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 DATES: January 27, 2004 and February 24, 2004
DECISION DATE: April 6, 2004

DECISION AND ORDER

This application was submitted on November 7, 2003, by the property owner, Folger Park North, LLC (the applicant or the owner). Following a public hearing, the Board of Zoning Adjustment (the Board) voted to approve the variance.

PRELIMINARY MATTERS

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) 6B, 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 6B The subject site is located within the jurisdiction of ANC 6B, which is automatically a party to this application. An ANC representative testified at the public hearing in support of the application and indicated that a formal ANC report would be submitted to the Board. However no formal report was received.

Requests for Party Status The Board received requests from nearby property owners at 320 Second Street, SE, 322 Second Street, SE, and 312 Second Street, SE. James Marsh and Mary Ann Snow, the owners of 320 Second Street, and Louise and Larry Smith, the owners of 322 Second Street, were all represented by the firm Robins, Kaplan, Miller & Ciresi. Both sets of property owners were granted party status, with no objection by the applicant. The Board also received a request for party status from Raymond Winter. Mr. Winter's request was filed as Trustee for a trust that owns 312 Second Street and 318 Second Street, SE. The application alleged that the trust would be uniquely affected" by the proposed variance due to "incursion into [the trust] easement", and "[i]ncreased competition for . . . street parking". The Board denied Mr. Winter's request based upon his failure to appear at the public hearing and failure to demonstrate that the trust's property interest would be uniquely affected.

Persons in Support/Opposition The applicant submitted a "petition" in support of the application, signed by numerous individuals who "live, socialize, work, or own investment

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property" in the immediate area (Exhibit 37). The Capitol Hill Restoration Society submitted a letter in opposition to the variance (Exhibit 36). The chair of its "Zoning Committee", Gary Peterson, also testified at the public hearing. Mr. Peterson asserted that the application did not meet the variance test because: (1) there is nothing unique about the property, (2) any practical difficulty was self-created because the applicant could have created and developed two conforming lots instead of three substandard lots, and (3) the proposed variance would be detrimental to the zone plan and public good.

Government Reports

OP OP submitted a report stating that, if the Board determined the three lot subdivision was "valid", the variance should be granted (Exhibit 33). During testimony at the public hearing, however, OP's representative stated that it did not have a position on whether the property was "unique" due to its zoning history.

Historic Preservation Review Board (HBRB) HPRB Staff issued a report recommending that the Review Board support the "overall scale and massing" of the projects and issue specific detailed directives (Tab H appended to Exhibit 42).

Department of Housing and Community Development (DHCD) DHCD issued a report supporting the zoning application, noting that the scale and width of the townhouses is the same as many townhouses in the neighborhood.

Other Government Agencies Other government agencies submitted comments to OP indicating either support, or that there were no concerns regarding the project. (See OP Report, Section XI "Other Agency Comments", detailing comments from the Metropolitan Police Department, the Fire and Emergency Medical Services Department, the Department of Transportation, the Department of Health, and the Water and Sewer Agency).

FINDINGS OF FACT

The Property and Surrounding Area

1. The subject property consists of three record lots, numbered 26, 27, and 28, in Square 763, located at 206 D Street, SE, 208 D Street, SE, and 210 D Street, SE, respectively.

2. Each of the three lots is improved with new homes that, as of the date of application, were partially constructed by the applicant. The homes are three levels, two family flats with fully finished English basements and off-street parking.

3. The property is zoned R-4 and is in the CAP (Capitol Interest Overlay District[1]). The R-4 zone permits one family dwellings, row houses and flats, such as those

[1] The CAP Overlay was established "to promote and protect the public health, safety, and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction, in a manner consistent with the goals and mandates of

constructed by the applicant. Although the CAP Overlay provides for restrictions on use, height and bulk of buildings, the homes constructed by the applicant conform to the Overlay provisions. The property is also in the Capitol Hill Historic District, resulting in HPRB review of the proposed development.

