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BZA Case 17124
Application of Howard Heu (Parkhill, Inc.)
601 Massachusetts Avenue, NE
(Square 866, Lot 809)
Washington, DC 20002-6005

Applicant's Proposed Findings of Fact, Conclusions of Law, and Decision

Hearing Date: March 16, 2004
Decision Dates: May 4 and June 8, 2004

1. The following case in question was filed by the property owner, Howard Heu (Parkhill, Inc.), pursuant to 11 DCMR § 3103.2, " ...for a variance from the lot occupancy requirements under section 403, and a variance from the off-street parking requirements under subsection 2101.1, to allow the construction of a new flat (two-family dwelling) in the R-4 District at premises 601 Massachusetts Avenue, N.E. (Square 866, Lot 809). Parkhill, Inc., is a dry-cleaning pickup and drop-off business located on the premises of the property as currently developed" (citation to case from Notice of Hearing as set forth on Office of Zoning website).

2. Mr. Heu is the owner of the land and proprietor of the business operating on that land.

3. The property is located in an R-4 zone district. The R-4 zone permits a range of residential uses including detached, semi-detached, and row dwellings for one family as a matter of right, along with churches, embassies, and public schools. The zone also allows flats, which are dwellings for two families, as a matter of right. Flats are not allowed by right in more restrictive Residence zones, i.e., R-3, R-2, and R-1-A and R-1-B. The R-4 zone also allows, subject to density restrictions, conversions of buildings and other structures built prior to May 12, 1958 (the effective date of the prevailing zoning regulations) to an apartment house under certain conditions, including the requirement that conversions may only occur if the total area of the lot equals or exceeds 900 square feet per apartment unit.

4. The R-4 zone's general provisions, at §§ 330.1 through 330.3: acknowledge that the zone is applied to areas developed primarily with row dwellings along with a "substantial number" of conversions of dwellings into dwellings of two or more families; state a purpose to be stabilization of remaining one-family dwellings; and declare that, while allowing conversions to apartment houses under certain conditions, that the zone is not intended as an "apartment house district."

5. Applicant's land is a corner lot, specifically located at the southeastern corner of the intersections of Massachusetts Avenue and Sixth Street, NE.

6. The lot has a total area of 1,501 square feet and is highly irregular in shape, this being a function of the angle at which the two streets intersect combined with an unspecified history of land sales, subdivisions, and modifications of lot lines such that there are now nine (9) distinct straight-line segments to the overall perimeter of the lot. The lot's frontage along Massachusetts Avenue NE extends 34.87 feet; the

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lot's frontage along Sixth Street NE extends 89.87 feet. Sixth Street, NE, is considered to be a street aligned to a true north-south axis.

7. While the lot's frontage along Massachusetts Avenue, NE is 34.87 feet long, the lot tapers and becomes as narrow as 10.61 feet at one point along its Sixth Street frontage, and, 32.65 feet south it widens slightly to 12.78 feet, this also being at a point three feet north of its southern lot line. The southernmost three feet of the lot is 23.99 feet deep and the part extending into the Square to the east abuts the southern limit of adjacent lot 808 (the lot known as 603 Massachusetts Avenue, NE) along one axis for 11.21 feet, abuts the south-most segment of the western property line of the lot next east of lot 807, lot 803 (known as 605 Massachusetts Avenue, NE) for 3.0 feet, and abuts lot 46 (known as 209 Sixth Street, NE) along the entire 23.99 foot length of its southern property line.

