Exhibit H: Applicant's Personal Statement About Permitting Events

Board of Zoning Adjustment
District of Columbia
CASE NO. 17194
EXHIBIT NO. 27A2

Chronology of Events for licensing
Akwaaba D.C. Bed & Breakfast

February 2003

Monique Greenwood and Glenn Pogue purchase 1708 16th St., N.W., formerly known as The Brenton Bed & Breakfast, for $950,000. They sell their primary home in Brooklyn, New York, to do so, and intend to relocate back home to Washington, D.C. and operate a six-room inn. The couple has been in the Bed & Breakfast industry for 10 years, both in Brooklyn and in Cape May, New Jersey.

The owners of The Brenton and the property owner, Jonathan Tutt, represent that the property has operated for 13 years as a bed and breakfast with a Certificate of Occupancy for an 11-room rooming house.

Monique Greenwood goes to the office of licensing to transfer C of O into her name. When she tells the gentleman (no name, but can identify him) that she intends to operate a bed and breakfast as the former occupants did, she is informed that this C of O is not what she needs. A bed and breakfast license is required. He gives her the paperwork and states that a 6-room inn, which she intended to operate, is a matter of right for a property in an historic district.

Greenwood and Pogue undertake renovations to the property with an anticipated grand opening party in October 2003.

October 2003

Greenwood and Pogue host a grand opening party and a media launch. The couple plan to take their first guests Valentine's Day weekend.

After a Washington Post article appears, Greenwood receives a call from Ms. ??? of the Zoning Office asking what kind of license the business will operate under. Greenwood states that she initially thought she could transfer the C of O for a rooming house and operate as the former owners had, but that she was aware she needed a Bed and Breakfast license and would be to the Zoning Office that week to complete the process. Mr. Tk and Ms. ??, by phone, thoroughly explained the process. They stated that the owner of a home in a historic district can operate a Bed and Breakfast with six rooms under the following conditions: The owner must reside at the property, and the owner must receive a sign-off from the Office of Historic Preservation indicating that the property is, in fact, in an historic district and that it contributes to the significance of that district.

January 2004

After the holidays, Ms. Greenwood completes the paperwork, receives the Historic Preservation sign-off, and meets face-to-face with Mr. Tk of the Zoning Office. After reviewing the paperwork, he assures Ms. Greenwood that everything was intact and that he and Ms. Tk would come to inspect the property on Wednesday, tk. He said Ms. Greenwood would have her permit in a matter of days.

On Tuesday, Mr. ??? calls Ms. Greenwood to say that he would not be coming to inspect the next day, because he and Ms. ??? had just been informed that the department had been misinterpreting the code for years, and that apparently, it is required for an owner to go before the Board of Zoning and Appeals to seek a special use permit. Mr. Tk said the discrepancy was brought to his attention by Mr. ???,.a former colleague who now works at the BZA.

Greenwood called Mr. ???, who explained that the Zoning Office has always given out permits for six-room inns in historic districts as a matter of right, but that that was not the correct interpretation of the code. When Greenwood asked why now, in her case, would things be different, Mr. ??? responded that "just because mistakes were made in the past doesn't give us permission to continue making mistakes."

Currently

Greenwood and Pogue put back through paperwork for a 2-room inn, which the Zoning Office states is a matter of right for any homeowner, but they desperately need licensing to operate at least six rooms. The couple has exhausted all of its personal finances buying the property and completing more than $100,000 in renovations. An additional $100,000 was spent on furnishings. If the couple can't secure the proper license, they will have no choice but to either turn their home into a rooming house or try to sell it. They are distraught and caught up in inconsistencies, incompetence and unfairness.

Greenwood and Pogue are experienced innkeepers, who have the ability to contribute greatly to the economic fiber of the city through tourism and cultural diversity. It has been their life dream to move back to their hometown and run a successful business.

Exhibit I: BZA Order No. 16333

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16333 of Richard T. Ross, as amended, pursuant to 11 DCMR 3108.1 for a special exception under Subsections 203.8 to operate a bed and breakfast as a home occupation in a multiple dwelling [Paragraph 203.8(a)], to exceed the maximum number of rooms [Paragraph 203.8(c)(1)], and to allow for additional staff [Paragraph 203.4(d)] in a D/R-5-B District at premises 1808 New Hampshire Avenue, N.W. (Square 152, Lot 175).

HEARING DATE: **April 15, 1998**
DECISION DATE: **April 15, 1998** (Bench Decision)

ORDER

SUMMARY OF EVIDENCE:

1. The subject property is located in the Dupont Circle neighborhood at 1808 New Hampshire Avenue, N.W. (Square 152, Lot 175). The lot is improved with a single family dwelling constructed in 1883, which contains almost 10,000 gross square feet of space. The house is located in the Dupont Circle Historic District and has been certified by the D.C. State Historic Preservation Officer as contributing to the character of the historic district.

