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July 16, 2003

D.C. ... OF ZONING
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Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, DC 20001

Re: 2708 44th Street, N.W. Square 1340, Lot 35
Application for Variance - BZA Case No. 17039
Revised

Dear Mr. Griffis:

Enclosed is a revised statement of justification. The house for which the variances are requested was completed in 1999. On March 18, 2003, the Zoning Administrator issued an Order to Abate violations of the Zoning Regulations, requiring the removal of dormers in the roof. Although the Zoning Administrator had signed off on the plans prior to construction, the Office concluded, after construction was complete and the house was sold, that the dormers made the roof a fourth story, in violation of the three story maximum. It notified the builder that since the roof was considered a story, the gross square footage limitations in the Wesley Heights Overlay District were also exceeded.

As the Board knows, simultaneously with the application, we filed an appeal from the Order to Abate. It should be understood that by filing the application, we were not conceding that the order was justified. We maintain all possible defenses to the order. Nevertheless, we hope that the Board's favorable ruling in this case will moot any further processing of the appeal.

BZA
Case No. 17039
Exhibit No. 33

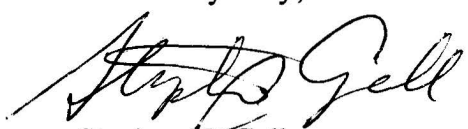
Board of Zoning Adjustment
District of Columbia
CASE NO. 17039
EXHIBIT NO. 33

We are also submitting a petition with 43 signatures of neighbors who support the variance. We have not encountered any opposition. On April 2, 2003, ANC 3D voted unanimously to support our application.

Our witnesses will be John and Pat McAdams.

Please call if there are any questions.

Yours very truly,



Stephen N. Gell

Enclosures
cc: John McAdams
John McGettigan

REVISED PREHEARING STATEMENT

STATEMENT OF EXPLANATIONS AND REASONS

SUPPORTING AN APPLICATION

TO THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

FOR AREA VARIANCES

PURSUANT TO SECTIONS 400.1, 1543.3 and 3103

OF THE DISTRICT OF COLUMBIA ZONING REGULATIONS

2708 44th Street, N.W.

(SQUARE 1340, LOT 35)

BZA Case No. 17039

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INTRODUCTION

This is a Statement of Explanation and Reasons supporting the application of Mr. and Mrs. John McAdams, (hereinafter "Applicants") for a variance from the provisions governing the WHOD/R-1-A Zone District to maintain a 4th story and exceed the allowable gross floor area for the Wesley Heights Overlay District.

The District alleges violations of 11 DCMR Section 400.1 (number of stories in WHOD/R-1-A), and Section 1543.3 (Wesley Heights Overlay District gross floor area limitations).

DESCRIPTION OF THE APPLICANTS

Mr. and Mrs. McAdams purchased this new house on April 14, 1999, from the builder, William Lipnick.

THE SUBJECT PROPERTY

A. Location and Description of the Property

The property which is the subject of this Application is located at 2708 44th Street, N.W., Square 1340, Lot 35. It is a single family dwelling with a basement level garage.

B. Area Surrounding the Property

The Property is on the West side of 44th Street, near Dexter. The neighborhood is entirely residential and park land. Approximately a block to the South is Wesley Heights Park and across the street is Glover Archibald Park. In addition, the houses on either side are also large structures so the subject house does not appear to be out of place.

C. Zoning History and Use History

The area is zoned WHOD/R-1-A. The property is subject to the Zoning regulations generally applicable to buildings in the WHOD/R-1-A Zone District as well as the Wesley Heights Overlay District Regulations found at Section 1541, *et seq.* (11 DCMR § 1541, *et seq.*)

REASONS IN SUPPORT OF THE APPLICATION FOR A VARIANCE

A. Compliance with D.C. Zoning Regulations

Extraordinary or exceptional physical conditions creating a practical difficulty

Section 3103.2 of the Zoning Regulations (11 DCMR §3103.2) provides that to support an area variance there must be a showing of "peculiar and exceptional practical

difficulties to ... the owner of the property." In this case, there are two major elements supporting uniqueness: the difficult slope of the lot and the District's failure to enforce the zoning regulations adequately.

