GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17060 of Fuad Alykhan, pursuant to 11 DCMR § 3103.2, for a variance from the nonconforming structure provisions under section 2001.3, to allow a second story rear deck addition to a single family row dwelling not meeting the lot occupancy requirements or rear yard requirements in the C-1 District at premises 2609 P Street, N.W. (Square 1265, Lot 95).

HEARING DATE: October 21, 2003
DECISION DATE: November 4, 2003

DECISION AND ORDER

The application was submitted on July 18, 2003 by Christian Zapatka, an architect, and authorized agent for the property owner, Fuad Alykhan (the applicant). Following a hearing on October 7, 2003, the Board of Zoning Adjustment (the Board) voted to approve the variance.

PRELIMINARY MATTERS

The application The original application requested relief from the nonconforming structure provisions under section 2001.3, but only from the provision under subsection 2001.3(a) limiting lot occupancy to 60%. However, granting the application also requires relief from the provision under subsection 2001.3(b) encompassing the extension of the non-conforming rear yard. Therefore, the application was treated as seeking relief under this provision as well.

Notice of Public Hearing Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, all owners of property within 200 feet of the subject site, the Advisory Neighborhood Commission (ANC) 2E, and the District of Columbia Office of Planning (OP). The applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect.

ANC 2E The subject site is located within the jurisdiction of ANC 2E, which is automatically a party to this application. In its report dated October 2, 2003, ANC 2E indicated that at a regularly scheduled monthly meeting with a quorum present, it voted that it was "unable to support the variance requested". The ANC stated that its report was based upon "concerns regarding impairment of privacy recently expressed by the neighbor whose property abuts the rear of the property at 2609 P Street".

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Requests for Party Status The Board received three requests for party status from neighboring property owners: a request from Kent Ozkum and William Morrow as proponents (Exhibit 21), and requests from Kevin Keelty (Exhibit 23) and Milton Gottesman, (Exhibit 22) in opposition. However, Mr. Gottesman was the only person requesting party status who appeared at the public hearing. Therefore, the Board considered his request for party status and denied the others. Because Mr. Gottesman's property (the Gottesman property) abuts the applicant's property to the rear and he could be uniquely affected by the proposed deck, and because there was no objection to his request, the Board granted him party status in the proceeding.

Persons in Support Several other neighboring property owners submitted letters in support of the application (See Exhibits 26 and 27).

Government Reports

OP Report OP submitted a report in support of the application (Exhibit 25). In addition, Travis Parker, the OP representative who prepared the report, testified at the public hearing in support of the variance application.

Commission of Fine Arts Because the subject property is located in an historic district, the proposed project was reviewed by the Commission on Fine Arts and the report was submitted by the applicant (appended to Exhibit 3 of the applicant's statement). The report noted that the Commission had no objection to the concept design for the proposed rear deck addition, alterations to the rear window, or a proposed new masonry opening for French doors to the rear deck. It did object to the proposed design concept for a new front door.[1]

FINDINGS OF FACT

1. The subject property is an existing three-story row dwelling built in 1890 and located at 2609 P Street, N.W. in a C-1 (commercial) zone on a small lot. It is also in the Georgetown Historic District.

2. Properties on both sides of P Street on this block are also zoned C-1 (commercial). The subject property is the only property on this block of P Street that is used solely for residential purposes, and has been recently renovated and modernized for sole residential use.

3. A one-story high brick wall extends along the rear property line of the buildings

[1] The front door proposal has no bearing on this variance application.

fronting on this block of P Street – including the rear property line of the subject dwelling. The rear ells on all but one of the P Street buildings extend to within a few feet of the wall. The result is that each of these P Street properties has a small, sunless, nearly inaccessible rear yard. However, the impact stemming from the rear yard conditions is unique to this one property because of its residential nature. Because the other buildings are used for commercial purposes (at least in part), the rear yards are used only for storage or trash collection, not living or recreation.

4. The Gottesman property (abutting the subject property to the rear at 1504 26th Street, NW) has a rear yard of more than 100 square feet, a large portion of which is used for a garden and patio. In addition to abutting the subject property, the Gottesman property also abuts 7 other properties and is separated from the subject property by a 7 to 8 feet fence.

