GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17123 of Beech Center, Inc., pursuant to 11 DCMR § 3103.2, for a variance from the lot area requirements under section 410.3, to allow the construction of two new single-family detached dwellings in the R-1-B District at premises 3139 and 3143 Westover Drive, S.E. (Square 5664, Lots 70 and 71).

HEARING DATE: **March 9, 2004**
DECISION DATE(S): **April 6, 2004**

DECISION AND ORDER

On December 16, 2003, Deeohn Ferris filed an application before the Board of Zoning Adjustment ("Board") on behalf of Beech Center, Inc. ("Applicant"), for a variance to allow the construction of two new single-family dwellings on undersized lots. Although the Applicant sought relief from § 401.1, the Board determined that § 401.3, which sets forth lot dimensions, was the provision from which relief was needed.

On March 9, 2004, the Board held a public hearing on the application. After the hearing, the Board left the record open to receive a statement from the Applicant setting forth how its application meets the variance test and to receive a response from the affected ANC to the Applicant's explanation. On April 6, 2004, the Board held a public decision meeting and unanimously voted to deny the application.

PRELIMINARY MATTERS:

Notice of Application Public Hearing Pursuant to 11 DCMR 3113.3, the Office of Zoning (OZ), by memoranda dated December 17, 2003, notified the Councilmember for Ward 7, Advisory Neighborhood Commission (ANC) 7B, Single Member District /ANC 7B04, and the District of Columbia Office of Planning (OP) of the filing of the application. On December 30, 2003, OZ mailed notices of the public hearing to the ANC, the Applicant and all of the owners of property within 200 feet of the subject property, advising them of the date of hearing. The Applicant's affidavit of posting, filed on March 4, 2004, indicates that on March 21, 2004, it posted three zoning posters at 3139 and 3143 Westover Dr. S.E., in plain view of the public. The Applicant corrected the date of posting on the record at the March 9, 2004 hearing and stated that the property was posted on February 21, 2004.

Request for Party Status There were no requests for party status.

Applicant's Case The Applicant's case was presented at the hearing by Philip Johnson. Somba Ndeti, a geotechnical engineer, testified concerning the soil conditions of the subject properties. Daniel Coywood, a licensed land surveyor with Maddox Engineering, testified concerning the history of the property's subdivision. In filing a post-hearing statement and at the decision

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meeting, Steven Gell, Esquire represented the Applicant. Mr. Gell argued that the Applicant met the variance test, that the government's creation of the two substandard lots in 1985 estopped it from denying the building permits sought, and that the Applicant had authority to maintain this action.

Government Reports The Office of Planning submitted a report to the Board dated March 2, 2004. OP stated that it could not recommend approval of the lot area variance because construction of two single family homes on the lots would be in direct contradiction of section 401.2 of the zoning code, and the economic hardship argument presented by the Applicant was insufficient to meet the practical difficulty requirement for the variance test. OP concluded that Applicant had failed to prove that there was a practical difficulty in conforming with the regulations by combining the lots and constructing one house on the combined lot.

ANC Report By letter dated February 20, 2004, ANC 7B indicated that at a regularly scheduled, properly noticed meeting on February 19, 2004, with all commissioners present, ANC 7B commissioners voted unanimously to oppose the application for variance relief. In a letter dated March 29, 2004, the ANC, continued its opposition to the application stating that it was not in the public good to grant the requested variance because soil conditions in the area posed a potential risk of damage to neighboring properties. The ANC also opposed the application because the Applicant is no longer in business and the ANC is concerned that it would be difficult to identify a responsible party if there are problems as a result of the construction.

Parties and Persons in Opposition During the hearing on April 6, 2004, Vincent Spaulding, ANC Commissioner 7B, and residents living on Westover Drive, Garet Bornstein, Thomas Kelly, and John Judge testified in opposition to the application. Their opposition was based upon the poor condition of the soil and the possible adverse impact of the construction upon neighboring properties because of destabilization of the soil, land slides, and erosion. Garet Bornstein also authored a letter dated March 27, 2004 in which he questioned the legal existence of the Applicant. A petition signed by neighborhood residents opposing the application was filed with the Board on March 9, 2004.

