HUNTON WILLIAMS

HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

RICHARD L. AGUGLIA
DIRECT DIAL: 202-955-1634
EMAIL: raguglia@hunton.com

FILE NO: 64929.000002

March 25, 2004

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

Re: February 24, 2004 Hearings:
BZA Application No. 17108
(Application of Folger Park North, LLC for a variance)

Dear Chairman Griffis and Fellow Board Members:

Enclosed are the Applicant's proposed findings of fact and conclusions of law in this case.

Sincerely,

Richard L. Aguglia

Richard L. Aguglia

Enclosures

cc: By Mail

ANC 6B
Attn: Julie Olson, Chair
David Sheldon, Esq.

By Mail

Richard Nettler, Esq.
Jeanine Rustad, Esq.

BZA
Case No. 17108
Exhibit No. 53

Board of Zoning Adjustment
District of Columbia
CASE NO. 17108
EXHIBIT NO. 53

By E-Mail

Selig Solomon, Esq.

Chris Doerfler

Alger Stoneburner

Joel Lawson
Office of Planning

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17108 of Folger Park North, LLC, pursuant to 11 DCMR 3103.2, for a variance from the lot width and lot area requirements under Section 401, to allow the construction of three flats (two family dwellings) in the CAP/R-4 District at premises 206, 208, and 210 D Street, S.E. (Square 763, Lots 26, 27, and 28).

HEARING DATE: February 24, 2003

DECISION DATE: _____

This application was submitted on November 7, 2003, by the owner of the property that is the subject of the application, Folger Park North, LLC ("Applicant") on appeal from a decision of the Zoning Administrator that a variance from the lot width and lot area requirements under Section 401 of the Zoning Regulations was required. Following a hearing on February 24, 2004 and a public meeting on April 6, 2004, the Board voted to approve the application.

PRELIMINARY MATTERS:

Notice of Application and Notice of Hearing. By memorandum dated November 26, 2003, the Office of Zoning gave notice of the application to the Office of Planning, the Department of Transportation, the Councilmember for Ward 6, Advisory Neighborhood Commission ("ANC") 6B, and Single Member District/ANC 6B01. Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters or memoranda dated November 26, 2003 to the Applicant, ANC 6B, and all owners of property within 200 feet of the subject property providing notice of the hearing. Notice of the hearing was published in the D.C. Register on Friday, December 5, 2003 (50 DCR 10322).

Requests for Party Status. ANC 6B was automatically a party in this proceeding.

Louise Smith, Larry Smith, Mary Ann Snow and James Marsh (the "Neighbors"), who own property immediately adjacent to the subject property were admitted as parties in opposition to the application.

Applicant's Case. The Applicant presented testimony and evidence (numerous exhibits) at the public hearing from four (4) witnesses, Alger Stoneburner, a principal of the Applicant; William Maiden, project architect; Fred Greene, zoning consultant; and Chris Doerfler, a principal of the Applicant. The substance of their testimony and exhibits was that on at least seven (7) different occasions over a span of thirteen months, the applicant, its architect and zoning consultant had been advised by at least three different officials in the Zoning Administrator's Office, both formally (in writing) and informally (orally) at public meetings and during the course of the permit process, that Applicant's proposed construction of three flats (two family dwellings) in Square 763, on Lots 26-27-28, was matter of right under current zoning regulations, without the need for a variance.

In reliance on these numerous approvals, including written zoning approval of the subdivision plat required to obtain a building permit, and written zoning approval on the applications for a building permit, the Applicant commenced construction of the three flats in June of 2003. After receiving a second stop work order from DCRA (the first stop work order was rescinded based on a false allegation that construction had started without a permit) because a variance was required, the Applicant appealed that decision to this Board. At the time of the second stop work order, the Applicant had expended $1,200,000 in construction costs in reliance on DCRA's assurances that the construction was under matter of right zoning.

The Applicant also submitted evidence that the height, massing, lot size and lot area of the three (3) flats was consistent with the surrounding neighborhood, as approved by the D.C. Historic Preservation Review Board.

Opposition's Case. Generally, the Neighbors' opposition revolved around the Applicant's alleged trespass on a right of way owned by the Neighbors located directly between the subject property and the Neighbors' homes, and the Neighbors' concern over storm water management created by the Applicants' placement of a pressure release pipe under the right of way. The Neighbors presented one witness, Chaz Langlin, a surveyor qualified as an expert. However, Mr. Langlin agreed with Applicant's counsel on cross examination that a contractor could have reasonably relied on written approval of the subdivision plat for the subject property by zoning officials to obtain a building permit and commence construction.

Government Reports. The Office of Planning ("OP"), by memorandum dated February 17, 2004, and by testimony at the public hearing, recommended that the application be granted if the Board determines that the three lot subdivision is considered valid, resulting in the lots being considered three legal non-conforming lots.