8. The lot is improved by a one-story building that was built prior to the establishment of zoning regulations in the District of Columbia that has never been used for residential purposes. The building's total area is uncertain, and there is not exact information about the amount of it that is built past the property line along its Massachusetts Avenue frontage into which it protrudes somewhat, but never more than two feet. Applicant understands the total footprint to be in the range of 600 to 700 square feet. The building is presently used as a dry cleaning pickup and drop-off business, that use having been allowed by the Board of Zoning Adjustment in 1996 in BZA Case 16125, a use that replaced the use prior to that, namely a barber shop. This building's exterior surface is stucco or its equivalent and is now white in color. The building occupies most of the Massachusetts Avenue frontage but less than one fourth of the frontage along Sixth Street. The building's face along Sixth Street turns within twenty-five feet of the Massachusetts Avenue property line and then runs perpendicular to Massachusetts Avenue, establishing a small triangular-shaped area open to the sky, either a court yard or a side yard. The entrance to the building is at the intersection of Massachusetts Avenue and Sixth Street, NE, where the entrance is recessed under a roof at an angle of 45 degrees to Massachusetts Avenue NE and the segment of the building wall perpendicular to it. The building has windows that have awnings extending from them that identify the establishment and the nature of its business. The only other existing doorway to the business is located along the building's southern face which opens into the rear yard. The rear yard is contained behind an eight-foot high wall of concrete block construction with two gates, one near the rear of the existing building and one at the southern end of the Sixth Street property line; a wooden fence of equal height to the concrete wall separates lots 809 and 808. A storage shed occupies the full width of the rear yard but is removed from the southern "stub" of the property by approximately five feet; it does not encroach on the portion of south-most three feet of lot 809 that abuts either lots 46, 803 or 808.

9. The use of the property for the laundry and dry-cleaning pickup and drop off station, while a non-conforming use, is allowed under the terms of the Order issued in BZA

16125. That use would continue under Applicant's plans, as allowed by BZA 16125 and as further specified by this Order.

10. The size of the lot, 1,501 square feet, is less than the minimum size for lots in the R-4 zone district for any use (§401.3), including conversions to apartments (three or more dwelling units in a single building), which require 900 square feet of land per apartment. The width of the lot, at 34.87 feet, exceeds the minimum width requirements for row dwellings and flats and for one-family dwellings, but is less than that for all structures other than buildings converted to apartments (for which there is no specified minimum width), that standard being 40 feet, across its Massachusetts Avenue frontage. For this circumstance, applicant selects Massachusetts Avenue as the "front" to avoid loss of most of it to a required 20 foot rear yard were Sixth Street were selected instead.

11. As presently used, the lot contains fewer square feet than is required for any lot on which a building is to be allowed by right in the R-4 zone and is not as wide as required for its present type of use. The lot is, thus, a non-conforming lot but its use is also allowed under the aforementioned BZA order and since the use and configuration date back continuously to a time prior to the establishment of any zoning regulations in the District of Columbia.

12. Both the Massachusetts Avenue and Sixth Street frontages of the lot abut the part of the right of way known as "the parking," public space created by the Government of the District of Columbia in the 1800's to be maintained by abutting owners but kept in public ownership. With permission, certain projections such as bay windows and stairways are allowed in areas such as this. In the case of this property, the depth of those areas are considerable, particularly along the Massachusetts Avenue frontage, where "the parking" is forty feet wide. The total area adjacent to lot 809 that is in "the parking" is more than twice the land area of lot 809 itself.

13. Applicant proposes to erect an addition to the present building in which there would be two dwellings. Application declared the intended use to be a "flat," a use allowed by right in the R-4 zone district. The record includes information that confirms Applicant presented this plan to the Department of Consumer and Regulatory Affairs and the Zoning Administrator, and that they concurred with his view that this would be the use for the property. Applicant does not propose to supplant the present non-conforming use but to create an addition that would rise to three stories but less than 40 feet (as allowed in the R-4 zone), the addition extending from Massachusetts Avenue south to a point twenty feet north of the southern property limit (thereby satisfying the requirement that a rear yard be at least 20 feet (§404.1).

14. The lot provides no parking space at this time.

15. The lot is located within the Capitol Hill Historic District.

16. When developing dwellings in an R-4 zone district, owners must ordinarily provide parking, the number of spaces being a function of the use. For a single-family dwelling, one space must be provided. For a flat, one space must be provided. For an apartment conversion, one space must be provided for each three units. For other uses, the number of spaces to be provided must be one space for each 600 square feet of gross floor area or cellar area (§2101.1).

17. Applicant understands the use proposed to be a flat (albeit with a continued use of a portion of the property as the dry-cleaning pickup and drop-off station).