5. The applicant proposes to construct a wooden deck at the second floor rear of the dwelling in order to provide accessible outdoor space for the dwelling. The deck would measure 9 feet 8 inches by 4 feet 5 inches, approximately 50 square feet in area, and would fill the existing footprint of the dwelling at the second story level.

5. Because the deck would increase the lot occupancy to 546.5 square feet (beyond the 60% lot occupancy permitted under the Zoning Regulations), the applicant would be enlarging the already non-conforming structure beyond what is permitted under § 2001.3(a) of the Regulations. The proposed deck would also require relief under § 2001.3(b) of the Regulations. Although the proposed deck would not change the existing 4 feet setback, it would extend this non-conformity.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799), as amended; D.C. Official Code § 6-641.07(g)(3)(2001), to grant variances from the strict application of the Zoning Regulations. As stated above, the applicant here seeks relief from the non-conforming structure provisions under § 2001.3 to allow a second story rear deck to a single family dwelling not meeting the lot occupancy or rear yard requirements.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily

burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.*At 1170.

Applying this test to this request, the Board agrees with OP that, due to a combination of existing conditions at the property and the use of neighboring properties, an exceptional situation exists at the subject property. The building is the only one on this portion of P Street that is used solely as a residence. Because it is situated on a small, landlocked, sunless lot, the rear yard is not usable for residential purposes.

The exceptional situation at the property results in a practical difficulty in that the existing rear yard is unusable for any outdoor or recreational purposes associated with residential use. Constructing the second story deck is the only feasible means to create outdoor space with light and air.

The Board credits OP's conclusion that the relief requested will not be a substantial detriment to the public good or substantially impair the intent, purpose or integrity of the zoning plan. The proposed deck will provide the benefit of open recreation space intended by the Zoning Regulations, but prevented by the existing conditions. In addition, the proposed deck is consistent with the "moderate density residential" use designation for this area in the Generalized Land Use Map. Finally, the Commission on Fine Arts design concept approval indicates that the proposed renovation will blend harmoniously in the Historic District.

While Mr. Gottesman contends that the proposed deck would adversely impact on the quiet enjoyment of his property and disturb his privacy, the Board is not persuaded that this is so. First, Mr. Gottesman's property has a comparatively large rear yard (Finding of Fact 4). Therefore, a large portion of his yard would not be in close proximity to the applicant's property. In addition, Mr. Gottesman's property abuts several other properties as well as the applicant's property, and each of these properties has windows that permit a view onto the edges of the Gottesman property. There is no evidence to suggest that Mr. Gottesman's privacy would be disturbed any more by the proposed second story deck than it would as a result of the windows at the second and third story levels of the other neighboring buildings. Finally, the Gottesman property has a 7 to 8 foot fence erected at the rear property that buffers it from other properties to the rear, including the applicant's property (Finding of Fact 4). Mr. Gottesman maintained that the proposed deck would permit persons to peer into the rear of his yard. However, as pointed out by the applicant, that would be improbable since the deck would be located 4 feet from the property.

As to Mr. Gottesman's claim of increased noise resulting from the deck, the Board cannot conclude that the resulting noise would be any greater than that associated with other outdoor use.

Finally, Mr. Gottesman contends that the proposed deck would result in a decline in his property values. However, he presented no substantive evidence to this effect, asserting only that it is "human nature" that the loss of privacy in his garden would result in a lower re-sale value of his residence.

The Board is required under D.C. Official Code § 1-309(d)(2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. However, the ANC " stated only that it was "unable to support" the variance request due to Mr. Gottesman's concerns. As explained more fully above, the Board has carefully considered each of the issues raised by Mr. Gottesman, but is not persuaded by his claims.

In reviewing a variance application, the Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. For the reasons stated in this Decision and Order, the Board finds OP's advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **GRANTED** to allow zoning relief from the requirements under § 2001.3, pertaining to non-conforming structures to allow the construction of the proposed second story deck.

VOTE: **5-0-O** (Carol J. Mitten, David A. Zaidain, Geoffrey H. Griffis, Ruthanne G. Miller to approve, Curtis L. Etherly, Jr. to approve by absentee ballot)

Vote taken on November 4, 2003

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: APR 2 9 2004

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."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN

SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. SG/RSN

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BZA APPLICATION NO. 17060

As Director of the Office of Zoning, I hereby certify and attest that on APR 29 2004 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:

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ATTESTED BY:

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