Hearing The public hearing on the application was held and completed on March 9, 2004. The Board left the record open to receive a statement from the Applicant as to how it meets the requirements for an area variance. The Board also permitted ANC 7B to file a response to the Applicant's post-hearing statement.

FINDINGS OF FACT

1. On December 16, 2003, Deeohn Ferris filed an application for an area variance on behalf of Beech Center, Inc. ("Applicant") concerning properties located at 3139 and 3143 Westover Dr. S.E., Square 5664, Lots 70 and 71 ("subject property").

2. The application indicated that the Applicant was the owner of the subject property.

3. The Applicant is now defunct. Prior to going out of business, it sold its interest

in the subject property on or about August 19, 2002 to Suraj Corporation, to whom it gave full power and authority to act in its name.

4 Suraj Corporation entered a purchase contract with Deeohn Ferris for the sale of the subject property and authorized him to file the application for a variance before the BZA.

5. The property consists of two undeveloped lots located within the radius of the 180-degree curve on the south side of Westover Drive, approximately 200 feet south of Pennsylvania Avenue, S.E. and is zoned R-1-B.

6. In 1985, the property was subdivided from three lots into two lots of 4,356 square feet each.

7 At that time and at present, the minimum lot size for properties located in the R-1-B Zone District is 5,000 square feet.

8 There is no record of any variance being granted for the creation of these substandard lots.

9 The lots are situated on a hillside that slopes upward at a steep angle and rises more than twenty-feet from the street frontage to the rear. The lots are 85 feet deep, resulting in a 25% slope on the property.

10. The fronts of the two proposed houses would face north and the foundation of each house and retaining walls would maintain the existing hill to the south.

11. The lots are triangular in shape, with each lot being narrow at the rear.

12. The soil of the subject property is composed of 60% Chillum-Urban Land Complex and 40% Muirkirk Variant Complex. Muirkirk Variant Complex soils are considered to be problem soils and require specialized techniques for construction addressing foundation support, slope stability, erosion potential, and high shrink-swell clay. Because of the extreme topography of the lots and the nature of the soil, construction will require specialized techniques to ensure the structural integrity of the houses that would be constructed and that of homes on neighboring properties.

13. As a result of the soil conditions, many properties in the area have experienced structural problems and land shifts.

14. The Applicant has expended $45,000 to prepare developmental plans.

15. Phillip Johnson testified that the Applicant would construct one single family home if the variance was denied.

CONCLUSIONS OF LAW

As a preliminary matter, the Board will address whether this application was properly brought in the name of Beech Center Inc. Although that entity is no longer in existence, upon selling the subject property to Suraj Corporation on or about August 19, 2002, it authorized Suraj to act in its name as the owner of the property "pending eventual recordation of the deed." There is no evidence in the record as to when or if the deed of sale was ever recorded. However, the Board finds that regardless of whether Beech Center or Surjai is the owner of the property, Surjai had the authority to act in the name of Beech Corporation. Therefore, the application was properly made.

The Board is authorized to grant a variance from the strict application of the zoning regulations in order to relieve difficulties or hardship 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. An Applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the Applicant, and that the granting of the variance will not be detrimental to the public good or impair the intent and integrity of the zone plan and regulations.

The Applicant meets the first prong of the test for an area variance in that the combination of the topography and shape of the subject property make it unique. The lots are pie-shaped and located on a steep hill, in the curve of a U shaped street. Additionally, the soil composition makes construction on these lots challenging because the clay is unstable and absorbs water. While the soil composition of the subject property is the same as that of surrounding properties, the subject property's location at the bend of the road and its shape make it distinct from other properties in the area.

Although the Applicant's property is unique, the Applicant failed to establish that it would have practical difficulties complying with the Zoning Regulations' lot area requirements as a result of this uniqueness. The Applicant argued that the practical difficulty it would incur by complying with the regulations would be economic hardship. In support of this contention, the Applicant submitted estimates of costs associated with building one house on the two lots in conformance with the zoning regulations compared with building two houses if variance relief were granted. While the Applicant showed that the margin of profit would be less for one house than for two, the inability to reap a greater profit does not constitute a practical difficulty under the variance test

Economic harm may be considered in the practical difficulty test. *Gilmartin v. District of Columbia Bd. of Zoning Adjustment;* 579 A.2d 1164 (1990), *Barbour v. District of Columbia,* 358 A.2d 326 (D.C. 1976). However, the Board has "no authority to grant a variance in order to assure ... a profit". *Taylor v. District of Columbia Board of Zoning Adjustment,* 308 A2d 230, 236 (D.C. 1973), *citing, Anderson's Law of Zoning* § 14.23; 3 § 14.48.