Stories

The Zoning Administrator states that the inclusion of dormers in the roof renders the house 4 stories rather than 3, as permitted by §400.1. We do not disagree because the number of stories is measured from the grade at the front of the house, and there the garage/basement is at grade. However, the site is on a slope with the front of the house 9 feet lower than the rear. Therefore, only a small part of it can serve as living space. In fact, the Wesley Heights Overlay regulations count as gross square footage only five times the fenestration area which we calculate to be 268 sf.

Gross Floor Area

According to the Zoning Administrator ("ZA") when the gross square footage of the roof is added, the building also violates the Wesley Heights gross floor area limitations by 353 square feet. Our calculations lead us to a different conclusion. The ZA cites to "Original computation sheets", (which we have not seen, but which conflict with the plans submitted in 1998) showing the basement and first and second floors as totalling 5,743.76 sf. The ZA then adds 962 sf for the fourth story and arrives at a total GFA of 6,705.76 sf, while only 6,353.2 sf is permitted.

We believe that the ZA did not follow the rule for the Wesley Heights District that in calculating gross square footage in the basement, one only counts 5 times the area of fenestration. The only windows are in the Northwest Corner of the house. Each window has a square footage of 26.79 sf. Together, the windows total 53.58 sf. Five times that number is 267.91 sf. Moreover, one of the two windows is 40% below grade.

On his plans the builder cited a fenestration area of 179 square feet. We assume he was taking the area of the room served by the windows. He also improperly deducted the area of the garage from the total (See Sec.1543 (3) (a)) to arrive at a usable area of 321 square feet. Regulations provide that one only counts that portion of the garage which exceeds 600 sf. Since the garage is 472 sf, we did not include it in our calculations. Finally, we used the builder's 1,121 sf for the third floor, rather than the ZA's 962 sf.

Below we have set out the three calculations: Builder, Zoning Administrator, and our own.

Builder's calculation:
First and second floors = 4,189
Basement: 179 (fenestration area) x 5 – 574 (garage) = 321
Third floor = 1121
Total = 5,631 Permitted - 6,353.2

Zoning Administrator's calculation:
Basement, first and second floors = 5,743.76
Third floor = 962
Total = 6,705.76 Permitted - 6,353.2

Our calculation:
First and second floors = 4,189 (as shown in the plans)
Basement: 53.58 sf fenestration area x 5 = 267.91
Third floor = 1121 (as shown in the plans)
Total = 5,577.91. Permitted - 6,353.2

In determining a practical difficulty, the Board should consider the fact that the sharp slope of the land and the intrusion of the garage result in the loss of 80% of the usable space in the basement. Moreover, the shape of the roof deprives the house of nearly half the potential usable space at the third floor.

Practical Difficulties caused by District action

A further practical difficulty arises from the District's approval of the plans, its discovery of its mistake after the house had been constructed and sold, its failure to notify the owner for three and a half years and its uncertainty as to a proper course of action. This gives rise to a claim of estoppel and laches which would be cognizable in court. *Wieck v. District of Columbia BZA*, 383 A.2d 7 (DC App. 1978).

After Applicants took title to the completed structure on April 14, 1999, the District advised the builder that it found the building to be in violation of the Zoning Regulations but did not notify the Applicant, the then record owner. The Zoning Administrator had signed off on the plans and construction permits on August 26, 1998. Only after the passage of three and a half years did the District notify the current owner of the violations. During the three and a half years from the time of the purchase on April 14, 1999, to the notice of violation in November 2002, there had been numerous letters between District officials and Mr. William Timmons, not one of which was copied to Applicants. This lack of notice should not be surprising, considering that as late as February 26, 2002, J. Gregory Love, Administrator, BLRA, advised Mr. Timmons that the matter presented "a quandary of retroactive enforcement." He concluded that the case law prevented further action.

