BEFORE THE
DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application of	)	
	)	
LUCIA AND CLAUDIO ROSAN	)	BZA Case No. 17044
2005 Columbia Road, NW	)	
Square 2536, Lot 150	)	

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OPPOSING PARTIES' PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Advisory Neighborhood Commission 1C, the Kalorama Citizens Association, and the Condominium Party (collectively the Opposing Parties) hereby submit the following proposed Findings of Fact and Conclusions of Law in the above-captioned case:

Proposed Findings of Fact

1. Applicants Lucia and Claudio Rosan (hereinafter "Applicants") purchased the property at 2005 Columbia Road, NW (Square 2536, Lot 150) on or about March 7, 2003 (with the deed apparently recorded on March 13, 2003). The Applicants purchased the subject property from the estate of the previous owner, Mr. Richard Bird, who died in or about April 2002.

2. The Applicants currently own two other inns/tourist houses in Virginia, and they do not plan to live in the subject property.

3. The property is improved with a row house constructed in 1898 and is located within an R-5-D District and within the Kalorama Triangle Historic District. The square in which the subject property is located is predominantly residential and includes row houses, conversions, and both rental and condominium apartment buildings.

4. Adjacent to the subject property to the southwest is a recently restored row house used as a single-family dwelling. Adjacent to the subject property to the northeast is a portion of a condominium building with an address on Wyoming Avenue but that shares a common façade on the Columbia Road side with the subject property. Directly across from the subject property on Columbia Road are three five- to nine-story condominium buildings (the Wyoming, the Oakland, and the Schuyler Arms). Two doors down from the premises is a residence in which the owner resides with an art gallery on the lower floor. Except for two diplomatic properties at opposite ends of the 2000 block of Columbia Road, NW, the remainder of the buildings in the square are totally residential.

BZA
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Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO. 17044
EXHIBIT NO. 46

5. On March 10, 2003, the Applicants filed an application for a certificate of occupancy (Application #50188) proposing to use the premises as an "inn/tourist house" consisting of 15 rooms, including occupancy of the basement, first, second, third, and fourth floors.

6. On March 20, 2003, the Applicants were issued a certificate of occupancy (CO # 50899) permitting use of the subject property as a rooming house with an occupancy load of 8 rooming units. The issuance of this certificate of occupancy was based upon a change of ownership; in 1969, a certificate of occupancy had been issued to the previous owner for use of the property as an 8-unit rooming house.

7. By letter dated April 7, 2003, the Office of the Zoning Administrator disapproved the Applicants' certificate of occupancy application #50188 to use the subject property as a 15-unit "Inn/Tourist Home" due to the need for Board of Zoning Adjustment (Board approval. The Zoning Administrator determined that the R-5-D District in which the property is located did not allow the proposed use and that a variance would be required for that purpose. The Applicants did not appeal the April 7, 2003 determination of the Zoning Administrator disapproving their certificate of occupancy application #50188.

8. On May 30, 2003, the Applicants filed the instant application #17044 with the Board for a "use variance to allow an Inn/Tourist House" for 15 units at the subject property. Advisory Neighborhood Commission 1C (ANC 1C), the Kalorama Citizens Association (KCA), the Wyoming Condominium Association, the Oakland Condominium Association, and Mr. Frank Ballance, the owner of 2009 Columbia Road, NW, filed requests for party status as opponents. At the hearing before the Board on July 29, 2003, the Board granted party status to ANC 1C and the Kalorama Citizens Association (KCA). In addition, the Board joined the two condominium associations as a single party to be known as the Condominium Party. The Board also joined Mr. Ballance with the KCA for purposes of party status with Mr. Ballance's consent.

9. Prior to the Applicants' acquisition of the subject property, Mr. Bird had the lawful right to use and operate the property only as an 8-room rooming house, which at the time of the issuance of the 1969 certificate of occupancy was defined in the Zoning Regulations as "a building or part thereof, other than a motel, hotel, or private club, which provides sleeping accommodations for three or more persons who are not members of the immediate family of the operator or manager, and such accommodations are not under the exclusive control of the occupants thereof."