18. As such, Applicant believes the number of parking spaces required for the development proposed to be added is one.

19. While parking requirements can be waived for properties that are deemed to "contribute" to the character of the historic district in which they are located (§2100.5), Applicant's present property is not so viewed. Accordingly, a variance is required and Applicant so seeks.

20. Among other limits, the zoning regulations limit the percentage of a lot that a building may occupy. In the R-4 zone this maximum percentage is established as a function of use, ranging from a high of 60 % for row dwellings, flats, public schools and churches to 40 % for "other structures," yet with no specific limit set for "conversions" to apartment buildings.

21. Consistent with Applicant's understanding that the use sought is a "flat," Applicant understood that the allowed lot occupancy was 60 percent.

22. The plans filed with the Board at the time of application and considered by the Board at its March 16 hearing proposed to enlarge the present building, possibly by structurally surrounding and extending over it (the design engineering not having been undertaken), to create a three-story building in which the present laundry and dry-cleaning establishment would remain at its present location. The first floor of the entire resulting building would be at grade, as is the present building. The flat would exist both over the existing building and extend to the south, stopping within or at twenty feet of the southern lot limit. This would result in lot occupancy of 82 percent, more than allowed.

23. Applicant had presented plans to develop the lot prior to the filing of this case with the Historic Preservation Review Board, plans Applicant described to the BZA as being broadly similar to those submitted when this application was filed. Those plans were not approved by HPRB. Instead, applicant was advised by HPRB and its staff to secure whatever zoning relief would be needed prior to returning to the Board with a refined conceptual plan with zoning relief in hand.

24. During the Hearing of March 16, the Board heard from Applicant Howard Heu, his architect (who was granted expert status), William Maiden, his land use, planning and zoning consultant Lindsley Williams (also granted expert status), from the

Advisory Neighborhood Commission, which was represented by Commissioner William Crews, from the Office of Planning by its staff member David McGettigan, from the abutting neighbor to the east and owner of Lot 808, Ms. Ilinca Bartolomeu, and from a representative of the Capitol Hill Restoration Society, Mr. Gary Peterson. The ANC is considered a party in the case. No other person sought or was granted party status. The record includes a letter from the owner of lot 803, Mr. Murringer.

25. The ANC, Ms. Bartolomeu, and Mr. Peterson expressed opposition to that part of the application seeking approval to develop in excess of the limits on lot occupancy, at least to the extent and in the manner then proposed. Mr. Murringer expressed concern that the plans not interfere with his access to and from Sixth Street along the three-foot wide stub of land lying at the southern limit of Mr. Heu's property.

26. While Ms. Bartolomeu and Mr. Peterson took no stance on the question of parking, the Office of Planning and the ANC supported the granting of that variance.

27. As to lot occupancy, the Office of Planning opposed the application as presented at the hearing of March 16 feeling the plan then advanced was excessive.

28. Applicant's team presented information establishing that the lot was, if not absolutely "unique," one of extremely unusual shape and that its history of use was also distinguishing.

29. Applicant's land use expert established that the area is one calling for "moderate density" housing under the Comprehensive Plan's generalized land use map and accompanying policies and that the R-4 zone is "not inconsistent" with the use the Comprehensive Plan specifies for the area. Applicant further established that the proposed use to be added is exclusively in the nature of residential dwelling units, fully consistent with the intent of both the Comprehensive Plan and zone plan.

30. Applicant's team presented information at the hearing establishing that there was a distinct "practical difficulty" in meeting the requirement to provide even one parking space on the lot given its configuration and narrow depth along Sixth Street.

31. Applicant's team presented information that the creation of a driveway to the lot if a space were created would create a curb cut along Sixth Street and thereby remove at least one parking space along its eastern curb in an area where public parking is already at a premium.

32. No testimony or other evidence exists to suggest that the parking variance requested has not satisfied all elements of the prevailing standards for parking of a dwelling or flat in an R-4 zone district.

33. When this aspect of the case was discussed at the hearing, the Board did not reach the question of "proposed use" of the property, i.e., whether the use proposed is fully embraced by the term "dwelling" or "flat" (discussed below).

34. As to the issue of lot occupancy, the same elements about the lot establishing uniqueness in the context of parking apply to that element of a variance test for percentage of lot occupancy.