To further compound the confusion, a subsequent inspection by the Office of Zoning Enforcement on August 13, 2002, resulted in a report that found no zoning violations on the premises. Specifically, the inspector concluded that the attic should not be counted as a story.[1] Since the District did not believe that it had the right to require

[1] Specifically, the inspector found that the attic was used for storage, buttressed by several photographs, and should not be counted as a story. In the copy of the inspection

the owner to alter the completed building, an owner, even if he had been privy to the correspondence, would not have known that he may be in violation.

The facts presented in this case are considerably more supportive of a finding of laches than in the *Wieck* case where arguably the District was misled by the builder into thinking that the plumbing and electrical work were being done on the main structure, rather than an out-building in the back yard. Moreover, there was no failure in *Wieck* to notify the owner of the non-conformity, which it did on two occasions. Laches was found in the "longlasting failure of the proper officials to enforce their previous orders and consequent prejudice to petitioner from their present attempted enforcement." *Wieck,* at 11.

The Court of Appeals did not find sufficient evidence for estoppel in *Weick* because petitioner did not establish the necessary elements:

> A party (1) 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 invoking the doctrine. Furthermore, the reliance of the party must be justifiable.

The court concluded that the petitioner did not demonstrate reliance on an affirmative act by the District to his detriment. Here the affirmative act was the approval of the plans as revised by the builder which enabled the builder to complete and sell the house to petitioner. Nor is there any suggestion that the District, in approving the plan amendments, relied on false information furnished by the builder, as it did in Weick. In that matter, our facts are closer to *Saah v. District of Columbia Board of Zoning Adjustment* 433 A.2d, 114 (Ct. App. 1981) where the Court, after noting that both the architect and the District should have known that the revised plans exceeded the percent of lot occupancy regulations, concluded that petitioner's reliance on the District's approval of the plans was justified. at 1117

Petitioner relied on the District's mistake to his detriment. Because the District did not properly enforce its regulations, the builder was allowed to sell the house for nearly two million dollars, a price which reflected the increased living space afforded by the dormers. Moreover, applicants might have been able to recoup some of their

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report that was provided to us, the word "not" had been scratched out by someone, without explanation, leaving the impression that there <u>was</u> a violation. However, the report must have concluded "no violation" first, because the evidence cited leads to that conclusion and, second, Mr. Timmons was provided a copy of the report with no alteration. In his letter of August 29, 2002, to Doris Parker-Woolridge, he states the following:

> Your inspector reports that the attic is not used as livable space and therefore doesn't count as a story, is not included in building height, and the space not calculated as gross floor area.

purchase price if they had had timely notice of the problem. Now, such redress would be speculative at best.

B. No Adverse Effects

The house is similar in height and bulk to the other houses in the neighborhood. The Wesley Heights Overlay District was adopted to protect smaller houses from being overshadowed and overwhelmed by outsized houses on adjacent lots. Such is not the case here. The houses on either side are substantial: Moreover, nearby neighbors have been supportive of the house remaining as it is. Finally, there are no houses across the street but, rather, Glover Archibald Park.

The bulk of the house should not be an issue here, since, absent the dormers, the building complies with regulations. Moreover, far from being a negative influence, the dormers are a valuable aesthetic feature. Their removal would have a greater negative impact on the neighborhood than their continued existence.

COMPLIANCE WITH THE COMPREHENSIVE PLAN

A. Appropriate Residential Use

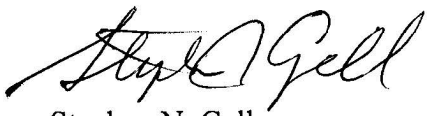
This single family house fulfills the objectives of the WHOD/R-1-A District.

CONCLUSION

The Applicants should be granted a variance to allow the dormers and additional gross floor area to remain. The building fits nicely into the neighborhood and its maintenance in its present size has no perceivable negative effect on the nearby houses. Moreover, such a use will be in harmony with the purpose and intent of the Zoning Regulations.