4. Square 763 is bounded by D Street, SE to the south, 3rd Street, SE to the east, C Street, SE to the north, and 2nd Street, SE to the west. Folger Park is directly to the south of the square, and the Library of Congress Madison Building is to the northwest. The square is predominantly developed with 2 to 3 story row houses, but also includes a 6-story apartment building facing C Street, SE, and a sport club and an American Legion building along D Street.

The Requested Variances

5. The lot size and width of each of the three lots meet none of the minimum requirements under section 401 of the Zoning Regulations. Lots 27 and 28 (208 and 210 D Street, SE) are 271 square feet shy of the 1,800 square feet minimum lot size requirement, and Lot 26 (206 D Street, SE) is 353 square feet shy of the 1,800 square feet minimum lot size requirement. The width of all three lots is 16 feet -- 2 feet shy of the 18 feet minimum width that is required in the zone.

Subdivision and Zoning History

6. Maps from the early 1900's indicate that the property was subdivided into three tax lots, and developed with a row house on each lot (See, OP Report, p. 2).

7. The Sanborn Maps indicate that on or about 1928, there were three residential homes on the three lots (Exhibit 9).

8. In 1942, PEPCO applied for a building permit to construct a one story and basement substation, and the structure was constructed on or about 1943 (See, OP Report, p. 2, and Exhibit 10, Surveyor's Plat, indicating a structure straddling three recorded tax lots bearing numbers 800, 801, and 802). At some point, possibly during the 1980s, use of the PEPCO substation was discontinued, but the structure remained in place until it was purchased by the applicant.

9. On or about 2001, the applicant identified the subject property and entered into discussions with PEPCO to purchase it.

10. On or about June, 2002, the applicant met with zoning officials at the Department of Consumer and Regulatory Affairs (DCRA). The zoning officials advised that the lots were buildable as a matter of right, notwithstanding their substandard width and size.

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the United States Congress. . ." § 1200.1 DCMR.

11. On or about November 13, 2002, DCRA issued a permit to raze the PEPCO substation.

12. On or about November 20, 2002, the applicant was notified by DCRA that the project required approval by the Historic Preservation Review Board (HPRB). The HPRB staff prepared a "Staff Report and Recommendation" for the February 27, 2003 HPRB meeting (Tab H appended to Exhibit 42). According to the Report, HPRB staff was advised by the Zoning Administrator at DCRA that the proposed development could proceed as of right.

13. On or about May 23, 2003, DCRA issued foundation permits for each of the three proposed row houses.

14. On or about August 25, 2003, DCRA issued building permits for each of the three proposed row houses.

15. While the building permit application was being processed, the Applicant applied to create three records lot in the same area of the tax lots.

16. Consistent with DCRA's interpretation that the substandard tax lots were buildable, the three 800 tax lots were converted to record lots (26-27-28) as part of the subdivision process (See Exhibit 2, Plat for Building Permit issued by the DC Office of the Surveyor, certified as in compliance with Zoning Regulations, July 22, 2003).

17. There is no evidence that the applicant made any misrepresentations to zoning officials during the building permit or subdivision process. Nor is there any evidence that the applicant attempted to subvert the building permit or subdivision process by filing "piecemeal" applications.

The Construction and Stop Work Orders

18. The PEPCO substation was razed during June, 2003 and construction on the row house foundations began on or about July 1, 2003. Construction continued after the building permits were issued on August 25, 2003.

19. On or about September 2, 2003, DCRA issued a stop work order based upon an "invalid raze permit". The applicant met with DCRA officials to confirm the validity of the raze permit, and the stop work order was lifted on or about September 5, 2003.

20. DCRA issued a second stop work order on or about September 15, 2003, shortly after some neighboring property owners appealed DCRA's issuance of the building permits to this Board. Although the stop work order did not cite any code violation, DCRA later issued a letter stating that the proposed development

did not comply with the minimum lot area and lot width requirements contained in § 401 of the Zoning Regulations.