2. The house is owned and occupied by the proprietors of a Bed and Breakfast. The property owners have operated the Swann House Bed and Breakfast (B&B) at the subject site since May 3, 1996, under Home Occupation Permit No. 96-571 issued by the D.C. Department of Consumer and Regulatory Affairs (DCRA).

3. In January 1998, upon inquiry by the property owners/applicants, DCRA stated that the home occupation permit under which the B&B had been operating was issued in error and that it was necessary for the applicants to apply for a new permit. The applicants re-applied on January 29, 1998, for authorization to operate a six-room B&B in their owner-occupied single family house. By letter dated February 3, 1998, the Acting Zoning Administrator of DCRA denied the application because the B&B exceeded the maximum number of permitted guest rooms (which is limited to two), and because a B&B is not permitted in a multiple dwelling. The applicants were instructed they could appeal this decision to the Board of Zoning Adjustment (BZA) by requesting a special exception to operate their bed and breakfast.

4. The applicants filed their application with the BZA on February 17, 1998, and requested two modifications of the bed and breakfast regulations, as permitted under Subsection 203.10(b). First, they requested to increase the number of permitted staff from one to two employees (203.4(d)). Second, they asked to increase the number of permitted guest rooms to nine (203.8(c)(1)). Because the applicants own and occupy the single-family house as their sole residence, Subsection 203.8(a) was not applicable; and no relief was necessary from the prohibition against bed and breakfasts in multiple dwellings. The house had previously been used as an apartment building. The use ceased and the building was returned to a single family residence after the applicants purchased the property in 1989.

5. The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to affected Advisory Neighborhood Commission (ANC) 1C, adjoining ANC 2B, and to owners of property within 200 feet of the site.

6. The applicants testified that with one exception, the proposed B&B complies with the bed and breakfast requirements under Subsection 203.8. They stated that the house is not used as a multiple dwelling; that breakfast is the only meal served, and served only to overnight guests; that the house is certified to contribute to the Dupont Circle Historic District, and thus there are no parking requirements for the property under the waiver granted; that cooking facilities are not available in guest rooms; and, that the dwelling is owner-occupied and used as the owners principle residence.

The applicants requested a modification to allow an increase in the permitted number of guest rooms from six to nine. Because the house is certified to contribute to the Dupont Circle Historic District, six guest rooms are permitted as a matter-of-right.

7. The applicants further testified that the proposed B&B complies with the applicable sections of the home occupation regulations under 11 DCMR 203.4 to 203.6. They stated that the house is principally used as their residence and the B&B use is secondary; that no finished products are produced by the B&B; that maintaining the residential character of the dwelling is integral to the success of the B&B; that no noxious odors, vibrations, or visual or electrical interference will be created by the B&B; that the level of noise associated with the B&B will not exceed the normal levels associated with the dwelling and immediate neighborhood; that no more than two vehicles will be used with the operation of the B&B; that a small non-illuminated brass sign will be affixed to the front of the house; and, that sales on the property shall consist of a fee charged for the rental of rooms. With respect to Subsection 203.4(d), which limits the number of staff to one employee, the applicants requested a modification in order to provide two full-time equivalent employees.

8. The applicants testified that the two requested modifications would not affect the intent or general purpose of the Zoning Regulations. The applicants noted that the large, historic house contains almost 10,000 square feet of space and already has nine rooms. The Zoning Regulations allow a maximum of six guest rooms for properties such as this

one that are certified to contribute to an historic district or that are historic landmarks. The applicants stated that increasing the number of guest rooms from six to nine would allow them to make effective use of the spacious dwelling consistent with its historic design. Because of the maintenance requirements for this historic house and a B&B operation, the applicants also stated that two full-time equivalent employees are necessary.

9. The applicants testified that registered guests of the B&B would be permitted to host social functions. For example, they stated that it is now customary for B&Bs to host small intimate weddings, where the wedding party and family members reserve all of the rooms for the occasion. B&Bs also provide business travelers an opportunity to entertain colleagues as they would in their own homes. Other out-of-town guests visiting relatives in the neighborhood find B&Bs the ideal location to stay in close proximity to family members. They also offer enough space in a home-like environment for geographically dispersed families to celebrate special occasions, such as birthdays, anniversaries, or other milestones. The applicants noted that 20 percent of their guests are referred by neighbors.

10. The applicants stated that social events are customarily incidental and subordinate to the B&B use and, as such, are permitted as an accessory use under the Zoning Regulations. The Regulations do not specifically address the issue of social events at bed and breakfasts. The applicants stated that such social functions are an ancillary service of a B&B and are no different from private social gatherings hosted by individual homeowners or events sponsored by other uses in less restrictive residential zones. Social events are routinely hosted by embassies, non-profit organizations, private clubs, sororities and fraternities, and house museums, although the Zoning Regulations do not address such events for these uses, either, other than the provisions related to accessory uses.