Finally, if the Board concludes that a variance for number of stories should be granted, we urge the Board to confirm that gross floor area and height are not considered in violation, or include them as additional variances.

Respectfully submitted,



Stephen N. Gell

To the Board of Zoning Adjustment:

We, the undersigned, support the request of John and Patricia McAdams for variances in the height, gross square footage, and number of stories of their home at 2708 44th Street, N.W. We understand that these variances will permit the house to remain as built in 1999.

Name Write	Print	Address	Date
C. Julio	CECILIA JULIO	4480 Dexter St. NW	06/26/03
Katherine Wilkins	Katherine Wilkins	4332 Garfield St	06/26/03
Elizabeth B. Dandy		4301 Forest St NW	6/27/03
[illegible]		4420 DEXTER ST NW	6/27/03
[illegible]		4420 Dexter St NW	6/29/03
[illegible]		4460 " "	6/29/03
KATE GREEN		4450 DEXTER ST	6/29/03
Richard Ahern		4301 Forest Ln	6/29/03
Katherine Epstein	Katherine Epstein	4420 Dexter St NW	6/27/03
[illegible]	Kathrine Cox	4432 Edmonds St. NW	7/1/03
[illegible]	Deborah Phelps	4500 Edmonds St NW	6/29/03
Karen Ruckman	Karen Ruckman	4530 Dexter St, NW DC	July 1, 2003
Alan Pearce	Alan Pearce	4530 Dexter St, NW DC	1 July 03
Ann Rakestraw	Ann Rakestraw	4520 Dexter St NW DC	7/1/03
[illegible]	Lynn Northland	2632 44th St NW	7/1/03
[illegible]	Don Bender	2518 44th St NW	7/1/03
[illegible]		2306 44th St NW	7/1/03
[illegible]		2306 44 St NW	7/1/03

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Name (Write / Print)	Address	Date
Thomas F. Gibson	4400 Edmunds St. NW	6.9.03
Alicia Van Arsdall	440B Edmunds St NW	6-13-03
PETER LEWIS	4412 Edmunds St NW	6-13-03
JERRY JACOBS	4401 DEXTER ST NW	6-15-03
Mrs. B.A. Schreiber	4501 Dexter St. N.W.	6-15-03
KAREN ERSTEIN	4470 DEXTER ST NW	6-15-03
Howard Newman	4410 Dexter NW	6-15-03
W. TED GOSSETT	4400 Dexter NW	6-20-03
Nola Washington	4555 Dexter St NW	6-20-03
STEFANIA SERRA	2524 44th St. NW	6-20-03
N.D. BAXTER	4415 Dexter St NW	6.25.03
C. Hope Eccles Quarles	4515 Dexter St. NW	6-25-03
Robert Kachen	4409 Dexter St NW	6-25-03
C. KOSTOPULOS	4500 DEXTER ST. NW	6-26-03
J. ARMSTRONG	4420 Edmunds St NW	6-30-03
	4347 Forest Lane	
Carol Kolsky	2810 44th St NW	6/30/03
Robert L Wheeler	4428 Edmunds St NW	7/1/03

To the Board of Zoning Adjustment:

We, the undersigned, support the request of John and Patricia McAdams for variances in the height, gross square footage, and number of stories of their home at 2708 44th Street, N.W. We understand that these variances will permit the house to remain as built in 1999.

Name (Write / Print)	Address	Date
Carlin R. Rankin - CARLIN RANKIN	2520 44TH ST, NW	7/1/03
Alfred Morgan	2520 44th ST NW	7/1/03
Lynne Pickard Lynne Pickard	2818 44th St. NW	7/1/03
PAUL A. ZEVNIK	2930 44th Street N.W.	7/1/03
Gerry SIGAL	2909 44th St NW	7/1/03
Susan Orchin - SUSAN ORCHIN	2831 44th St NW	7/1/03
Jeremy D. Orchin JEREMY D. ORCHIN	2831 44th St NW	7/1/03