21. At the time the second stop work order was issued, the applicant had spent approximately 1.2 million dollars on the project. The Board credits the applicant's testimony that it would have faced bankruptcy and/or litigation from creditors were it to have abandoned the project at that juncture.

22. On or about October 30, 2003, the applicant and DCRA entered into an agreement that provided for DCRA's lifting of the stop work order in return for the applicant's agreement to indemnify DCRA for any construction related damages, and to seek variances from this Board from the minimum lot area and width requirements.

23. The Board considers the agreement to constitute the zoning memorandum required for the variance application form and an admission by DCRA that the three record lots were invalidly created.

24. At the time of the public hearing the applicant had spent approximately 2.4 million dollars on the project.

Compatibility with the Surrounding Area

25. The area in which the subject property is located is predominantly residential in character. The three flats under construction are consistent with the surrounding row houses, in terms of lot size and width. For instance, the town homes across the street from the subject property are also 16 feet wide. A survey of row houses one block in any direction of the subject property indicates 56 row houses with a lot width less than 18 feet, and 40 row houses with a width less than 16 feet (Tab J appended to Exhibit 42).

CONCLUSIONS OF LAW

As stated above, the applicant, without conceding that an error was made by DCRA, seeks a variance from the minimum lot requirements and minimum width requirements of the Zoning Regulations. The Board is authorized to grant an area variance from the strict application of the zoning regulations in order to relieve difficulties where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. Relief can be granted only "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." *Id.*

The Applicant in this case, therefore, had to make three showings: (1) uniqueness of the property, (2) that such uniqueness results in "practical difficulty" to it, and (3) that the granting of the variance would not impair the public good or the intent and integrity of the zone plan and regulations.

The property is unique because of its zoning history

As the Board noted in *Application of William T. and Norma G. Byrd*, BZA Application No. 16989, 50 DCR 8932 (2003), when evaluating a variance request, the Board's review is not limited to the physical conditions of the property:

> In determining uniqueness the Board is directed to look at the property, including the physical land and the structures thereon, but it can also consider "subsequent events extraneous to the land." *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978); *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987). The Court of Appeals has opined that the Board must be able to consider such events in order "to weigh more fully the equities in an individual case." *National Black Child Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687, 690 (D.C. 1984). *See also, Downtown Cluster of Congregations v. Board of Zoning Adjustment,* 675 A.2d 484 (D.C. 1996) (market conditions); *French v. Board of Zoning Adjustment,* 658 A.2d 1023 (D.C. 1995) (previous chancery use); *Tyler v. Board of Zoning Adjustment,* 606 A.2d 1362 (D.C. 1992) (economic factors); *Gilmartin v. Board of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990) (easement); *United Unions v. Board of Zoning Adjustment,* 554 A.2d 313, 317-318 (D.C. 1989) (historic preservation requirements); *National Black Child Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687 (D.C. 1984) (changes in zoning regulations); *Capitol Hill Restoration Society v. Zoning Commission,* 380 A.2d 174 (D.C. 1977) (private restrictive covenant); *Clerics of St. Viator v. Board of Zoning Adjustment,* 320 A.2d 291 (D.C. 1974) (societal changes).

Id. at 8936.

The Board finds, here, that the applicant has established a unique "zoning history" based upon the pre-1958 tax lots, the 2003 subdivision into three record lots, and the fact that zoning officials implicitly or explicitly approved the subdivision and as-of-right development on seven different occasions (Findings of Fact 5-18). Furthermore, the Board finds that the facts in this case are strikingly similar to the facts of a Court of Appeals decision which upheld this Board's grant of a variance.