11. In response to questions posed by the Board, counsel for the applicants stated that the D.C. Court of Appeals upheld an interpretation by the Zoning Administrator that "the Zoning Regulations express no intent to prohibit any and all subordinate or occasional uses, even if outside the scope of the principal use...." *Ass'n for Preservation of 1700 Block of N Street v. Board of Zoning Adjustment*, 384 A.2d 668, 673 (D.C. 1978). The court noted in that case that the Zoning Administrator determined that a secondary use could constitute as much as 20 percent of the overall use of the property and still be considered incidental under the Zoning Regulations.

12. In response to concerns raised by ANC 1C regarding parking problems generated by social events at the B&B and catering trucks blocking the alley behind the property, the applicants volunteered to impose the following controls and limitations on events:

- The number of events would not exceed an average of two per month, or 24 a year;

- All events would end by 11:00 p.m., and no caterers would be permitted to load or unload trucks after that time;

- No amplified or outdoor music would be permitted;

- All guests would be required to use a valet parking service, which would park cars in nearby garages, and not on neighborhood streets; and,

- No catering trucks would block the alley at the rear of the property and trucks would be moved immediately upon the request of a neighbor, even if loading and unloading activities are still in progress.

13. The applicants organized an open house for their neighbors to discuss the proposed operation of the B&B with conditions, and other concerns related to the B&B. They also met or talked with individual residents. As a result of those meetings and discussions, the applicants solicited over 135 signatures on a petition in support of the B&B, with the conditions noted above. Over 90 of the signatures were from residents in the immediate neighborhood. The abutting neighbors, those most directly affected by the B&B, either signed the petition or submitted letters to the record in favor of the application.

14. ANC 1C testified in support of the application. The ANC recommended approval of the application by a unanimous vote (6-0, 5 members constituting a quorum) at its April 1, 1998 meeting. The Board waived its seven-day filing requirement to accept the ANC's report into the record.

15. The Department of Public Works, by report dated April 13, 1998, stated that from a transportation standpoint, the Swann House Bed and Breakfast would not have an adverse traffic and parking impact on the local transportation system. The Department noted that the amount of traffic generated by the B&B is insignificant. The correspondence stated that DPW wholly supports the valet parking arrangement to minimize or eliminate any parking problems in the immediate neighborhood residential streets, and supports the proposal in general.

16. A neighbor at 1754 Swann Street, N.W. testified in support of the application and was granted party status by the Board. The neighbor stated that the expenses associated with maintaining such a large historic house are prohibitive and that the B&B use is the most appropriate one that will assure the continuation of its historic and residential appearance. The neighbor noted that the B&B use is less intensive than the previous apartments on the site. The neighbor also stated that she and her husband had not experienced any problems with trucks blocking the alley, parking, or any disruptions from social events at the subject property.

17. A neighbor at 1705 Swann Street, N.W., testified in support of the application. The nearby property owner stated that her house is located directly across the alley from the B&B to the rear, and as such, she would be directly affected by operations of the B&B.

The neighbor stated that she had no objections to social events at the B&B and urged approval of the application.

18. A full-time employee of the B&B testified in support of the application. The employee stated that the Swann House B&B is the exact type of small-scale facility that the city tries to encourage because of its ability to enrich the neighborhood, foster historic preservation goals, provide a service to neighbors and support local businesses.

19. There were several neighborhood residents and a representative of the Dupont Circle Citizens Association who were granted party status by the Board and who testified in opposition to the application. Persons testifying against the application stated that the social events sponsored by guests of the B&B were not an accessory use but rather were in direct contradiction to the home occupation regulations. They stated that social events at Swann House served meals other than continental breakfast, that the number of guests would exceed the maximum number of eight, that guests were permitted in the outside garden area and on exterior decks, and that noise generated by the parties was excessive, all in contravention to the restrictions set forth in Subsections 203.4 and 203.8 of the Zoning Regulations.

20. One of the neighbors testifying in opposition to the application stated that the B&B operations were commercial in nature and derogated the residential quality of the neighborhood. It was stated that the B&B created adverse impacts on the community through excessive noise and parking problems that could not be mitigated by the proposed conditions.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The applicants comply with the provisions of Subsection 203.8 of the Zoning Regulations, except for 203.8(c)(1) for which a modification is requested. The subject property is not used as a multiple dwelling; breakfast is the only meal served, and served only to overnight guests; the house is certified to contribute to the Dupont Circle Historic District and thus there are no parking requirements for the property under the waiver granted; six guest rooms are permitted as a matter-of-right by virtue of the historic certification; cooking facilities are not available in guest rooms; and the dwelling is owner-occupied and used as the principle residence.

2. The applicants further comply with the applicable provisions of the home occupation regulations under Subsections 203.4 through 203.6, except for section 203.4(d) for which a modification is requested. The house is principally used as the applicants' residence and the B&B use is secondary; no finished products are produced by the B&B; the residential character of the dwelling will be maintained; no noxious odors, vibrations, or visual or electrical interference will be created; the level of noise associated with the B&B will not exceed the normal levels associated with the dwelling and immediate neighborhood; no more than two vehicles would be used with the operation of the B&B;

a small non-illuminated brass sign will be affixed to the front of the house; and sales, on the property would consist of a fee charged for the rental of rooms.