10. The applicants, during the course of their testimony and in their submissions to the record, raised the issue of grandfathered rights to the use of the rooming house as a transient accommodation, asserting that the previous owner had had a transient accommodation. To the extent that the definition of "rooming house" quoted above may have permitted the use of the subject property as of 1969 as a partial or total transient accommodation, the Applicants failed to offer evidence demonstrating that such transient lodging was offered and operated lawfully by Mr. Bird from a date on which such use

would have been conforming to the date on which a new certificate of occupancy was issued to the Applicants (March 20, 2003) without interruption for any period of time greater than three years. At a minimum, the property has not been operated as either a rooming house or as a transient accommodation since Mr. Bird's death in April 2002 to the present time. To the extent that business tax records for the property are available, they indicate that any transient accommodation business operated by Mr. Bird prior to his death was not operated in compliance with District tax laws. The letter of August 19, 2003 from the Office of Tax and Revenue (OTR) indicates, at a minimum, that there are multiple delinquent tax obligations to the District from this property, and that OTR *"will not be able to sign off on any license or permit that is sought regarding this business with any District agency, pursuant to the Clean Hands law."*

11. The Applicants testified that they were not aware of the type of use restrictions applicable to the residential zoning district in which the subject property was located at the time they purchased it, including the restrictions applicable to inns under the Zoning Regulations, and that they simply assumed when they purchased the property that they would be able to operate their proposed business there. They apparently did not seek or obtain any legal counsel to confirm this assumption prior to the purchase, nor did they make the sale contract contingent on their obtaining a certificate of occupancy or use variance for the operation of an inn or tourist house business, or on the previous owner's estate obtaining such a variance. They were informed of this zoning problem, however, if not before purchase, within a short time after their purchase of the house.

12. The applicants were granted a building permit to "alter/repair as per stamped drawings" on June 2, 2003 illustrating expansion of the number of sleeping rooms and baths to 11 sleeping rooms with accompanying baths on the second, third and fourth floors and one sleeping room in the basement with 2 baths. Of the 12 bedrooms shown on their drawings for the subject property, the Applicants plan to make all 12 available for transient guests. They acknowledged at the hearing that there could be as many as 26 guests staying at the property when it is full, and they estimate that its occupancy will average approximately 80% of capacity. This represents a substantial expansion of any possible previous non-conforming transient use, inasmuch as the applicants have stated that their expansions of facilities and sleeping rooms is for the purpose of enabling them to operate an expanded transient accommodation, and are seeking a certificate of occupancy for that express purpose. The total cost estimated by the Applicants for this construction work is $183,000.

13. Notwithstanding the Zoning Administrator's determination of April 7, 2003 and the pendency of their use variance application before the Board, the Applicants nonetheless commenced construction on the subject property based upon the architectural plans submitted for a building permit and filed with their variance application described above. The Applicants assert that said plans are identical to those they submitted in connection with their application for a building permit to renovate the property for use as an 8-unit rooming house as allowed under the certificate of occupancy. These plans include the addition of numerous full baths to provide a private full bath to every one of the 12 guestrooms shown on the plans. They have persisted in this construction,

notwithstanding the fact that the building permit was approved after they had filed an appeal for a use variance to operate a 15-room guesthouse and prior to a decision on this case. They have indicated that they understand that they are taking a chance in so doing and have been advised that to do so might well make it more difficult to market the house if it had to be sold.

14. The subject property has no driveway and no parking, and is located on a portion of Columbia Road, N.W. that provides only one travel lane in the southwesterly direction in front of the building. To the extent that taxicabs, airport shuttles, guests' vehicles, or commercial delivery vehicles are required to stop in front of the subject property to pick up or discharge passengers, luggage, or other items in order to serve the proposed inn/tourist house, vehicular traffic traveling in the southwesterly travel lane will be required either to stop in that lane, or to move left into an oncoming left-turn lane in order to pass. This situation will create a traffic hazard in front of the subject property, and noise will be associated with guests coming and going at all hours by taxi, car, or tourbus or airport bus. To the extent that guests rent or bring their own vehicles, the proposed inn or tourist house will further burden on-street parking in a neighborhood already burdened by a parking shortage. Based on a recent decision tentatively approved by the Board of Zoning Adjustment regarding interpretation of parking requirements in a historic district, opponents pointed out that when there is an intensification of a use in a historic district, where parking is not an issue for standard uses, parking would have to be provided for the intensification of use.