In *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233 (D.C. 1978), a building permit was issued for construction of a single family dwelling on a substandard lot. The house was never built and the property was sold. The purchaser, relying upon the past approvals, applied for a building permit to construct a single family home. The application was denied due to the substandard lot. The BZA held that these circumstances constituted a unique "zoning history" that necessitated an area variance. The variance was challenged on appeal, in part, on

the ground that the property's "zoning history" did not amount to an "extraordinary or exceptional situation or condition" for variance purposes. The Court disagreed with this argument, citing the fact that both subdivisions and building permits are subject to review and must be in accordance with the zoning regulations. *Id.* at 1235. Therefore, the Court noted that – by virtue of the approvals during the subdivision and permit process -- the zoning authorities had implicitly determined three times that the lot width complied with the zoning regulations *Id.* at 1238.

The opposing neighbors argue that the facts of this case are distinguishable from *DeAzcarate* because here the applicant, not DCRA, played a significant role in creating the substandard lots. The Board disagrees. To be sure, the applicant played a role in creating the substandard lots. But the evidence indicates that DCRA determined through the subdivision and permit process on seven different occasions that the lots were buildable. (See, Findings of Fact 9, 12 -17). The Board finds that, under these unique circumstances, it was reasonable for the applicant to rely on the informal advice and formal determinations from DCRA, particularly DCRA's zoning certification of the surveyor's plat that subdivided the property into record lots. Moreover, the Board is not persuaded by the opposition's claim that the applicant misrepresented the facts to DCRA or that the applicant acted in bad faith during the subdivision and permit process.

The unique subdivision and zoning history results in practical difficulty for the owner

Because DCRA's actions led the applicant to believe that the lots were buildable, the applicant commenced construction at the property. By the time it learned that DCRA had reversed its position that the lots were buildable, it had already spent 1.2 million dollars At this juncture, strict compliance with the Zoning Regulations would have required a complete redesign of the project, which would have likely resulted in dire financial consequences for the applicant. The Board finds that these circumstances constitute practical difficulties.

The Capitol Hill Restoration Society argues that the *DeAzcarate* finding of practical difficult is distinguishable because the subsequent purchaser had constructed two homes on adjacent conforming lots, making it impossible to make the substandard lot conforming. Here, the Society argues, the applicant knew of a "problem" when the property was still vacant, so that there was no physical or ownership impediment to subdividing the property into two conforming lots, presumably in sufficient time to have corrected it without a variance and without encountering any "practical difficulty". Again, the Board does not agree with this position. The evidence in the record does not support a finding that the Applicant knew that there was a problem with the property prior to the issuance of the second stop work order. By that time. building on two lots was not an economically feasible option Thus, though the practical difficulties faced by the applicant may differ in kind from those confronting property owners in *DeAzcarate,* they are at least equal in magnitude.

The variances will not result in detriment to the zone plan or the public good

There is no evidence that the requested variances will result in detriment to the zone plan or the public good. Both HPRB and OP state that the three row houses are compatible with the

surrounding area in terms of massing and design. In addition, the 16 feet wide buildings – though non-conforming – are typical in the surrounding area. Finally, the Board believes that far from being a detriment to the public good, the requested variances will result in an improvement to the public good. The three row houses will not only provide housing that is in harmony with the neighborhood, they will replace an abandoned PEPCO substation that was a blight on the neighborhood for many years.

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, in this case, the ANC failed to file a written report. As a result, there are no issues and concerns to address or give great weight to.

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. OP did not comment as to whether the "zoning history" in this case satisfied the "uniqueness" test, or whether it caused a "practical difficulty" that necessitated this variance. As a result, there is nothing for the Board to give "great weight" to with respect to the first two prongs of the variance test. OP did conclude that the requested variances would not cause detriment to the zone plan or the public good. For reasons discussed in this decision, the Board finds this reasoning to be persuasive, and gives "great weight" to this portion of OP's recommendations.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is hereby **GRANTED** to allow zoning relief from the requirements under section 401 regarding minimum lot area and lot width, to allow the construction of the three row dwellings.

VOTE: **4-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and Anthony J. Hood, by absentee ballot, to approve the application)

Vote taken on April 6, 2004

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: MAR 04 2005

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.

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. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 17108

As Director of the Office of Zoning, I hereby certify and attest that on MAR 0 4 2005 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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