35. As to practical difficulty and undue hardship in the matter of the variance from the percentage of lot occupancy, the record contains sufficient evidence, not rebutted, that this condition is satisfied. This information is found partly as part of the applicant team's testimony but also in the post-hearing submission the Board allowed the applicant to submit which sets forth a range of practical difficulties (such as fire code's requiring flats to have a second means of egress at least 25 feet from each other) as well as hardships that alternative development programs would produce (e.g., temporary closing of the business, added costs of construction for underpinning).

36. As to whether the lot occupancy relief can be granted without any "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, the Applicant submitted revised plans in the nature of an alternative, not a substitution, for the plans initially filed. Applicant introduced evidence and testimony to the effect that both plans satisfied this requirement. As determined and conditioned by the Board, the Board concurs.

37. During the hearing, Ms. Bartolomeu and Mr. Peterson expressed concerns about the effect of the proposed addition on the light and air reaching the adjacent lot, as did the Office of Planning. Mr. Peterson also expressed concern about the overall density of the proposed development and a concern that approval would be a negative precedent.

38. These plans differ, in large part, from those initially filed in that they propose that the three-story portion of the overall development extend only as far south as the southern limit of the building next east, south of which the building would consist of a partially below-grade floor with a floor above it. Although not diagrammed, applicant's written submission accompanying the new elevation diagram indicated willingness to adjust the depth of the partly below grade floor and thus the plane of the roof above the story over that. Applicant reasons that in removing one story completely and lowering the plane of the second story's roof of that portion, more light and air reaches the adjacent properties. Applicant also reasons that having the extended portion being partly below grade creates an elevation profile along Sixth Street that is more akin to that of the surrounding area in which the residences typically have steps leading up to their main entrance, as proposed here – similar to residences south along Sixth Street, NE – with an English Basement existing or with the potential for same below the main floor level. The Board so finds.

39. The plans also differ in their apparent treatment of entrances to and from the uses contained within the building. The revised Sixth Street elevation depicts, from north to south (a) the entrance to the dry-cleaning pickup and drop-off business, (b) a single doorway located along the Sixth Street right of way (that would be an

emergency exit from the business space, a rear door to the large unit within the flat (located above and extending south from the business), and the main door to the second unit of the flat (in the partly below grade area and the single story above it) and (c) the gate at the southern limit of the property, which would be retained. As explained, that unit's second fire exit is not depicted as it would be on the southern face of the building, not shown in its western elevation. Thus, the plans result in no more than two doorways along either the property's Massachusetts Avenue or Sixth Street frontages, frontages that are wider than most in the area, which are typically the width of row houses. The total frontage along both rights of way is 134.24 feet, a distance in which seven row houses could be built if in a series of lots at least 18 feet wide. Taken separately, even the "narrow" Massachusetts Avenue frontage is of sufficient width for two row houses, the other is shy by less than two percent of the combined width needed for five such row homes.

40. The Applicant's plans are common in their treatment of the continued laundry pick-up and drop-off location. It's exterior would be refinished to comport with neighborhood standards and would be subject to design review and approval of the Historic Preservation Review Board, as would all other design and materials aspects of the proposal. Its present commercial awnings would be eliminated. There would be no sign. In sum, while the use is not fully "withered away," it would be housed in a structure fully in keeping with the character of the area, vastly less obtrusive than it is at present.

41. The plans are common in their treatment of the existing shed: it would be razed.

42. Accordingly, the Board finds that the image of density and concerns that the lot would be overfilled if the application were approved raised by some comments is effectively addressed, again as conditioned by the terms of this Order.

43. During the latter stages of the hearing of March 16, the Board itself raised the question of the use, brought about in part by the comment of the Office of Planning that it saw the proposed use not as a "flat" but as something else, that being a function of the continued presence of the use allowed by BZA 16125, the present laundry and dry-cleaning pickup and drop-off station. The Board invited Applicant to comment on this topic.