15. The subject property has no access to any alley for the storage or removal of trash. Thus, trash will have to be placed for pickup on the sidewalk, which from the curb to the berm in front of the property is only 9 feet at its widest point and no more than 5 feet wide between the berm and a tree box in front of a portion of the area. With an average of more than 20 guests staying at the proposed inn/tourist house at any given time, this situation will create an unsightly condition (and potentially a hazardous one with respect to the attraction of rodents) inappropriate to a residential district located within a Historic District. The Applicants also testified that they had been having difficulty arranging for trash removal during their ongoing construction activities because the Department of Public Works had refused to take their trash.

16. The subject property is neither exceptionally narrow, shallow, of an exceptional shape, nor constrained by exceptional topographical conditions. The subject property was developed as a row house, a conforming use within the R-5-D District, and several neighboring row houses are currently used as single-family dwellings or as conversions from single-family to multiple family dwellings. The Applicants produced no evidence to demonstrate why the subject property cannot be used for either a matter of right use or a use that would be permitted by special exception.

17. Mr. Bruce Johnson, an architectural and historic preservation construction consultant, was qualified as an expert witness and testified that in his opinion the subject property is well-suited to renovation and use as a residential dwelling. He based this opinion on his experience with other comparable properties, including the rowhouse at

2007 Columbia Road, NW, immediately adjacent to the subject property, which he purchased in 2000 and renovated into a single-family dwelling in which he now lives.

18. Mr. Mark Gude, a licensed real estate agent in the District of Columbia, was qualified as an expert witness and likewise testified that in his opinion the subject property is well-suited to renovation and use as a residential dwelling, and that following such a renovation the property could be sold at a reasonable profit, whether or not the Applicants choose to live there following renovation. He based this opinion on his extensive experience in real estate sales in the Kalorama Triangle, Adams Morgan, Dupont Circle, and Logan Circle neighborhoods, and on comparisons with the sale, renovation, and subsequent resale of other comparable properties in the vicinity. Additional evidence of recent sales and renovations for varied residential configurations in the immediate area was presented by other parties in opposition to the case.

20. Notwithstanding the provisions of 11DCMR330.6 prohibiting any advertisement of a rooming house located in an R-4 (and therefore an R-5) District from being "displayed or published on or off the premises holding out the establishment to be a hotel, motel, inn, hostel, bed and breakfast, private club, tourist home, guest house, or other transient accommodation," and notwithstanding the Applicants' failure as of the date of the hearing to have obtained lawful permission to operate an inn or tourist home, the Applicants have been advertising the anticipated opening of the subject property as an inn or tourist house on their commercial website, *www.AmericanGuesthouse.com*. They testified that they were unaware of this prohibition until it was brought to their attention on cross-examination.

21. Taken together, the Applicants' failure to investigate the zoning and use issues applicable to the subject property prior to their purchasing it, their failure to seek or obtain qualified professional advice or assistance with respect to those issues at least through the date of the Board hearing in spite of having been advised to do so on several occasions by the Chairperson of ANC 1C, their undertaking of construction work on the premises designed to convert the property into an inn or tourist house prior to having obtained the necessary approval to do so, and their advertising of the property contrary to Zoning Regulations suggests that the Applicants may not be relied upon to inform themselves adequately as to District laws and regulations so as to conduct their affairs in full compliance with those laws and regulations.

22. At a duly noticed meeting on July 2, 2003, a quorum being present, ANC 1C voted 6-0 (with 1 abstention) to oppose the use variance sought by the Applicants. ANC 1C's full report in the case was duly submitted to and accepted into the record by the Board. The Board is required by law to give "great weight" to ANC 1C's recommendation.

23. The Office of Planning, in a report to the Board dated July 21, 2003, concluded that the Applicants' proposal "does not meet the required variance test and cannot be granted *'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." (Emphasis in original). The Office of Planning further concluded that the granting of the variance would be inconsistent with the District of Columbia Comprehensive Plan, accordingly recommending that the requested variance be denied.

