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June 1, 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:

Enclosed for submission are the Proposed Findings of Fact and Conclusions of Law submitted on behalf of the Foggy Bottom Historic District Conservancy. Please do not hesitate to contact me should you have any questions or requests of any kind.

Sincerely,

John Bond, Esq.

JB:tbm

BZA
Case No. 17154
Exhibit No. 44

Board of Zoning Adjustment
District of Columbia
CASE NO. 17154
EXHIBIT NO. 44

FOGGY BOTTOM HISTORICAL DISTRICT CONSERVANCY
PROPOSED Findings of Fact and Conclusions of Law:

THE APPLICATION OF BRUNO FRESCHI (No. 17154) pursuant to 11 DCMR sec. 3103.2 is seeking several zoning variances. This application is analyzed examining the potential need for variances from lot area (sec. 401.3), lot width (sec. 401.3), lot occupancy (sec. 403.2), minimum rear yard (sec. 404.1) and minimum side yard (sec. 405) and a special exception for the proposed roof structure. The subject lot is situated on an alley within the Foggy Bottom Historic District and is currently zoned FB/R-3.

HEARING DATE: May 4, 2004

The Applicant seeks permission to develop the subject lot with an alley dwelling pursuant to 11 DCMR sec. 2507.1-4. The lot was created when two narrow lots fronting 26th Street was combined and then subdivided creating one lot fronting 26th Street and the subject lot facing Hughes Mews Alley. The best available evidence indicates the lot was created in January 1969. At that time, the lot was zoned R-5-B. Also at that time, several other zoning regulations pertaining to the analysis of this application were in existence. Among them are regulations for alley dwellings (sec. 2507), an 80% threshold for grand-fathering existing lots (sec. 401.2), street frontage (sec. 406.1) and general provisions addressing the "intent, purpose, and integrity of the zone plan" (*inter alia* sec. 101).

Contested issues regarding this application heard by this Board at our May 4, 2004 hearing included:
1. Whether the Board can deny the property owner permission to develop the lot with a dwelling.
2. What type of dwelling is being proposed, i.e., a detached, semi-detached or row dwelling.
3. The practical difficulties with respect to each requested variance.
4. The quantity and degree of variances that can be granted for one lot and still maintain the "intent, purpose, and integrity of the zone plan."

1. Property Right in Development of a Dwelling.

Applicant asserts a property right to develop the lot with a dwelling. Applicant claim's this right attached when the lot was created in 1969 and the applicable zoning was R-B-5. The applicant further asserts that the denial of variances necessary to build a dwelling on this lot that has been down-zoned to R-3 would result in an unconstitutional taking of this property right.

Whether the property owner in 1969 had a by-right or matter-of-right ability to develop the lot with a dwelling is not controlling in our decision today. Regardless of that right, the test for today's decision is whether a change in zoning creates a situation "where a property owner is deprived of all beneficial

uses of his property." (*Russell v. D.C. Bd. Of Zoning Adjust.*, 402 A.2d 1231, 1236 (1979) and *Clerics of Saint Viator, Inc. v. DC BZA* cited therein). Denial of variances for a dwelling is not an unconstitutional taking in this instance because the owner still has two alternative uses of economic value under the current zoning classification: Accessory Uses and Buildings (11 DCMR sec. 321) and as a revenue producing studio (11 DCMR sec. 2507.5). Thus, whatever our ultimate decision, there is no constitutional prohibition on denying variances to allow development of the lot with a dwelling.

This Board has always interpreted sec. 2507 as disfavoring alley dwellings and interpreted matter-of-right standards as the maximum optimal conditions, which should not be lightly discarded. (See this Board's decision in *Order of Application 16927-A of the Public Welfare Foundation and Manna, Inc.*) Given that that this lot falls far short of the 80% grand-fathering threshold for lot size, the excessive number and degree of variances required, and the disfavored purpose for which the variances are sought, we find that the granting of variances to allow the development of a dwelling on this alley lot would substantially harm the public good and impair the intent, purpose, and integrity of the zone plan.

2. Type of Dwelling Proposed for Development.

Notwithstanding the applicant's characterization of the proposed dwelling as a row dwelling, we find that the proposed dwelling is in fact a semi-detached dwelling. While recognizing the definition of a "row dwelling" is not well settled and there currently exists sufficient room for disagreement, we, nevertheless, find the better argument requires us to classify this dwelling as a semi-detached dwelling.

Two zoning regulations are relevant to our current need to define the type of dwelling proposed in this application. The general definitions section is found at 11 DCMR sec. 199 and does provide a definition of detached, semi-detached and row dwellings. However, there is nothing in this particular section or any other section of the zoning regulations that prevents a more specific section from applying additional or more specific requirements. In this instance, there are more specific provisions in Chapter 3. We find that the Chapter 1 language and the Chapter 3 language must be read together to create "a harmonious whole" as cited in the Applicant's Post Hearing Submission of May 18, 2004.