44. Applicant commented in several ways, reminding the Board of Applicant's prior reliance on the interpretation first set out by his architect at the time of filing and by the Department of Consumer and Regulatory Affairs orally and, ultimately, in writing (submitted by Applicant as part of its post-hearing submission). Applicant's expert also opined that he supported applicant's conclusion while agreeing that another interpretation was possible but not productive, focusing as did the Board solely on the question of the variance sought from lot occupancy and not examining the potential parallel effect on degree of parking relief needed if the use is determined to be the "other" classification under Chapter 21 and its attendant requirement for one space for each 600 square feet of gross floor and cellar areas.

45. ANC's initial resolution, while not supporting all lot occupancy relief sought, supported granting relief such that three stories of development could occur as far south along Sixth Street as the point at which the lot is most narrow, which is also where the lot lines perpendicular to Massachusetts Avenue end and where the adjacent property's rear's porch corner post sits.

46. Applicant indicated that development, if allowed only as far at that porch's post, would not be sufficient to establish a flat with units of the size required.

47. Mr. Heu indicated that he planned to move his family into the larger of the two units and reside at the premises.

48. Applicant met with the ANC and its Planning and Zoning Committee prior to and following the hearing during April (once) and May (twice). Applicant and ANC each asked for and received the Board's permission to extend the time in which to submit additional materials and comments on them (Board decision at its meeting of May 4, 2004)

49. As of May 27, the ANC had not advised the Board of its reactions to the plans applicant submitted to it at the meetings of its committee or the ANC itself earlier that month. Applicant is not allowed under the rules of procedure to introduce a finding illuminating their conclusion.

50. Applicant's submissions indicate to the Board that it made diligent and good faith efforts to develop a plan that would be acceptable to the community. The Board finds the alternative plans, as conditioned, fully acceptable.

51. Applicant also addressed, in its post-hearing submission, the Board's and others' concerns about possible conversion of the existing commercial area into a third dwelling unit, noting that such a conversion would not be allowed as a matter of right since the lot is less than the area three units would require, 2,700 square feet. The Board so finds.

52. The Board also asked Applicant to comment on the issue of removing the existing business and building a new building. Applicant addressed this in its post-hearing submission, noting issues of undue hardship to the business and citing, as well, a provision of the lot controls that appears to only grant exceptions to build in substandard lots when there a structure in them was in place as of November 7, 1957 in which case development may occur if the pertinent standard is reached to the level of at least 80 percent (§401.2). Applicant noted that the act of razing the existing building would remove the basis on which new construction would be allowed, a significant practical difficulty.

53. The plans depict a "privacy wall" south of the limits of the proposed building.

Conclusions of Law

1. The Board has ample authority and evidence to grant the relief sought.

2. The Board finds the Applicant has met the burdens established for the two variances sought, as conditioned by the Board.

3. The Board has accorded, in its analysis of the Facts of this Case, great weight to the ANC and that, since each case is decided on its merits, there is no basis to reason that the granting of the relief herein sought would constitute a negative precedent.

4. Under the circumstances, the Board finds that the use proposed *to be added* is a "flat" for purposes of interpreting and applying the zoning regulations. Given the limited scope of impact and the conditions established herein, there is no need to establish a ruling on the classification of mixed use structures that would have ramifications far beyond this case that the Board cannot begin to consider fully and that is, if appropriate for any body, a question for the Zoning Commission to pursue with the Office of Planning and the Zoning Administrator.

5. As to the question whether a new building could be constructed if the existing building were razed, the Board finds the provisions of section 401.2 as ones whose literal interpretation could thwart the intent of the regulations as a whole and commend the Zoning Commission to review same at its pleasure. However, the Board will not take a stance in this case that could further erode Applicant's situation, which an Order effectively requiring the existing building to be razed could produce.

6. The "privacy wall" shown is not within the areas in which the Board has authority.

7. The overall design of the facades and choice of materials within Historic Districts are not within the authority of the Board.

8. Granting of the relief sought, as conditioned, is in full accord with the zone plan, including its declarations of intent for the R-4 zone set forth in §§ 330.1 though 330.3 particularly given the limited number of entrances (three) that would exist over a frontage that exceeds 133 feet and the fact that Applicant would maintain an area of abutting public space whose total area is more than double that of the area of the lot itself, following a plan that would be approved by both the Historic Preservation Review Board and the Public Space Committee.