3. The requested modification of Subsection 203.8(c)(1) to increase the number of guest rooms from six to nine is appropriate for the size and historic nature of the house and is consistent with its residential character and the surrounding historic district. The requested modification of Subsection 203.4(d) to allow two full-time equivalent employees is necessary to the successful operation of the bed and breakfast. The two modifications will not compromise the general purpose and intent of the Zoning Regulations and can be granted without any adverse impacts to the neighborhood.

4. The social events sponsored by registered guests of the bed and breakfast are customarily incidental and subordinate to the bed and breakfast use, and thus are permitted as an accessory use under the Zoning Regulations. The applicant has agreed to limit the number of events per year to 24, which constitutes less than 20 percent of the calendar year. Further, the conditions proposed by the applicants are an appropriate measure to ensure that the social events will have no adverse impact on the surrounding neighborhood.

5. The Board takes note of the position of Advisory Neighborhood Commission 1C, and in its decision the Board has accorded to the ANC the "great weight" consideration to which the Commission is entitled.

CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and evidence of record, the Board concludes that the applicants have met the burden of proof, pursuant to 11 DCMR 203.10(b) and 3108, that the modifications comply with the general purpose and intent of the home occupation regulations, and that requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map. The Board concludes that no adverse impacts will result from the increase in number of employees and guest rooms. It is therefore **ORDERED** that this application be **GRANTED, SUBJECT** to the following **CONDITIONS**:

1. Only registered guests of the bed and breakfast shall be permitted to host social events;

2. The number of social events shall not exceed 24 a year, with no more than five events in any one-month period;

3. No event shall begin before 9:00 a.m. and all events shall end by 11:00 p.m. Caterers shall not load or unload vehicles after 11:00 p.m.;

4. Outdoor music and amplified music is prohibited. An attendant of the bed and breakfast shall be on the premises at all times during social events to ensure that there are no disturbances to the neighborhood;

5. Guests of the bed and breakfast, including those attending social events, shall be required to use a valet parking service, which must park cars in nearby garages and not on the streets or in alleys; and,

6. The proprietors shall use their best efforts to ensure that the alley behind the property is not blocked at any time by anyone associated with the bed and breakfast.

THIS ORDER WAS ADOPTED, AS AMENDED, BY THE BOARD OF ZONING ADJUSTMENT AT ITS PUBLIC MEETING OF MAY 6, 1998.

VOTE: 4-0 (Betty King, Maurice Foushee and Sheila Cross Reid to adopt; Jerrily Kress to adopt by absentee vote.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: Sheri M. Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

FINAL DATE OF ORDER: MAY - 7 1998

Ord16333/BAB

PURSUANT TO D.C. CODE § 1-2531 (1987), SECTION 267 of D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

UNDER 11 DCMR 3103.1, "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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF TWO YEARS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT, HOME OCCUPATION PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16333

As Interim Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on May 7, 1998 a copy of the order entered on that date in this matter was mailed first class postage prepaid to each party who appeared and participated in the public hearing concerning the matter, and who is listed below:

John T. Epting, Esq. (Attorney for the applicants)
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W., Suite 1100
Washington, D.C. 20006

Richard and Mary Ross
1808 New Hampshire Avenue, N.W.
Washington, D.C. 20006

Todd Mosley, Chairman
Advisory Neighborhood Commission 1C
P.O. Box 21652
Washington, D.C. 20009

Lee Aikin
1754 Swann Street, N.W.
Washington, D.C. 20009

Israel Stollman
1708 Swann Street. N.W.
Washington, D.C. 20009

William Kummann
1713 S Street, N.W.
Washington, D.C. 20009

Guido Fenzi
1824 16th Street, N.W.
Washington, D.C. 20009

ATTESTED BY: Sheri M. Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

DATE: MAY - 7 1998

Exhibit J: Copy of De Azcarate v. D.C. Board of Zoning Adjustment

C

District of Columbia Court of Appeals.

Luis DE AZCARATE et al., Petitioners,
v.
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT, Respondent,
Marvin Pitkin and Walter J. Schafer, Intervenors.

No. 12650.

Argued May 11, 1978.
Decided July 14, 1978.

Judicial review was sought of final order of the Board of Zoning Adjustment which granted landowner a variance from minimum lot-width requirement, thus permitting landowners to construct single-family residence. The District of Columbia Court of Appeals, Kern, J., held that: (1) Board was authorized to grant variance due to extraordinary situation concerning lot where original parcel out of which lot was subdivided was susceptible subdivision into three conforming parcels, zoning office personnel on three occasions implicitly found lot conformed to width requirements, lot owner and predecessor proceeded in good faith and dispute over lot width was due to actions of zoning officials which were later found to be in error, and (2) failure of lot to meet width requirement could not accurately be described as a direct consequence of sole and affirmative acts of owner and predecessor in title where zoning department employees played significant part by approving three separate applications concerning subdivision of parcel creating lot, and thus self-created hardship rule did not preclude variance.

Affirmed.

