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December 22, 2003

BY HAND
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: Application of the Mark Lee Phillips, BZA Application No. 17079
3209 Highland Place, N.W.
Our File No. 092441.0000

Dear Mr. Griffis:

Enclosed you will find the Proposed Findings of Fact and Conclusions of Law for the above referenced matter.

Thank you for your attention to this matter.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: Mark Lee Phillips
ANC 6B
Jacqueline Eiting (107 5th Street, S.E.)
Eugene Berry, Jr. (100 5th Street, S.E.)
William Martin (409 A Street, S.E.),
Christopher Andres and Aaron Schuham (415 A Street, S.E.)
Richard Nero (by email at Richard.Nero@dc.gov)
Travis Parker, Office of Planning
(all with enclosure)

Word 45652714.1

Case No. 17079
Exhibit No. 79

Board of Zoning Adjustment
District of Columbia
CASE NO. 17079
EXHIBIT NO. 79

Government of the District of Columbia
Board of Zoning Adjustment

Application No. 17079 of the Mark Lee Phillips, pursuant to pursuant to 11 D.C.M.R. § 3104, for a special exception from section 203.8(c)(1) of the zoning regulations to allow an increase in the number of sleeping rooms from two (2) to four (4) at 417 A Street, S.E., Square 818, Lot .

HEARING DATE: December 2, 2003
DECISION DATE: January 6, 2003

I. SUMMARY OF EVIDENCE:

1. The subject application was filed as a result of the then Zoning Administrator, Robert Kelly's, decisions dated March 19, 2003 and March 24, 2003. In the March 19, 2003 letter, the Zoning Administrator incorrectly determined that -- despite the plain language of section 203.8(c)(1) of the zoning regulations, its past practice, decisions of this Board and of the Court of Appeals -- a special exception was required to increase the number of sleeping rooms, in the bed and breakfast (B&B) at the subject property from two (2) to either four (4) or six (6). The Zoning Administrator's letter dated March 24, 2003 denied the applicant's home occupation permit to increase the number of sleeping rooms based on the Zoning Administrator's erroneous decisions that: (1) a special exception was required from the Board of Zoning Adjustment ("BZA") to receive a parking waiver pursuant to 2100.5 of the zoning regulations; and (2) a special exception was needed from section 203.8(c)(1) of the zoning regulations.

2. By letter dated September 15, 2003, the Zoning Administrator withdrew its position on parking and confirmed that parking was waived, as the property had been certified as a contributing building to the Capitol Hill Historic District by the Historic Preservation Division of the Office of Planning.

3. The instant application was filed on September 4, 2003, seeking an increase of sleeping rooms from two (2) to four (4) or six (6), as permitted as a matter of right pursuant to section 203.8(c)(1) of the Zoning Regulations or, in the alternative, a special exception to allow such an increase. In his prehearing statement and in response to the concerns of his neighbors and in direct response to comments from the Capitol Hill Restoration Society and the Office of Planning, the applicant reduced his request to increase the number of sleeping rooms to four (4) rather than six (6).

4. The Property is located at the southwest corner of 5th and A Streets, S.E. in the Capital Hill Historic District. The Property is improved with a building that has been certified as contributing to the historic district.

5. Since its construction in 1896, the property has been used almost exclusively as a rooming house. Upon the applicant's purchase of the property in 1990, the property contained four

(4) kitchens, evidencing its long use as a rooming house. Upon his purchase of the property, the applicant undertook to renovate the Property to use as his residence. From 1990 through 2002, the applicant used the property solely as his primary residence for him and his family. In 2002, the applicant obtained a home occupation permit to operate a bed and breakfast with two (2) sleeping rooms.

6. The applicant currently uses the property as his residence and has a home occupation permit to operate a bed and breakfast ("B&B") with two (2) sleeping rooms. Although there are four (4) sleeping rooms available, only two (2) are used at any one time.

7. The applicant testified that fifty-five percent (55%) of his guests stayed at the property while visiting friends or relatives on the Hill.

8. With regard to parking, the applicant testified that the majority of his guests arrive by train or metro at union station and arrive at the property by taxi. In his first year of operation, the applicant obtained only three (3) temporary parking passes from the police department for guests of the B&B.