In addition, Mr. Johnson, on behalf of the Applicant, testified that, despite the lower margin of profit,.he would proceed with construction of a single home if the variance request were denied, thus belying the practical difficulty in complying with the regulations.

With respect to the third prong of the variance test, the Board concludes that granting the variance relief would be substantially detrimental to the public good and would substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Office of Planning, ANC 7B and concerned neighbors raised serious issues regarding land shifting, soil disturbance and the risk to neighboring properties that may result from the permanent excavation and site placement of two homes. While construction of one home may also create some disturbance, the Office of Planning noted in its report that the disturbed area and the size of the retaining walls for one house would be smaller. In addition, as OP notes, 11 DCMR Section 401.2 appears to have been drafted specifically to prevent what the Applicant seeks to do here by variance. Section 401.2 provides that under certain circumstances a structure may be built on a substandard unimproved lot that was in single ownership on November 1, 1957, but only if the owner does not own an adjoining unimproved lot. Accordingly, the intent of the regulations is for nonconforming lots to combine, if possible. In light of the fact that the record shows that it is possible for Applicant to construct a house on the combined lot, granting the variance would be substantially detrimental to the intent and integrity of the zoning regulations.

The Applicant has argued that the government is estopped from denying the area variance because, in 1985, the District permitted the creation of the substandard lots. The Applicant stated that it purchased the property under the assumption that two houses could be built on the lots.

Estoppel is an equitable doctrine that is disfavored by the courts in zoning cases because of the important public interest in the integrity and enforcement of the zoning regulations. *Wieck v. District of Columbia Board of Zoning Adjustment,* 383 A.2d 7 (D.C. 1978).

In order for the government to be estopped, the Applicant must establish that it acted in good faith on the affirmative actions of the government, that it made expensive and permanent improvements in reliance on the government action, and the equities are strongly in favor of the Applicant. *Id. at 11.*

Estoppel is not applicable in this case for several reasons. While the Applicant argues that he presumed he could develop a house on each substandard lot in reliance on the District's affirmative substandard subdivision of the lots, there is no evidence of any affirmative acts on the part of the District expressly authorizing such construction. In addition while the. Applicant has expended $45,000 in preparation costs, he has not made permanent improvements as

required by the second prong of the estoppel test. Finally, the equities in this case are not in favor of the Applicant when weighed against the possible detriment to the neighboring properties and to the zone plan that will result from permitting the construction of two houses, where there should only be one.

Finally, the Applicant's argument that the District is barred from enforcing the legal retrictions in this case under the theory of laches fails for similar reasons. "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches. [A] claim of laches in the zoning context is not judicially favored and is rarely applied " except in the clearest and most compelling [circumstances]." *Wieck,* supra at .5 -6. In this case, there is no right that the District failed to assert, only a presumption on the part of the Applicant that was incorrect.

Based upon the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to its application for an area variance.

ANC and OP Great Weight

In denying this Application the Board, concurs with the recommendations, of the affected ANC and the Office of Planning, and in the above discussion of their issues and concerns, has afforded them the "great weight" to which they are entitled by virtue of DC Official Code §§ 1-309.10(d) and 6-623.04 (2001), respectively.

Therefore, it is **ORDERED** that the application be **DENIED** with respect to the variance from the lot area requirements.

VOTE: **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller , David A. Zaidain, and John G. Parsons (by absentee ballot) to deny the request for a variance from the lot area requirements).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board Member approved the issuance of this order.

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

FINAL DATE OF ORDER: JUL 0 5 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.

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BOARD OF ZONING ADJUSTMENT



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As Director of the Office of Zoning, I hereby certify and attest that on JUL 0 5 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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ATTESTED BY:

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Director, Office of Zoning