West Headnotes

[1] **Zoning and Planning** 489
414k489 Most Cited Cases

Statutory language allowing the Board of Zoning Adjustment to issue variance from zoning regulations for "other extraordinary or exceptional situation or condition of a specific property" served as a grant of authority to Board empowering it to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations. D.C.C.E. § 5-420(3).

[2] **Zoning and Planning** 489
414k489 Most Cited Cases

[2] **Zoning and Planning** 536
414k536 Most Cited Cases

Once an extraordinary and exceptional situation or condition has arisen with respect to property, the owner must show peculiar and exceptional practical difficulties or exceptional and undue hardship in order to obtain variance from zoning regulations; furthermore, Board of Zoning Adjustment may grant variance relief only where there is no substantial detriment to the public and no impairment of the intent, purpose and integrity of the zone plan. D.C.C.E. § 5-420(3).

[3] **Zoning and Planning** 536
414k536 Most Cited Cases

Application for use variance from zoning regulations requires a greater burden of proof than an application for an area variance.

[4] **Zoning and Planning** 496
414k496 Most Cited Cases

The extraordinary or exceptional condition which is the basis for use variance need not be inherent in the land, it can be caused by subsequent event extraneous to the land itself. D.C.C.E. § 5-420.

[5] **Zoning and Planning** 496
414k496 Most Cited Cases

The term "extraordinary or exceptional situation or condition" in statute providing for variances from zoning regulations was designed to serve as an additional source of authority enabling the Board of Zoning Adjustment to temper the strict application of the zoning regulations in appropriate cases, subject to limitations set forth in the statute. D.C.C.E. § 5-420.

[6] **Zoning and Planning** 503
414k503 Most Cited Cases

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

Board of Zoning Adjustment was authorized to grant variance from minimum-width requirement of lot for single-family residential use where original parcel had been susceptible to subdivision into three conforming parcels, zoning office personnel on three occasions implicitly found that lot in question conformed to width requirements, lot owner and predecessor proceeded in good faith following subdivision of original parcel, homes were constructed on two out of three newly created lots and present dispute was due to actions of zoning officials which were later found to be in error. D.C.C.E. § 5-420(3).

[7] **Zoning and Planning** 497
414k497 Most Cited Cases

The self-created hardship rule applicable to requests for variances from zoning regulations is a manifestation of equitable principle of estoppel; if an applicant for an area variance or his predecessor in title committed an affirmative act which directly resulted in the hardship complained of, the variance relief will be withheld.

[8] **Zoning and Planning** 497
414k497 Most Cited Cases

Failure of configuration of lot to meet width requirements could not accurately be described as a direct consequence of the sole and affirmative acts by lot owner and predecessor in title where zoning department employees played a significant part by approving three separate applications during original subdivision creating lots, and thus self-created hardship rule did not apply to preclude variance from lot width requirements. D.C.C.E. § 5-420.

***1234** James L. Montgomery, Washington, D. C., for petitioners. Nelson Deckelbaum, Washington, D. C., was on the brief for petitioners.

Leo N. Gorman, Asst. Corp. Counsel, Washington, D. C., for respondent. Richard W. Barton, Deputy Corp. Counsel, Washington, ***1235** D. C., also entered an appearance for respondent. Respondent adopted the brief of the intervenors.

Whayne S. Quin, Washington, D. C., with whom Norman M. Glasgow and Iverson O. Mitchell III, Washington, D. C., were on the brief, for intervenors.

Before KELLY, KERN and YEAGLEY, Associate Judges.

KERN, Associate Judge:

Petitioners seek review of a final order of the District of Columbia Board of Zoning Adjustment (Board) which granted intervenors a variance from the R-1-A district's minimum lot-width requirement of 75 feet, thereby permitting them to construct a single-family residence on the lot in question.

The history of the present dispute can be briefly summarized. Lot 17, for which the Board granted the area variance was originally part of a considerably larger lot designated Lot 13. Lot 13 was a triangular-shaped parcel of approximately 26,000 square feet, located in the R-1-A zone.[FN1] During July 1975, Lot 13 was subdivided into three lots and this subdivision was duly recorded at the Office of the Surveyor of the District of Columbia. Subsequently, Lot 17 was enlarged slightly to include an additional strip of land and this subdivision was also recorded. Following the approval of the second subdivision, intervenor-Pitkin applied for and Received a building permit for the construction of a single-family dwelling on Lot 17.[FN2]

FN1. The minimum lot-area requirement for this particular type of zone is 7,500 square feet. D.C. Zoning Regs. s 3301.1. No one disputes that intervenors meet this requirement.

FN2. Prior to recording a proposed subdivision, the Office of the Zoning Regulations Division reviews the subdivision to determine whether or not it is in accordance with the applicable zoning regulations. Also, D.C. Zoning Reg. 8103.1 provides: ". . . a building permit shall Not be issued . . . Unless such structure complies with the provisions of these regulations." (Emphasis added.) Presumably, such reviews occurred on three occasions: first, when Lot 17 was recorded; second, when the addition to Lot 17 was added and recorded; and third, when the first building permit was issued.