Decision

1. The Board hereby orders that the relief sought be GRANTED, subject to the following conditions:

    a. Applicant's plans must be submitted to and be approved by the Historic Preservation Review Board, which itself must give great weight to any comments it receives from the affected Advisory Neighborhood Commission at the time the case is considered. That Board may also consider the landscaping and perimeter walls or fencing of the portions of the property not occupied by a building.

    b. Applicant shall develop and submit plans for contiguous public space known as "the parking" to the Public Space Committee and, prior to its consideration of same, advise the Historic Preservation Division of the Office of Planning of these plans for concurrence.

    c. No more than one unit of the flat shall have its principal or "front" entrance from Massachusetts Avenue, NE. Likewise, the second dwelling of the flat may have its principal entrance only from Sixth Street, N.E. The doorway to the latter may serve, however, as a doorway that is also a secondary means of access to the first unit and as an emergency exit from the existing commercial space. The entrance to the existing laundry pick-up and drop-off business shall be at whatever single location is approved by the Historic Preservation Review Board.

    d. There shall be no signs posted to indicate the presence of a business, nor shall it have any awnings with or without signs, nor shall there be signs within the establishment visible from the outside without approval of the Historic Preservation Review Board.

    e. Any change in the nature of the business shall require further review by and approval of this Board. The area of that business shall not expand but may be constricted to establish areas along Massachusetts Avenue in which to create a means of entering one dwelling unit of the flat. If a second means of emergency egress is provided to Sixth Street, the area so utilized shall not be used for the business in any form or fashion.

    f. The existing shed shall be removed and not be replaced.

    g. No windows or other openings will exist along any part of the eastern wall of the Applicant's building past the point where the building to the east at 603 Massachusetts Avenue southern limit is reached overlooking that property's area that is a porch or area below that porch, or where it is a rear yard.

    h. A rear yard area with a depth of at least 20 feet is to be provided.

i. The height of the portion of the building south of the lot's narrowest point shall not exceed ***[BZA here to select one of the following: (a) three stories, i.e., the original plans, (b) 17 feet, i.e., the height of the revised elevation, or (c) some other limit the Board determines is appropriate to assure adequate light and air].***

j. Maximum lot occupancy allowed from the north to south to the narrowest point of the lot shall not exceed 70 percent, and any areas to the north of that point that remain or become, under the review by the Historic Preservation and Review Board, are not to be utilized to extend the development into the area of the required rear yard and maximum overall lot occupancy shall not exceed 82 percent or whatever percentage is sufficient to leave a rear yard of at least 20 feet should the Office of Surveyor determine additional changes are needed in the shape when creating a "record lot" through the subdivision process.

k. The "privacy wall" shown in the plans south of the buildings, depicted as brick to a height of seven feet, is neither approved nor required; its presence, character, and other features are not within the jurisdiction of this Board but may be within the purview of the Historic Preservation Review Board; applicant shall abide by their determinations, if any, in this regard.

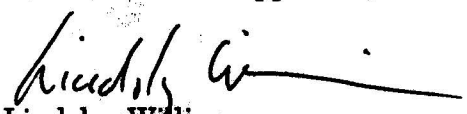
l. Nothing in this Order is deemed to create, affirm, acknowledge, modify, supplement, or supplant any rights of passage along or access the stub of land that is three feet wide at the southern end of the lot has relative to properties that stub of land abuts. However, this Order requires that nothing be built in that area to interfere with same, if any such exists.

m. If any plans are conceptually approved by the Historic Preservation Review Board but require zoning relief not herein provided, the Applicant shall either file an amendment to this Application or a new case, as the staff to this Board may direct at that time.

Certificate of Service

A copy of the foregoing is provided by regular mail and email to the Chairperson of the Advisory Neighborhood Commission 6-C, Commissioner Rob Hall this date, Friday, May 28, 2004, thereby affording the required 10 days prior to the Board's consideration of the Case for decision at its regular monthly meeting of June 8. The rules allow Parties to file a response or their own Findings of Fact and Conclusions of Law, but they may not introduce therein new evidence or opinion.

On Behalf of the Applicant,



Lindsley Williams

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