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May 18, 2004

Mr. Geoffrey H. Griffis
Chair, Board of Zoning Adjustment
441 4th Street, NW, Suite 210
Washington, DC 20001

RE: BZA Application No. 17154 of Mr. Bruno B. Freschi

Dear Mr. Chairman and Members of the Board:

I appeared before this Board to testify in opposition to this application on behalf my client, The Foggy Bottom Historic District Conservancy. During the hearing on May 4, 2004, I was asked questions regarding, among other issues, the very ability of any development for a dwelling to occur on this lot due to the zoning change from R-5-B to R-3, applicability of street frontage requirement, and definition of a rowhouse.

A. Property Rights and Development Rights

During the hearing I was asked if the Board had the legal ability to deny the property owner the ability to development any dwelling on the lot. I stated that in this instance the Board did have that authority. The applicant, by counsel, argued that one of the most significant functions of zoning variances was to prevent zoning laws from unconstitutionally taking property rights by precluding development.

The lot in dispute was created in 1969 when the area was zoned R-5-B. The property was down-zoned in 1992 in conjunction with the creation of the Foggy Bottom Overlay District. The applicant became the owner of the subject property in April 2003. It is undisputed that the applicant bought the property with a knowledge of the zoning restrictions and the general condition of the neighborhood. No one is disputing the applicant's right to do whatever the law allowed at the time he purchased the property. The law does not recognize any development right in a current owner just because at some time in history, a development right was associated with that property. This issue is one of the fundamental issues raised and resolved when zoning first came into existence early in the last century.

This application does not involve a case of a regulatory "taking" of property rights, but the request for a regulatory "granting" of profit potential. The applicant has never owned this lot with a property right to develop a dwelling and this Board, on behalf

BZA
Case No. 17154
Exhibit No. 42

Board of Zoning Adjustment
District of Columbia
CASE NO. 17154
EXHIBIT NO. 42

of the city, owes no obligation to grant him a windfall by giving him something he has never owned. Indeed, there was no showing that the subdivision that created this lot was ever intended to create a dwelling lot as opposed to any other permitted alley or backyard use, and, therefore, there has been no showing that any owner at any time ever had the right to develop the lot with a dwelling.

There is no constitutional taking of property by requiring an owner to use the land in conformance with the law as it was written on the purchase date and there is no legal barrier to the denial of any application for a dwelling unit on this lot.

B. Applicability of Street Frontage Requirement

The Conservancy concurs with the applicant's assertion that the specific requirements of the "Alley Regulations" are controlling in lieu of the general zoning regulations. However, permission is not entitlement. The finding that a dwelling on an alley lot is permitted is not the same as finding that an owner is entitled to a dwelling on an alley lot. The requirement for minimum alley width and building height infers the intent that alley building to be in proportion to the lot and the surrounding space. Such intent is pervasive throughout the zoning ordinance. The permissive use of alley lots for dwellings does not require the evisceration of the zoning laws to permit every such request.

C. Characterization of Proposed Dwelling and Related Regulatory Requirements

The Conservancy joins in the call for clarification of the legal definition of a "rowhouse" within the zoning regulations. Nonetheless, sufficient evidence of intent of the zoning definition exists for this Board to act in redefining the proposed building as a detached or semi-detached dwelling. Along with redefining the building, the Board should attach the corresponding greater burdens to this application. (*Taylor v. District of Columbia Board of Zoning Adjustment*, 308 A.2d 230, 235 (DC 1973))

As with the street frontage/alley regulations above, the more specific provision of Chapter 3 are controlling for R-3 zones in lieu of the general provision of Chapter 1. Section 320.1 states that permitted dwellings are "one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3) or more row dwellings." Given the obvious and commonsensical use of words, this section can only have one meaning. There must be three or more dwellings connected in order for each dwelling to be a row house. "Semi" has a dictionary meaning of "one-half" and a semi-attached dwelling occurs when two dwellings are adjoined with one-half of their walls attached. In an R-3 district, a dwelling without any attached walls is a detached dwelling.

The OP report addresses the detached dwelling requirements and notes that the variance requests from this standard are dramatic. The DC Court of Appeals has clearly stated "that the more drastic the requested variance, the greater the burden of proof that is required." (*Taylor*, supra, citing *Palmer v. BZA*, 287 A.2d 535 (D.C. App. 1972)) This rule applies equally when a greater degree of variance is discussed as well as in the distinction between lot size/setbacks and uses.

Given the dramatic variance request and the heighten burden of proof attached thereto, all variance requests should be denied. The size of the lot is not a mitigating factor as the size of the lot is a self-imposed condition "which is entitled to only slight weight if any." (See *Taylor*, supra.)

I appreciate this opportunity to address issues raised by Board members at the hearing and please contact me at your earliest convenience with any other questions or concerns.

Sincerely,

John Bond

John Bond, Esq.

JB:tbm

cc: Office of Planning – Joel Lawson
Applicant Bruno Freschi, c/o Phil Feola, Esq.
Dorothy Miller, ANC2A
Lisa Farrell