As approved, Lot 17 was an irregular configuration. The main body of the property was connected to the street by a strip of land 30 feet wide and 70 feet long. A single-family home was to be constructed on the

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

main portion of the lot, which contained approximately 8,500 square feet. Intervenor-Pitkin did not proceed with construction of the dwelling and, during December 1976, he sold Lot 17 to intervenor-Schafer on condition that the property was suitable for the erection of a single-family residence. During this same time-frame, single-family homes were constructed upon each of the other two lots carved from the original Lot 13.[FN3]

FN3. Petitioners do not allege that the other two lots upon which the houses were built are substandard in any respect.

When intervenor-Schafer applied for another building permit in February 1977, his application was rejected on the ground that Lot 17 failed to conform with the width requirements of the R-1-A zone; specifically, the Zoning Regulations Division concluded that Lot 17 was substandard since its width measured approximately 62 feet although the R-1-A zone requires a 75-foot width.[FN4]

FN4. The record does not clearly indicate the basis for the zoning authorities inconsistent decisions Viz., the grant of a building permit followed by the rejection of an application concerning the very same lot. One of the Board's findings of fact indicates that ". . . after (a) Reinterpretation and application of the definition of width of lot for lot 17, by the Zoning Regulations Division, the applicant was told the lot no longer complied with such definition and that all previous approvals had been in error." (Emphasis added.) Counsel for intervenors, during the hearing before the Board, described the different techniques of computation which purportedly produced the inconsistent results. Regardless of the methodology employed, the record indicates that on April 13, 1976, the Zoning Regulations Division concluded that the average width of Lot 17 was 76 feet. A later computation made when intervenor-Pitkin's application for a building permit was submitted, produced an average lot width figure of 50 feet. This figure was later withdrawn when the Zoning Regulations Division concluded that Lot 17 had an average width of 62 feet. Intervenors raise no specific challenge to the propriety of any alleged changes by the Zoning Regulations Division in their interpretation of the term "lot width."

***1236** Following the denial of his application for a building permit, intervenor-Schafer sought to obtain a variance from the 75-foot width requirements of the R-1-A zone.[FN5] After a public hearing, the Board, by unanimous vote, granted the area variance on the ground intervenors had established a practical difficulty in utilizing the lot. The Board concluded ". . . that (without a variance) the unusual shape of the lot renders it unusable for any purpose." The Board further concluded that relief, by way of a variance, could be granted without ". . . substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan."

FN5. A variance of approximately 16% was needed to permit utilization of Lot 17. Intervenors contend, without contradiction, that the property satisfied every other requirement of the R-1-A zone. The record indicates that the complaints of the petitioners to the proposed construction of a single-family home were entirely esthetic.

D.C.Code 1973, s 5-420(3) provides in pertinent part:

> Where, by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations or by reason of exceptional topographical conditions Or other extraordinary or exceptional situation or condition of a specific piece of 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 such property, (a variance may be granted). (Emphasis added.)

Petitioners' first contention is the Board lacked the statutory authority to grant a variance on the ground of any alleged difficulty in the application of the lot-width zoning regulation to Lot 17 since:

> "exceptional situation or condition of a specific piece of the property" refers to a situation or condition connected to the property. It does not include the circumstances here where invalid subdivisions and an invalid permit were issued because those circumstances are not conditions of a specific piece of property. (Petitioner's brief at 5.)

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

[1] Intervenors respond, Inter alia, that the grant of authority contained in the statutory phrase "or other extraordinary or exceptional situation or condition of a specific property" permits the Board to grant a variance in this case. We agree with the intervenors that this statutory language serves as a grant of authority to the Board empowering it to provide variance relief, in appropriate cases, to extraordinary or exceptional conditions brought about after the original adoption of the zoning regulations.[FN6]

> FN6. Consideration of all of petitioners' contentions is unnecessary in light of our resolution of this case. The thrust of petitioners' argument is that the Board lacked authority to grant a variance. Assuming the Board possessed statutory authority to act, petitioners cannot contend persuasively that its factual findings are not supported by and in accordance with reliable, probative and substantial evidence in the whole administrative record or that the Board's conclusions do not flow rationally from these findings. Ass'n for Preservation of 1700 Block of N Street, N.W. and Vicinity v. BZA, D.C.App., 384 A.2d 674, 677 (1978).

This court has recognized the purposes served by a procedure through which a variance can be obtained:

> It is designed to provide relief from the strict letter of the regulations, protect zoning legislation from constitutional attack . . . and prevent usable land from remaining idle. (Palmer v. Board of Zoning Adjustment, D.C.App., 287 A.2d 535, 541 (1972). See Daniel v. Board of Zoning Adjustment, D.C.App., 329 A.2d 773, 775 (1974); Salsbery v. Board of Zoning Adjustment, D.C.App., 318 A.2d 894, 896 (1974).)

[2] Palmer v. Board of Zoning Adjustment, Supra at 539, did observe that "few cases . . . (have construed) the term 'extraordinary or exceptional situation . . . of a specific piece of property'." Moreover, the legislative history of s 5-420 ***1237** offers no explanation of the standard. Id. In that case, this court did not attempt to define comprehensively the content of the term "extraordinary or exceptional situation or condition"; instead, decisions from other jurisdictions are cited which defined the term to include economic, geographic or topographic conditions or A condition created by the zoning authority's zoning of a lot "partly for residence and partly for business." Id.[FN7]

> FN7. During oral argument, counsel for petitioners contended that a broad interpretation of the phrase "extraordinary or exceptional situation or condition of a specific piece of property" would vest the Board with unbridled authority. We disagree. D.C.Code 1973, s 5-420(3) itself imposes restraints upon the Board's discretion. Once an extraordinary and exceptional situation or condition has arisen, the owner of the property must show "peculiar and exceptional practical difficulties" or "exceptional and undue hardship." Furthermore, the Board may grant variance relief pursuant to the statute only where there is no "substantial detriment to the public good" and no "(impairment of) the intent, purpose, and integrity of the zone plan."

[3][4] A second decision of this court suggests that petitioner's claim is not well taken; Viz., that a variance can be granted only where the extraordinary or exceptional situation or condition inheres in the land itself at the time of the passage of the statute. In Clerics of St. Viator, Inc. v. Board of Zoning Adjustment, D.C.App., 320 A.2d 291, 293-4 (1974), this court rejected the contention that "only a hardship which is inherent in the 'land' can be the basis of a variance." In that case, a Use variance was sought in order to permit the conversion of an existing religious seminary into a nursing home. [FN8] Id. at 292. After concluding that an exceptional situation had been shown by the applicant, Viz., a serious and continuing decline in the seminary's enrollment, the court stated:

> FN8. That an application for a use variance requires a greater burden of proof than for an area variance is well-established in this jurisdiction. Ass'n for Preservation of 1700 Block of N St., N.W. and Vicinity v. BZA, Supra at 677; Palmer v. BZA, Supra at 541.

> We think that the statute is clear. It provides that "other extraordinary or exceptional situation or condition of a specific piece of property" may be grounds upon which a variance may be granted. The Board is in error when it takes the position that a variance may only be issued when the required hardship inheres in "land" as opposed to

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

"property." (Id. at 294.)

In effect, the extraordinary or exceptional condition which is the basis for a use variance need not be inherent in the land, but can be caused by subsequent events extraneous to the land itself, such as the failure of the seminary to remain a viable institution in Clerics of St. Viator, Inc., Supra.[FN9]

> FN9. This is not to say that Any subsequent event will invariably result in unusual conditions supporting the grant of a variance, particularly if an affirmative act of the applicant is the direct and sole cause of the hardship complained of.

[5] We also need not in this case precisely define the contours of the term "extraordinary or exceptional situation or condition." In our view, that term was designed to serve as an additional source of authority enabling the Board to temper the strict application of the zoning regulations in appropriate cases, subject to the limitations found in Section 5-420. It is sufficient for the present to conclude that the facts of this case fall within the ambit of that term. See Palmer v. Board of Zoning Adjustment, Supra at 542 (the nature and extent of the burden justifying an area variance is best left to the facts and circumstances of each case).

[6] Consequently, we hold that the Board was authorized to grant an area variance in the instant case due to the extraordinary situation concerning Lot 17 which created "peculiar and exceptional practical difficulties" for the intervenors. However, because it is not necessary to define comprehensively the statutory term at issue here, we will recite those factors which we found significant to the outcome in the instant case. First, the record suggests and it was asserted during oral argument by intervenors, without contravention by petitioners, ***1238** that the original Lot 13, although of irregular shape, was susceptible to subdivision into three conforming parcels. Second, zoning office personnel, on three occasions, implicitly found that Lot 17 conformed to the lot width requirements of the R-1-A zone. Third, intervenors proceeded in good faith, following the subdivision of the original parcel and, eventually, two homes were constructed on two of the three newly-created lots. Finally, during oral argument before this court, counsel for the Board conceded that the present dispute was due to the actions of the zoning officials which were later found to be in error.

Petitioner's second contention is that the "self-created hardship rule" bars variance relief where the affirmative act of the applicant, or his predecessor in title, is the sole cause of the hardship complained of.[FN10] At the outset, petitioner is confronted by A.L.W., Inc. v. Board of Zoning Adjustment, D.C.App., 338 A.2d 428, 431-32 (1975), where it is said:

> FN10. Petitioner cites 2 A. Rathkopt, Law of Zoning s 48-1 (3rd ed. 1972), for the proposition that:
> if the peculiar circumstances . . . have been themselves caused or created by the property owner or his predecessor in title, the essential basis of á variance, I. e., that the hardship be caused Solely through the manner of operation of the ordinance upon the particular property is lacking. In such a case, a variance will not be granted. (Emphasis in original.)

> In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases, I. e., the fact that the condition complained of was self created is not dispositive of the matter but only one factor to be considered by the zoning board in determining whether to exercise its discretion and grant an area variance." (Id. at 431-32.)