9. Guests of the B&B are given keys to the property during their stay to avoid their need to use the doorbell. Additionally, check-ins are not permitted past 8:00 p.m. During the first year of operation, the applicant testified that guests arrived beyond this hour on only two (2) occasions, one of which was caused by airline delays. On each of these occasions, the applicant had prior notice and waited for the guests to arrive.

10. The Property is zoned CAP/R-4. The R-4 districts are designed to include those areas predominantly developed with row dwellings and include buildings converted from single-family to two-family dwellings. The CAP overlay is intended to limit height, bulk and uses in order to protect the U.S. Capitol and its surrounding residential neighborhoods. Any use allowed by special exception in the R-4 district is, likewise, permitted in the CAP/R-4 district.

11. The immediate surrounding neighborhood is predominantly improved with row-dwelling single family homes and flats. Additionally, there two apartment buildings in the unit block of 5th Street, S.E. and two apartment buildings in the 400 block of A Street. The Property is one (1) block from Independence Avenue and two (2) blocks from Pennsylvania Avenue and the many restaurants, bars and retail shops along those streets.

12. Robert Schwartz, FAIA, was accepted as an expert in planning and architecture. Mr. Schwartz testified that, from a planning perspective and being familiar with the Zoning Regulations, the requested increase in sleeping rooms was as a matter of right. Mr. Schwartz further testified that, if granted as a special exception, the application met the requirements set forth in section 203.8 and that the proposed increase would not have any adverse effect on the surrounding community. Mr. Schwartz pointed that, unlike rural or suburban B&Bs, not many people drive to urban B&Bs. Mr. Schwartz further testified that the proposed B&B use was less intensive than a rooming house, which would be permitted as a matter of right.

13. Jacqueline Reed, who was involved in adoption of section 203.8 and owner and operator of the Aaron Shipman House Bed and Breakfast, a six (6) sleeping room inn operating with a matter-of-right home occupation permit, testified on behalf of the applicant. Ms. Reed testified regarding the bed and breakfast community's lobby to amend the proposed legislation to allow up six (6) sleeping rooms in a bed and breakfast located in a historic building. Ms. Reed further testified that, as the booking agent for the property, only two (2) rooms have ever been rented at any one time. Ms. Reed further testified that, in the event that the applicant books a room on his own, he is obligated to inform her, so that the B&B is not overbooked.

14. Letters of support were received from CHAMPS (Capitol Hill Association of Merchants and Professionals), Roy and Julie Harris of 221 5th Street, S.E. and Chi and Jennifer Kuhn of 653 A Street, S.E.

15. Approximately nine (9) letters in opposition were submitted, as well as a petition signed by 116 individuals.

16. The Capitol Hill Restoration Society submitted a letter in opposition, noting however, that if parking were provided, the Society would support an increase to four (4) sleeping rooms.

17. ANC 6B, which is automatically a party to this matter, submitted a letter in opposition to the application. The ANC's objection was based on the neighbor's complaints about parking. Commissioner Julie Olson testified on behalf of the ANC and added that other concerns regarding potential adverse impact were noise and commercialization of the neighborhood.

18. Jacqueline Eiting (107 5th Street, S.E.), Eugene Berry, Jr. (100 5th Street, S.E.), William Martin (409 A Street, S.E.), and Christopher Andres and Aaron Schuham (415 A Street, S.E.) were granted party status as one party in opposition. Mr. Andres and Mr. Berry testified on behalf of the party in opposition, based primarily on parking, noise and commercialization of the residential neighborhood.

19. Mr. Andres, the adjoining neighbor, testified regarding hearing noises through the party wall such as plumbing noises, luggage being carried up the stairs along the party wall and the doorbell being rung. Mr. Andres also expressed concern regarding additional fire hazards, parking congestion and diminished property values. Mr. Andres stated that he can no longer enjoy using his front porch, as he is stopped by passers-by who ask for directions and/or recommendations for restaurants. Mr. Andres acknowledged that he did not know if such passers-by were guests of the B&B.

20. The remaining parties in opposition complained of diminished property values, traffic and commercialization of the residential neighborhood if the increase in sleeping rooms were increased.

21. Council member Sharon Ambrose submitted a letter in opposition to the application.

22. The Office of Planning, by its memorandum dated November 21, 2003, noted the potential for adverse impacts on the neighborhood come in the form of parking, traffic, noise, and the intensification of uses in a residential area. With regard to parking and traffic, the OP referred the application to the Department of Transportation (DDOT). As to the other issues, the Office of Planning stated that (1) noises associated with bed and breakfast use does not normally fall within the standard of an adverse impact on a neighborhood and (2) bed and breakfast use is not inherently too intrusive for the neighborhood, nor will it necessarily lead to commercialization of the area. OP concluded that there were outstanding issues regarding the potential neighborhood impacts of traffic and parking that need to be addressed by the applicant.