Proposed Conclusions of Law

24. The Board is empowered to grant variances as provided by section 3103.2 of the Zoning Regulations as follows:

> *With respect to variances, the Board has the power under § 8 of the Zoning Act, D.C. Code, 2001 Ed. § 6-641.07(g)(3) (formerly codified at D.C. Code § 5-424 (g)(3) (1994 Repl.)), "[w]here, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation adopted under D.C. Code, 2001 Ed. §§ 6-641.01 to 6-651.02 would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship; provided, such relief can be granted 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."*

25. With respect to the element of undue hardship, an applicant for a use variance has the burden of proving that reasonable use cannot be made of the property in a manner consistent with the Zoning Regulations or that strict application of the Zoning Regulations would preclude use of the property for any purpose to which it may reasonably be adapted. Silverstone v. BZA, 396 A.2d 992, 993 (D.C. 1979) (per curiam); *see* Bernstein v. BZA, 376 A.2d 816, 819 (D.C. 1977); Palmer v. BZA, 287 A.2d 535, 542 (D.C. 1972).

26. Inability to put a property to a more profitable use or the loss of economic advantage is not sufficient to constitute undue hardship. Palmer, *supra.*

27. In this case, the Applicants have failed to sustain their burden of proof on the issue of undue hardship. They presented no evidence to demonstrate why the subject property cannot be used for either a matter of right use or a use that would be permitted by special exception. By contrast, two expert witnesses for the opposing parties presented uncontroverted testimony that the subject property is well-suited to renovation, use, and profitable resale as a residential dwelling in this R-5-D District, with additional evidence submitted by opponent parties and other opponents.

28. Self-inflicted hardship cannot be the basis for granting an applicant a use variance. Specifically, a variance is not available where it results not from a condition of

the property but rather from the Applicant's appropriation of it for commercial purposes without first obtaining a zoning change, Clouser v. David, 309 F.2d 233, 234 (D.C. Cir. 1962); or where it results from an applicant's purchase of a property without conditioning the contract on securing the necessary zoning variances or other permissions for an intended use, Salsbery v. BZA, 357 A.2d 402, 404 (D.C. 1976); or to avoid the financial burdens of a transaction entered into improvidently, *see* Silverstone, *supra,* at 993-94. Any hardship the Applicants may sustain as a result of not being able to use the property for the inn or tourist house they seek was self-inflicted and cannot form the basis for the grant of a use variance.

29. Even if undue hardship were demonstrated, the Applicants would also have the burden of proving that granting of the requested use variance would impose no substantial detriment on the community and that it would not be inconsistent with the zone plan for the location.

30. The opposing parties offered evidence showing that use of the subject property as desired by the Applicants would be likely to substantially increase the number of transient guests coming to and from this residential area, increase the vehicular traffic to and from the area, further burden on-street parking in the neighborhood, and increase the amount of trash generated by the subject property. The evidence presented by the opposing parties also demonstrated that the increase in vehicular traffic would pose traffic safety hazards, and that the increase in trash being placed on the sidewalk for pickup would be unsightly and inappropriate to this residential street in a Historic District. The Applicants, who bear the burden of proof on these issues, failed to convincingly rebut this evidence of substantial detriment to the community presented by the opposing parties. Moreover, in accordance with the Board's recent interpretation of parking requirements in a historic district, for an intensification of use from an 8-unit rooming house even to a 12-unit inn (much less the 15-unit inn actually requested in the application), at least 2 parking spaces would be required for the 4 added rooms as an inn (1 space for each 2 units required for an inn). These additional parking spaces are not available on the subject property.

31. In the so-called Hotel Case decided on May 16, 1980, the Zoning Commission established new rules for the location and expansion of hotels in the R-5-B, C, D, and E Districts. These rules allow hotels as a matter of right if they existed in these districts at the time of the zoning order and subject to certain conditions, including the preclusion of certain expansions (11DCMR350.4(d)). Additionally, revised definitions were approved to clarify distinctions between uses in order to better protect residential areas against commercial encroachment.

32. In another Zoning Commission case decided September 16, 1988, the Zoning Commission established new rules regarding home occupations as an accessory use, one such home occupation being a "bed and breakfast" facility operated by an owner whose principal residence is the address of the facility, and subject to certain conditions (11 DCMR 203.8). (Applicants have indicated that they would not find operating such a facility an acceptable use of the property.)