Petitioner seeks to avoid the import of this decision by arguing:

> The type of affirmative action creating the (zoning) difficulty as here has to be distinguished from the type of self-created difficulty which arises when the applicant has purchased the lot subject to the zoning ordinance. The latter, the purchase type of self-created difficulty, does not bar relief for an area variance. . . . The distinction from the facts before the court in this petition was recognized in A.L.W., Inc. (v. Board of Zoning Adjustment, supra), at 432 when the court said:
> Unless the applicant himself as a result perhaps of some prior conveyance is responsible for the irregular shape of the property, he cannot as a practical matter improve the lot in any way that would enable him to realize income or sell it to a purchaser for value. . . .
> The act of the applicant or a former owner in the chain of title creating the condition does bar relief. (Petitioner's brief at 11.)

However, a recent decision of this court, Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. Board of Zoning Adjustment, D.C.App., 384 A.2d 674, 678 (1978), undermines petitioners'

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

argument. In that case, the Board granted a parking variance.[FN11] After concluding that the Board properly treated the application as an area variance rather than as a use variance, the court rejected the petitioners' contention that the rule of self-created hardship applied.[FN12]

FN11. The opinion notes that
Provision of the required off-street parking with the proposed building on the subject property is impossible due to its irregular shape; furthermore, even if the lot were rectangular in shape, only thirty parking spaces rather than the required forty could be provided with the building. There would be further hardship to the YMCA if the required parking were to be placed below the proposed swimming pool. Each such parking space would cost over $20,000 to provide, whereas the normal cost of each off-street parking space located within the garage structure is between $6,000 and $8,000. (Id. at 676.)

FN12. The problem faced by the applicant (YMCA) in that case was "self created" in the narrow sense that the configuration of the lot, the design of the building, and the zoning regulations in force combined to create the hardship. Although it is clear that given these variables the YMCA could not readily comply with the zoning code on the lot in question, it is equally clear that the YMCA's difficulties stemmed directly from its decision to erect the facility on a small, irregularly shaped parcel of land.

***1239** Petitioners state that whatever hardship faced the YMCA "was self-created to the extent of Metro YMCA having Full knowledge of all problems with the alleged shape of the land, the type of zoning, and costs of putting in the parking Prior to the purchase of the property in March 1974." The YMCA's self-created hardship in not a factor to be considered in an application for an area variance, however, as that factor applies only to a use variance. (Id. at 678. See Salsbery v. Board of Zoning Adjustment, D.C.App., 357 A.2d 402, 404 (1976); A.L.W., Inc. v. Board of Zoning Adjustment, supra at 431 (emphasis in original).) ([FN13])

FN13. In Salsbery v. BZA, Supra at 404, and A.L.W., Inc. v. BZA, Supra, it appears that the self-created hardship rule was found inapplicable to variances where the purchaser-applicant bought the property with knowledge of its nonconformity with the zoning regulations. In A.L.W., supra at 431-2, it is stated:
the fact that the owner knew or should have known of the area restrictions Before he purchased the property Does not alter the lesser standard (used in area variances as opposed to use variances). In New York, for instance, the rule seems to be "that the 'self created hardship' concept does not apply to area variance cases." (Emphasis added.)
In Salsbery, supra at 403-04, the applicant for a use variance purchased the commercial property without conditioning the contract upon the grant of a variance for a different nonconforming use. In that case, the economic hardship stemmed from the fact that the applicant made no efforts to protect his rights. In that context, the court's statement is entirely appropriate:
If there is hardship present, it stems from the fact that petitioner contracted to purchase the existing property . . . without conditioning the contract upon the securing of a use variance. A self-inflicted hardship, such as this, will not support the grant of a use variance. (Id. at 404.)

[7][8] Regardless of the impact of A.L.W., Inc. supra, and Association for Preservation of 1700 Block of N Street, N.W., supra, on the applicability of the self-created hardship rule in area variance cases, we think petitioners' argument founders for yet another reason; Viz., the particular facts of this case. The self-created hardship rule is, in fact, a manifestation of the equitable principle of estoppel; that is, where an applicant for an area variance, or his predecessor in title, has committed an Affirmative act which directly results in the hardship complained of, variance relief will be withheld. 2 A. Rathkopt, Law of Zoning, s 48-6 (3rd ed. 1972). However, the hardship at issue here the failure of the configuration of Lot 17 to meet the lot-width requirement cannot be accurately described as the direct consequence of the intervenors' sole and affirmative acts; here, the zoning department employees played a significant part by approving three separate applications during the original subdivision of Lot 13. Having concluded that Section 5-420(3) authorized the Board to grant an area variance in this case and that the doctrine of self-created hardship, whatever its validity in this

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works

jurisdiction to area variances, is inapplicable on the facts of the present dispute, we are unwilling to disturb the decision of the Board.

Affirmed.

388 A.2d 1233

END OF DOCUMENT

Copr. © West 2004 No Claim to Orig. U.S. Govt. Works