23. By memorandum dated November 25, 2003, DDOT determined that the proposed increase in sleeping rooms would not adversely affect parking and traffic in the neighborhood. Based on this memorandum, OP submitted a supplemental report stating that it had no objection to the proposed increase.

24. The Architect of the Capitol submitted a letter stating that the increase would create no adverse effect on the Capitol Complex or the Master plan.

II. FINDINGS OF FACT

Based on the evidence of record, the Board finds as follows:

1. The Board finds that the proposed increase is as a matter of right by virtue of the historic certification of the property. Additionally, the Board finds that the applicant complies with the provisions of Subsection 203.8 of the Zoning Regulations for a special exception. The subject property is not used as a multiple dwelling; breakfast is the only meal served, and served only to overnight guests; the house is certified to contribute to the Dupont Circle Historic District and thus there are no parking requirements for the property under the waiver granted; cooking facilities are not available in guest rooms; and the dwelling is owner-occupied and used as the principle residence.

2. The applicant further complies with the applicable provisions of the home occupation regulations under Subsections 203.4 through 203.6. The house is principally used as the applicant's residence and the B&B use is secondary; no finished products are produced by the B&B; the residential character of the dwelling will be maintained; no more than one (1) nonresident of the property will be engaged or employed at the B&B; no noxious odors, vibrations, or visual or electrical interference will be created; the level of noise associated with the B&B will not exceed the normal levels associated with the dwelling and immediate neighborhood; no more than two vehicles would be used with the operation of the B&B; there are no signs on the property; and sales, on the property would consist of a fee charged for the rental of rooms.

3. The requested increase in the number of guest rooms from two (2) to four (4) is appropriate for the size and historic nature of the house and is consistent with its residential character and the surrounding historic district. The increase will not compromise the general purpose and

intent of the Zoning Regulations and can be granted without any adverse impacts to the neighborhood.

4. The Board does not agree with the parties in opposition that the increase in sleeping rooms from two (2) to four (4) will have an adverse affect on the neighborhood in terms of parking, traffic, noise or commercialization of the residential neighborhood.

5. The Board takes note of the position of Advisory Neighborhood Commission 6B, and in its decision the Board has accorded to the ANC the "great weight" consideration to which the Commission is entitled. However, the Board notes that DDOT, in its memorandum, concluded that the increase in sleeping rooms will not adversely affect the neighborhood and that OP testified that the noise levels associated with B&B use does not rise to the level of adverse impact, as well as that B&B use does not lead to commercialization of residential neighborhoods. The Board further notes that the applicant testified to measures he has taken to ensure that any noises associated with the B&B do not rise to the level of adverse impact. The Board further notes that the applicant testified, and the correspondence from DCRA in the record supports this testimony, that he is in compliance with all applicable regulations. For these reasons, the Board, while giving great weight to the ANC's recommendation, disagrees with the ANC that the proposed application, if granted, would adversely affect the neighborhood.

III. CONCLUSIONS OF LAW AND OPINION:

A. The Requested Increase is Permitted as a Matter of Right.

The requested increase in the number of sleeping rooms is permitted as a matter of right. Section 203.8(c)(1) states that:

> (c) The maximum number of sleeping rooms shall be two (2), except:
>
> (1) Pursuant to § 203.10(b), the maximum number of sleeping rooms maybe increased to four (4); or, in a dwelling that is an historic landmark, or that is located in a historic district and certified by the State Historic Preservation Officer as contributing to the character of that historic district, the number of sleeping rooms may be increased to six (6).

On its face, the regulation provides that, in a certified contributing building, up to six (6) sleeping rooms are permitted as a matter of right in a historic building. The special exception to increase to four (4) sleeping rooms is only necessary with non-historic properties. The Zoning Administrator, in denying the Applicant's home occupation permit for six (6) sleeping rooms, asserted that the use of the word "may" in referring to the increase of six (6) sleeping rooms in historic structures inferred that approval was needed from the Board. However, the use of the word "may" only infers that an owner is not required to increase the number of sleeping rooms in a bed and breakfast in a historic structure to six (6), but may elect to do so if he wishes. This plain reading

is supported by the legislative history of section 203.8, as well as DCRA's prior application and the Board's interpretation of that section.