ANC Report. By letter dated _____, the chairman of ANC 6B indicated that at a regularly scheduled and properly noticed meeting on February 9, 2004, ANC 6B voted 3 to 2 to support the application.

Parties and Persons in Support. The Applicant submitted a petition signed by 104 persons who live, work and socialize in the area adjacent to the subject property who supported the application.

Parties and Persons in Opposition. Three persons in addition to the Neighbors and Gary Peterson, Chairman of the Capitol Hill Restoration Society, Zoning Committee, testified in opposition to the application.

FINDINGS OF FACT

1. The subject property consists of three lots and is located in a CAP/R-4 district on the north side of D Street between 2nd and 3rd Streets, S.E. and is known as 206, 208 and 210 D Street, S.E. The lots are improved with three flats partially constructed by the Applicant and were formerly improved with an abandoned PEPCO substation razed by the Applicant.

2. The variances requested are for area and width of lots 26, 27 and 28. The lot area variances requested are 271 square feet (15%) (for 208 and 210 D Street) and 353 square feet (20%) (for 206 D Street), with the width variance for all three lots being 2 feet (16 feet instead of 18 feet) or an 11% variance.

3. The Applicant presented substantial and credible testimony and exhibits from four (4) witnesses that it reasonably relied on written and oral approval from officials in the Zoning Administrator's office that construction of the three flats on Lots 26, 27, and 28 as proposed in the Applicant's application for a building permit was permitted under the zoning regulations as a matter of right, without the need for a variance. The Applicant's evidence included approval of a subdivision plat in writing by the Zoning Administrator's office for zoning purposes which was required to obtain a building permit.

4. The Board finds that the Applicant acted in good faith and reasonably relied on these approvals in commencing construction on the subject property.

5. The Board further finds that the area in which the subject property is located is predominantly residential in character and that the subject three flats are consistent with the surrounding row houses, in terms of lot size and width, and would be the only residences on the portion of the block fronting on Folger Park.

6. The Board notes that the Historic Preservation Review Board previously approved the design of the three flats as consistent with the neighborhood in terms of massing, height and design.

7. The Board finds that the Applicant's provision of one off street parking space per home (three (3) total) at the rear of the property is sufficient for traffic control problems.

8. The Board is required by statute to give "great weight" to the written recommendations of the ANC. Advisory Neighborhood Commission – 6B voted to support the application and David Sheldon, the Single Member District ("SMD") on behalf of himself and the ANC recommended at the hearing that the variance be granted. Further, the ANC characterized the property owner as being forthright in dealings with the ANC, and the ANC stated that the granting of the variances would be of benefit to the community. Tr. 157-164.

9. Residents of two neighboring homes appeared in opposition to the application. However, the Neighbors' opposition centered on an alleged trespass by the Applicant on an easement way apparently owned by them and located between their homes and the subject property. Moreover, the Neighbors' expert surveyor witness, Chaz Langlin, supported the Applicant's reliance on the approved subdivision plat to start construction, as a valid document. Tr. 293.

10. The Board further notes that the Office of Planning indicated at the hearing that "If the lots are legal and they are smaller than normal, then that constitutes a hardship in and of itself." (Joel Lawson, Tr. 150).

CONCLUSIONS OF LAW:

Based on the record, the Board concludes that the variances requested are area variances, the granting of which requires the showing of a practical difficulty brought forth 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 Board concludes that the zoning history of the lots, that is, the Applicant's good faith reliance upon multiple approvals of DCRA zoning officials that construction on the subject property as proposed by the Applicant was matter of right under zoning regulations, is both an extraordinary and an exceptional situation and therefore constitutes a practical difficulty upon the Applicant owner allowing the variances requested. See, for example, Decision and Order in BZA Application No. 16989 of William T. and Norma G. Byrd; Monaco v. BZA, 407 A.2d 1091 (DC 1979); and DeAzcarate v. BZA, 388 A.2d 1233 (DC 1978).

In addition, the Board concludes that the variances are minimal. The Board notes that the lots, though slightly undersize, are not inconsistent with other lots in the neighborhood which are improved with dwellings.[1] The Board notes that there is ANC and community support for the application. It is further noted that the new homes have eradicated an abandoned building which

[1] For example, the Neighbors' lot sizes are 1522' (16% variance) (Smiths) and 1343' (25% variance) (Snow) as indicated on the survey presented by Mr. Langlin and dated February 14, 2004.

was deemed to be an eyesore. The Board also notes that owner will provide onsite parking on the subject property, thus reducing any on-street parking impact. Finally, it notes that it has no jurisdiction over the Neighbors' trespass complaint on an adjoining easement way. See Decision and Order in BZA Appl. No. 13021 of Mr. and Mrs. Bernard Foullon.

The Board also concludes that the variances can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the Zoning Regulations. Accordingly, it is ORDERED that the application is GRANTED.

VOTE: _____

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

Each concurring Board member approved the issuance of this order.

FINAL DATE OF ORDER: _____

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 APPLIANT 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.