The specific zoning regulations for R-3 zones states that permitted dwellings are "one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3) or more row dwellings." (11 DCMR sec. 320.1) 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 dwelling. This interpretation strikes us as mandatory. It is only logical that

you cannot have a "row dwelling" without a "row." "Semi" has a dictionary meaning of "one-half" and a semi-detached dwelling occurs when two dwellings are adjoined, or have the future potential to be adjoined, with one-half of their walls attached. A dwelling without any attached walls or the potential for either side wall to be attached in the future, is a detached dwelling. We find no inconsistency between this interpretation and the definitions in sec. 199.1. We also find that there is no prohibition in the zoning regulations that prevents us from granting a complete variance from the side yard requirements. Therefore, we find that houses with no side yards may either be detached or semi-detached houses in which no side yards were required (complete variance) or row dwellings with both side walls attached, or potentially attached to an adjacent row dwelling.

We concur with the Office of Planning analysis that a three ("3") foot side yard along the southern property line is in the public interest and that no side yard need be required on the northern property line. Even though the future potential may be slight, because it is possible that a building could be built adjacent to the subject property on the northern property line, we find that the proposed dwelling is best defined as a semi-detached dwelling.

3. Analysis of Variance Relief Requested

(a) Lot Area and Lot Width (sec. 401.3)
We concur with the Office of Planning analysis that the lot is sufficiently unique to create practical difficulties in meeting area and width requirements, but we also concur that this lot was not intended for development with a dwelling and its lot area and width is insufficient to support the size of dwelling proposed.

(b) Lot Occupancy (sec. 403.2)
We find no practical difficulty in complying with the lot occupancy requirement for a semi-detached dwelling limiting the building to 40% of the lot area. This requirement allows for a 370.7 sq.ft. building footprint. When built with three floors, the resulting building would have 1112 sq.ft. A building of this size is economically viable.

(c) Minimum Rear Yard (sec. 404.1)
We find no practical difficulty in complying with a 20 foot minimum rear yard requirement. Given the lot occupancy restriction and the height allowance providing for three stories, relief in the rear yard requirement would require that either the building be only two stories or receive a lot occupancy variance. The latter we find not justified and the former is a design choice, not a practical difficulty.

(d) Minimum Side Yard (sec. 405)
We find that requiring an 8 foot minimum side yard creates great practical difficulties in constructing any building on this lot. We concur with the Office of

Planning analysis that a three foot side yard along the property line shared with the adjacent homeowners on Queen Anne's Lane would lessen the impact on the public good that a variance would create, is consistent with building widths found in Washington alley buildings and is consistent with previous Orders of this Board.

(e) Rooftop Penthouse Special Exception (sec. 400.7b)
Though not specifically requested by the Applicant, if construction of a dwelling were permitted on this lot, we would find that a special exception is necessary for the proposed rooftop structure and that it would not be contrary to the purpose or intent of the Zoning regulations.

4. The quantity and degree of variances that can be granted for one lot and still maintain the "intent, purpose, and integrity of the zone plan."

As outlined by our analysis above, this application seeks a variance from every applicable lot requirement imposed on residential lots by Chapter 4. The only restriction not to be avoided is the height restriction of section 2507 pertaining to alley lots. As such, this application might well be considered a rezoning application rather than a variance application. While we need not define any bright line at this time, it is clear that permitting the construction of a dwelling that violates every lot restriction imposed in a specific zoning category is an impermissible de facto zoning amendment and, furthermore, must also be found to violate the "intent, purpose, and integrity of the zone plan." (See *Russell v. D.C. Bd. Of Zoning Adjustment*, infra at p. 1235.)

[Proposed Alternative Ruling]

Requested Ruling:

For the reasons cited above, we find that the property has alternative viable economic value in being used for a purpose other than as a dwelling and we find that the application as it now stands is an impermissible de facto zoning amendment. Therefore, we find the applicant has not met the burden of proving a legal basis for the relief sought and application is hereby
ORDERED DENIED.

Alternative Requested Ruling:

For the reasons cited above, we find as follows:

The dwelling proposed in this application is determined to be a semi-detached dwelling.

The applicant has not met the burden of proving a legal basis for its request for variance from the lot occupancy requirement of 11 DCMR sec. 403.2 and that variance is hereby ORDERED DENIED; and,

The applicant has not met the burden of proving a legal basis for its request for variances from the minimum rear yard requirement of 11 DCMR sec. 404.1 and that variance is hereby ORDERED DENIED; and,

The applicant has not completely met the burden of proving a legal basis for its request for complete variance from the minimum side yard requirement of 11 DCMR sec. 405 but has established the need for a variance and, therefore, a variance of five feet for the southern side yard requirement is hereby ORDERED GRANTED; and,

The applicant has met its burden of proving the practical difficulties created by requirements for lot area and width (sec. 401.3) and, therefore, the application for variance from the lot area and width requirement is hereby ORDERED GRANTED.

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Facsimile Cover Sheet

TO: Mr. Geoffrey Griffis, Chair
Members of the Board of Zoning Adjustment

FAX #: (202) 727-6072

DATE: June 1, 2004

FROM: John Bond

Total pages (including cover sheet) 6

RE: BZA Application No. 17154 – Application of Bruno Freschi

Please accept the attached submission of Proposed Findings of Fact and Conclusions of Law.

*** The information transmitted in this fax message is intended only for the use of the addressee listed above, and may be privileged attorney-client. If this message is received in error please call (703) 359-7116 as soon as possible. Thank you.