In 1986, the Office of Planning proposed the adoption of new regulations which would authorize home occupations and bed and breakfasts, as a matter of right, in residential districts. The initial regulations limited the number of rooms in a bed and breakfast to two (2). The matter was set down for a hearing by the Zoning Commission and the Office of Planning amended its proposed regulations to provide for an increase in the number of sleeping rooms in a B&B to four (4), provided that special exception relief was obtained from the Board of Zoning Adjustment. Following four (4) days of hearings before the Zoning Commission in April and May 1987, during which the B&B community pressed for leniency with regard to B&Bs located in historic districts and recommended amendments to the proposed regulations, the Zoning Commission retained the special exception requirement for four (4) sleeping rooms for B&Bs except for B&Bs located in a historic landmark or in a building certified as contributing to a historic district. A special exception for B&Bs in historic districts was required only if the operator desired to increase the number of sleeping rooms beyond the six (6) permitted as a matter of right.

Consistent with the foregoing, the DCRA began approving of applications to increase the number of sleeping rooms in a B&B in a historic building to six (6) without requiring any special exception approval. *See e.g.* Application and Approval for the Mansion on O Street.

In Application No.16333 of Richard T. Ross, the applicant sought authorization to operate a six-room B&B in a single family house. The Acting Zoning Administrator denied the application because, in her opinion, the B&B, which had been certified as a contributing building to the Dupont Circle Historic District, exceeded the maximum number of permitted guest rooms (which she says was limited to two). Additionally, the Zoning Administrator denied the home occupation permit on the misunderstanding that the Property was an apartment building. When the matter came before this Board, the applicant challenged the decision of the Acting Zoning Administrator and also sought to increase the number of guest rooms to nine (9). With regard to the Acting Zoning Administrator's decision, this Board found that there are no parking requirements for the property and "six guest rooms are permitted as a matter-of-right by virtue of the historic certification" received since the building contributes to an historic district. This decision of the Board was affirmed in *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1258, 1267 n. 3 (D.C. 2000)(attached hereto in Exhibit 7).

B. The Applicant Meets the Standard for the Requested Special Exception.

The applicant is seeking a special exception. The Board may grant special exceptions, "where, * * * those special exceptions will be in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps * * * ." However, the Board's discretion in reviewing an application for a special exception is limited to a determination of whether the Applicant has complied with requirements of the section. If the Applicant meets this

burden, the Board ordinarily must grant the application. First Baptist Church of Washington v. District of Columbia Board of Zoning Adjustment, 432 A.2d 695, 698 (D.C. 1981).

1. The applicants comply with the provisions of Subsection 203.8 of the Zoning Regulations, except for 203.8(c)(1) for which a modification is requested. The subject property is not used as a multiple dwelling; breakfast is the only meal served, and served only to overnight guests; the house is certified to contribute to the Capitol Hill Historic District and thus there are no parking requirements for the property under the waiver granted; cooking facilities are not available in guest rooms; and the dwelling is owner-occupied and used as the principle residence.

2. The applicant further complies with the applicable provisions of the home occupation regulations under Subsections 203.4 through 203.6. The house is principally used as the applicant's residence and the B&B use is secondary; no finished products are produced by the B&B; the residential character of the dwelling will be maintained; no more than one (1) nonresident of the property will be engaged or employed at the B&B; no noxious odors, vibrations, or visual or electrical interference will be created; the level of noise associated with the B&B will not exceed the normal levels associated with the dwelling and immediate neighborhood; no more than two vehicles would be used with the operation of the B&B; there are no signs on the property; and sales, on the property would consist of a fee charged for the rental of rooms.

Based on the findings of fact and evidence of record, the Board concludes that the applicant has met the burden of proof, pursuant to 11 DCMR 203.10(b) and 3108, that the modifications comply with the general purpose and intent of the home occupation regulations, and that requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. The Board concludes that no adverse impacts will result from the increase in the number of guest rooms. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS:**

1. The increase in the number of guest room in use at any one time shall be four (4).

VOTE: 5-0 (Geoffrey Griffis, Anthony Hood, Curtis Etherly, Ruthann Miller and David Zaidain to grant).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
FINAL DATE OF ORDER: