GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17148 of Marshall Heights Development Organization, pursuant to11 DCMR § 3103.2, for a variance from the side yard requirements under § 405 to allow the construction of a single-family detached dwelling at premises 3034 Clinton Street, N.E. (Square 4319, Lot 72) in the R-4 zone.

HEARING DATE: **April 20, 2004, May 18, 2004**
DECISION DATE: **May 25, 2004**

DECISION AND ORDER

Preliminary Matters

The Marshall Heights Community Development Organization, Inc. (Marshall Heights), filed this application for variance relief with the Board of Zoning Adjustment (the Board) on February 3, 2004. Marshall Heights is the authorized agent for the owner of the subject premises. For the reasons stated below, the Board finds that the applicant failed to meet the elements for an area variance. The application is therefore denied.

Notice of Public Hearing The Board scheduled a public hearing for April 20, 2004. Pursuant to 11 DCMR 3113.3, notice of the hearing was sent to the applicant, owners of all property within 200 feet of the subject premises, the Advisory Neighborhood Commission (ANC) 5A, 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
(Exhibit 34).

Self-Certification The zoning relief requested (side yards of five feet on the south and one foot on the north) was self-certified, pursuant to 11 DCMR § 3113.2 (Exhibits 1 and 6). After the first day of public hearing, the applicant amended its application to reduce the amount of the variance to provide for a minimum side yard of four feet (Exhibits 30-32).

OP Report OP reviewed the variance application and prepared an initial report (Exhibit 24) and a supplemental report (Exhibit 35). In its initial report, OP recommended approval so long as the applicant provided side yards of at least four feet. Because the applicant revised its plans and application to provide four feet side yards, OP recommended approval of the variance in its supplemental report.

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ANC Report In its report dated March 30, 2004, ANC 5A indicated that it had voted to oppose the variance at a regularly scheduled monthly meeting where a quorum had been present (Exhibit 22). The ANC did not provide any specific reason in the report for its opposition. However, it submitted an additional report responding to the applicant's amended application. In this report (dated May 10, 2004) the ANC stated that -- even with four feet side yards – the neighboring property owner would not have sufficient privacy (Exhibit 36).

Requests for Party Status The Board received a request for party status from neighboring property owner, Eric Wiggins (3032 Clinton Street, N.E., Exhibit 28). Although Mr. Wiggins testified at the April 20, 2004 public hearing, he did not appear at the continued hearing on May 18, 2004, when his request for party status was considered by the Board.[1] Because Mr. Wiggins was not present at that time and could not participate fully as a party, his request for party status was denied. However, the testimony and evidence that he submitted was considered in opposition to the application (see below).

Persons in Opposition to the Application In addition to Mr. Wiggins, four other nearby property owners testified in opposition to the application: Paula Nickens, Tama Gillis, Fannie Tate, and Susan Finnegan. Each asserted, among other things, that the requested variance would negatively impact on the privacy of adjacent property owners.

Closing of the Record After the first day of public hearing on April 20, 2004, the Board continued the hearing to May 18, 2004 and left the record open for submission of the amended application, responses from the ANC, and Mr. Wiggins' request for party status. After the May 18, 2004 public hearing, the record was closed and the matter was set for a decision meeting on May 25, 2004.

Decision Meeting The Board voted to deny the variance application at the May 25, 2004 Decision Meeting.

FINDINGS OF FACT

1. The subject property was awarded to Marshall Heights through the District of Columbia's "Home Again Initiative" program (Home Again). This program was created by the District in 2002 to create homeownership opportunities for persons ranging in income. Vacant and abandoned properties, like the subject property, were purchased in "bundles" by prequalified developers who were to develop and sell the homes.

[1] Mr. Wiggins filed his party status request after the first day of public hearing.

2. Marshall Heights purchased the subject property as part of a "bundle" of properties, but has an option to return the property to the District and build elsewhere.

3. Marshall Heights proposes to build a single family affordable home, placing the dwelling at the front of the lot so that it fronts on Clinton Street and blends with the streetscape. It would have a four foot side yard instead of the required eight feet side yard.

4. The subject property is located on an odd "flag shaped" lot (Exhibit 2). It is extremely narrow at the front (the Clinton Street side), and becomes significantly wider at the rear of the property.

5. The rear portion of the lot has a steep topography and is at least partially wooded. As a result, it would be difficult and expensive to excavate and build in the rear.

6. Dwellings in the area are placed in varying locations on the lots and have varying appearances. At least two other nearby lots have homes placed in the rear portion of the lots. Although these lots too were wooded, they were cleared for construction.

7. The Board finds that the proposed four foot side yard would interfere with the privacy of the adjacent property owner, Eric Wiggins.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001), to grant variances from the strict application of the Zoning Regulations. The applicant here seeks relief from the requirement under § 405 of the Regulations that it maintain an eight foot side yard setback, so as to permit it to have a four foot side yard.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). In order to prove "practical difficulties," an applicant must demonstrate first, that compliance with the area restriction would be unnecessarily burdensome; and, second, that the practical difficulties are unique to the particular property. *Id.* At 1170.

The applicant has failed to establish that it has met the three-prong test for a variance
While the applicant has satisfied the first two prongs of the variance test, he has not satisfied the third prong of the test. As stated at the outset, the applicant must satisfy all three prongs test for area variances in order for relief to be granted.

First prong There is no doubt that the property is unique because of its shape and topography. As stated in the Findings of Fact, the lot is a very unusual flag shaped lot with steep topography (paragraphs 4 and 5).

Second prong There is also no doubt that the applicant would encounter practical difficulty were the side yard setbacks strictly applied. The Board is persuaded that it would be difficult and costly to build in the rear of the lot – where zoning relief would not be needed – due to the steep topography and existing woods (Finding of Fact 5). Although the Board finds the rear lot is buildable (and nearby property owners have built toward the rear), the cost of building at the rear of this site would probably impact on the applicant's ability to develop an affordable housing unit.

Third prong Notwithstanding the above, the applicant has not met the third part of the variance test. Based upon the record, the Board is persuaded that the requested variance would result in substantial detriment to the public good and the zone plan. First and foremost, the Board finds that the proposed dwelling with four foot side yards would interfere with the privacy of the adjacent property owner, Eric Wiggins. Second, the Board finds that the proposed dwelling, placed at the front of the lot, would be out of character with the neighborhood. Although Marshall Heights claims that the placement of the dwelling at the front of the lot would result in a uniform and harmonious streetscape, the Board disagrees. Because the front of the lot is too narrow to accommodate the required side yards on either side of the dwelling, the placement of the dwelling in the front location would be out of character with the rest of the homes that have substantial separation and are sighted on the lot to accommodate at least one, if not both side yards.

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. The Board has carefully considered the issues and concerns raised in the ANC's report. The ANC asserted that it opposed the variance application because it would impact on the privacy of the adjacent property owner and be out of character with the surrounding neighborhood. For the reasons stated above, the Board finds the ANC's reasoning to be persuasive.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. The Board concurs with the Office of Planning in supporting the goals of the Marshall Heights Community Development Organization in

its attempt to implement the Mayor's Home Again Initiative in this case. That program is designed to "encourage the maintenance of existing housing stock and, where appropriate, the new construction of detached...housing." (Emphasis added. OP Report at Page 4). The Board, however, finds that this location is not appropriate in light of the above stated adverse impacts on the privacy of the neighboring property and on the character of the surrounding neighborhood.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the motion to deny the variance is granted.

VOTE: 3-0-2 (Geoffrey H. Griffis, Ruthanne G. Miller, and John A. Mann II, to deny the variance application, Curtis L. Etherly, Jr. having been necessarily absent, and Anthony J. Hood having recused himself)

Vote taken on May 25, 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: DEC 15 2004

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DEMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. SG/rsn

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BZA APPLICATION NO. 17148

As Director of the Office of Zoning, I hereby certify and attest that on DEC 15 2004 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: Jerrily R. Kress

JERRILY R. KRESS, FAIA
Director, Office of Zoning