33. As a result of the two Zoning Commission cases described above, so-called "inns" or "tourist homes" are allowed in an R-5-D District only as a home occupation meeting the requirements for bed and breakfasts, or as non-owner occupied facilities only if they had valid certificates of occupancy before the Zoning Commission order of September 16, 1988.

34. The Zoning Commission cases described above, taken together, indicate that the zone plan disfavors the creation or expansion of inns, tourist homes, and other transient accommodation businesses in this R-5-D District and the other residential zones enumerated above, in order to retain the residential integrity of residential districts, prevent conversion of residences and buildings suitable for use as residences to non-residential uses in residential zones, and encourage small-scale, owner-occupied, accessory use bed and breakfasts as an alternative form of transient accommodation more appropriate to a residential zone than larger commercial facilities such as inns, tourist houses, motels, and hotels.

35. The Applicants have failed to produce the evidence necessary to demonstrate that their proposed use would not be inconsistent with the zone plan described above. The Rosans indicated at the hearing, contrary to what was indicated at an earlier ANC meeting, that they would not apply to institute an owner-occupied bed and breakfast operation at 2005 Columbia Road.

36. The Applicants belated claim of a right to be "grandfathered" into whatever rights were lawfully held by the previous owner Mr. Bird is not supported by sufficient evidence to enable the Board to determine precisely what rights Mr. Bird lawfully possessed, if any, beyond the right to operate an 8-room rooming house. In the absence of proof, which the Applicants' have the burden of presenting, the Board will not lightly presume the existence of grandfather rights, and will not lightly approve an extension or expansion of a non-conforming use under a questionable claim of grandfather rights. Furthermore, the limited evidence available on this issue suggests that any transient operations by Mr. Bird were not conducted in full compliance with District law and regulations. It would be inappropriate for this Board to sanction a claim of grandfather rights in a case in which the person who previously possessed the rights sought to be grandfathered failed to operate his property in full compliance with District law, and particularly the Clean Hands law, as appears to be the case with the previous owner Mr. Bird. .

37. In any event, such a claim of grandfather rights, if legitimately available, should have been raised in the Applicants' application to the Zoning Administrator for a certificate of occupancy to operate an inn/tourist house. The Applicants testified that the possibility of grandfather rights was raised to them by a member of the Zoning Administrator's staff. Thus, they were clearly aware during the pendency of their Application #50188 that this question was being considered by the Zoning Administrator. However, the Zoning Administrator obviously concluded that no such rights were available in this case and disapproved the Applicants' application.

38. If the Applicants believed they had such grandfather rights and had the evidence to demonstrate such, they could have appealed the Zoning Administrator's April 7, 2003 determination to the Board. However, they elected not to appeal and instead, on May 30, 2003, filed the instant application for a use variance. In taking this course, the Applicants accepted the Zoning Administrator's determination that no grandfather rights were available to them in this situation, and they are now precluded from filing such an appeal inasmuch as the time limit for such an appeal has expired (11 DCMR 3112.2(a)), and the Applicants cannot meet the criteria for allowing an extension of time (11 DCMR 3112.2(d)).

39. The community and the parties were given notice only of a use variance application, and the parties' cases, arguments, and evidence were presented on the basis of the standards applicable to use variances (11 DCMR 3103.2). It would be inappropriate for the Board now in effect to convert this case *sua sponte* into an appeal of the April 7, 2003 determination of the Zoning Administrator, for doing so would not only nullify the right of the community to due notice and opportunity to be heard on a properly filed appeal, but circumvent the requirement that such appeal be filed within a sixty day period.

40. Because the Applicants have failed to sustain their burden of proof on any of the required elements for the grant of a use variance, their application must be denied.

Respectfully submitted,

Advisory Neighborhood Commission 1C
BY: Alan J. Roth, Chairperson

Kalorama Citizens Association
BY: Ann H. Hargrove, Duly Authorized

The Condominium Party
BY: Peter Crawford, Duly Authorized
(on behalf of the Oakland Condominium Association and Wyoming Condominium Association)

Date: September 5, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by first-class mail, postage prepaid, to Lucia and Claudio Rosan, 2005 Columbia Road, NW, Washington, DC 20009, this 5th day of September, 2003.

Alan J. Roth