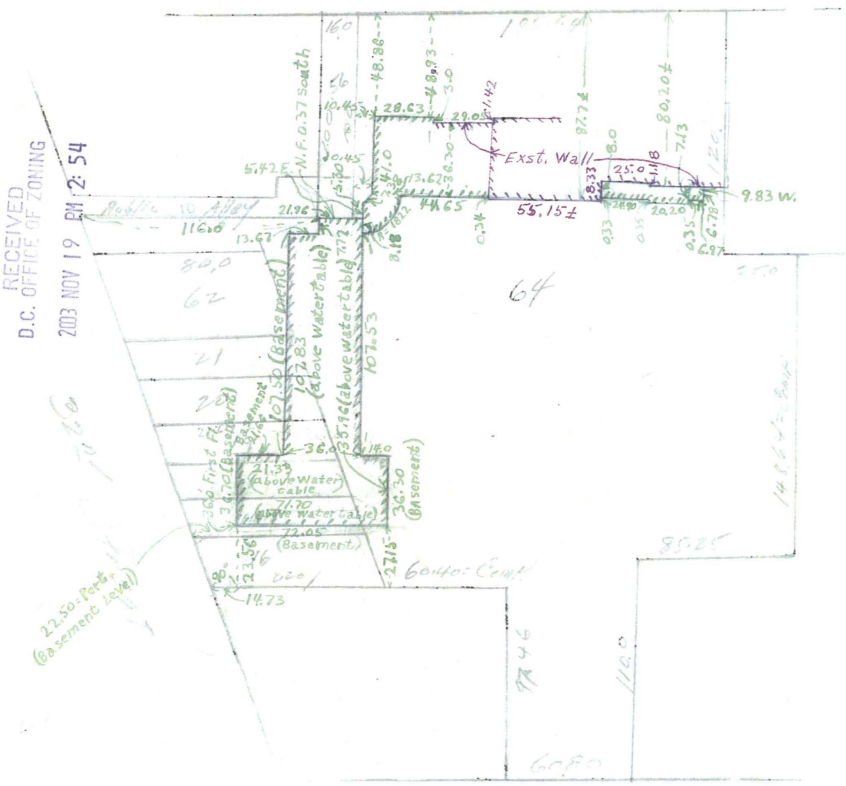
Washington, D. C., 4-17, 1957

Plat, *for Building Permit of* Lot 64 Square 64+62 - S - 12.70

Recorded in Book 25 page 27 42

Scale: 1 inch = 20 feet

S. O.



Furnished to Office Cashier

I hereby certify that all existing improvements shown hereon, are completely dimensioned, and are correctly platted; that all proposed buildings or construction, or parts thereof, including covered porches, are correctly dimensioned and platted and agree with plans accompanying the application; that the foundation plan as shown hereon is drawn, and dimensioned accurately to the same scale as the property lines shown on this plat; and that by reason of the proposed improvements to be erected as shown hereon the size of any adjoining lot or premises is not decreased to an area less than is required by the Zoning Regulations for light and ventilation; and it is further certified and agreed that accessible parking area where required by the Zoning Regulations will be reserved in accordance with the Zoning Regulations, and that this area has been correctly drawn and dimensioned hereon. It is further agreed that the elevation of the accessible parking area with respect to the Highway Department approved curb or alley grade will not result in a rate of grade along centerline of driveway at any point on private property in excess of 20% for single-family dwellings or flats, or in excess of 12% at any point for other buildings. (The policy of the Highway Department permits a maximum driveway grade of 12% across the public parking and the private restricted property).

Date _____

_____
(Signature of owner or his authorized agent)

_____
Surveyor, District of Columbia.

Per _____

LC-8

NOTE: DATA SHOWN ON ASSESSMENT AND TAXATION LOTS OR PARCELS ARE PER RECORDS OF ASSESSOR, D. C. BUT DO NOT NECESSARILY AGREE WITH DEED DESCRIPTION.