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January 7, 2005

Mr. Geoffrey Griffis, Chairman
Board of Zoning Adjustment
Room 210
441 4th Street, N.W.
Washington, DC 20001

RECEIVED
D.C. OFFICE OF ZONING
2005 JAN -7 PM 3:00

Re: BZA Case No. 17204
2512 I Street, N.W. (Square 17, Lot 35)

Dear Mr. Griffis:

At the end of the hearing on Case No. 17204, a special exception to diminish the rear yard setback at 2512 I Street, N.W., the Board requested that we respond to certain points raised by opponents both at the hearing and in letters to the Board. This includes letters from Mr. Paul Falon and Ms. Dorothy Miller, and the report of the Office of Planning.

Third story is consistent with FBOD and §223.1

Mr. Falon's letter objected to our revised application. While confirming that the project will not physically affect him in terms of light, air, or views, etc., he nevertheless objected to the third story which he regards as inconsistent with 11 DCMR §1521.3(a)(2), the Foggy Bottom Overlay District regulations. That section states the objective to foster development that respects the "characteristics of the low scale harmony of the rhythmic townhouses of a purely residential neighborhood..." The relevant implementation language is found in §1523.1 which provides that no expansion shall be permitted "unless in conformance with the requirements of the underlying R-3 District."

It could be argued that the fact that the Zoning Commission adopted an R-3 designation gives some preliminary indication that it regarded three stories as consistent

BZA
Case No. 17204
Exhibit No. 56

Board of Zoning Adjustment
District of Columbia
CASE NO. 17204
EXHIBIT NO. 56

with the low-scale harmony of the rhythmic townhouses. Even without that interpretation, however, the proposed addition to the subject dwelling, including the third floor, is in harmony with the scale of the adjacent dwellings and its neighbors. In the rear, the three-story addition will be flush with the rear vertical line of the adjacent townhouse, and the profile of the new garage will be slightly lower than the current carport. As viewed from the front, the proposed third floor addition is smaller than those of the adjacent neighbors to the West which are legal and likely to remain indefinitely. Mr. Falon has failed to support the proposition that the addition of a third floor would be regarded as interrupting that harmony.

While not dispositive, it is somewhat instructive that the size and placement of the proposed third story, 29 feet from the front of the house, was dictated by concerns of the adjacent neighbor and recommendations by the staff of the Historic Preservation Review Board. Mr. Dinee recommended the 29 foot setback because he felt the third story should not cover the original house but could cover the new addition and previous rear addition. He gave due regard to the historic ambiance of the neighborhood and found that the addition would retain its low-scale harmony.

Mr. Falon's testimony suggests that the Zoning Commission, in creating the overlay zone, intended that no townhouse in the immediate vicinity of the subject may be more than two stories. No evidence was put forward for this proposition. On the contrary, a third story is a matter of right in the R-3 zone. While imposing additional tests of harmony and low-scale development, the Foggy Bottom Overlay Zone was not intended to deprive homeowners of the opportunity to build third stories in every case. Each proposed project must be viewed in light of its own setting. An examination of the area reveals that the setting of the subject house has both three-story and two-story structures. On the East is a vacant lot and three story structures. On the West are two three-story townhouses. Across the street is a row of three-story structures. To the South across the alley is a multifamily dwelling well over 3 stories. We acknowledge that §1522.3 favors the more restrictive provisions in the event of conflict with the underlying zone. However, given the mix of two and three story structures, there is no conflict between the R-3 zoning and the FBOD appeals for harmony. Had the Donnells decided to build a third floor without encroaching on the rear yard, it is unlikely that the matter would ever reach the BZA.

Nor can a pattern of BZA practice be cited for Mr. Falon's proposition. Recent development projects have been authorized at three stories, such as 2530 I Street, (Square 17, Lot 43) and 935 26th Street, N.W. (Square 16, Lot 94) where the BZA granted a variance in Case No. 17154 to build a three-story house. (Exhibit A)

Mr. Falon bases part of his opposition to the third floor addition on its visibility. Our site line study indicates that the addition would not be seen from the front of the house. It is only by stepping east of the site opposite a vacant lot that any portion of it would be visible from the street, and then only for a few feet since the houses on the East are so much closer to the street. Moreover, mere visibility has never been the

applicable test. 11 DCMR §223.2(c) provides that the addition must "not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage." "Substantially visually intrude" means that it does some violence to the character, scale, and pattern... ; o r that it substantially negatively impacts the character, scale, and pattern ... . The BZA has implicitly adopted this interpretation countless times. For example, in BZA Case No. 17007 (June 3, 2003) Kathleen Peoples and Philip Sedlak sought a rear addition to a row dwelling at 1018 Constitution Ave, N.E. The house was at the end of a line of row houses and adjacent to an alley. The addition could be seen from the street but was permitted because it did not intrude on or negatively impact the pattern of houses on the street:

> The Board further concludes that as viewed from the street the addition does not visually intrude on the character scale and pattern of houses along the subject street frontage. The Board notes that the predominant use on the subject street frontage is row houses. The addition is consistent with the predominant use, and in fact, the addition renders the applicant's property more consistent with the character, scale, and pattern of houses along the subject street frontage than it was previously. (Exhibit B, Page 4)

Additional focus should be placed on the word "substantially". Mr. Falon would apply a standard that forbids any visibility at all. The word "substantially" is there for a reason. A third story which is pulled back 29 feet from the front of the house and can only be seen from a side angle is hardly a substantial visual intrusion even assuming that it would, in any way, be considered a "visual intrusion".

Roof deck is permitted

Mr. Falon objects as well to the roof deck. However, I am not aware of any prohibition in the Zoning Regulations against a roof deck. Any house with the space could have one. It is a matter of right use as to which no variance or special exception is required. Moreover, a railing up to four feet may be provided as a matter of right. §411.17 Again, Mr. Dinee saw no historic preservation problem with the roof deck so long as the railing is kept to 4 feet or less.

FBOD does not deprive a homeowner of rights under the special exception provisions of §223.1

In her November 23 letter to the Board, on page 2, Ms. Dorothy Miller, Chair of ANC 2A, asserts that Section 223.1, which permits special exceptions, is in conflict with Section 1523.1 which provides that "...n o addition, replacement or expansion of the building ... s hall be permitted unless in conformance with the underlying R-3 District." While the language of §1523.1 is important and should be given full consideration, there is no evidence that that provision was intended to deprive homeowners of all recourse to special exception and variance provisions. The language of ZC Order No. 714 of March 19, 1992, is relevant:

The Commission believes that many of the properties, as is the case in many historic districts, generally are already nonconforming. Thus, the rezoning proposed does not significantly alter the process available to property owners for obtaining relief if additions to existing structures are sought. Page 7

Calculation of lot occupancy

We note that the Office of Planning Supplemental Report recommends neither grant nor denial of the special exception. After concluding that there will be no appreciable impact on light and air, that privacy will not be unduly compromised, and that it has no objection to the size or appearance of the rear addition, OP raises thoughtful questions about the proper interpretation of relevant zoning provisions, such as whether the garage portion of the building counts toward lot occupancy. The answer is found in the following sections. In Section 199. "Percentage of lot occupancy" is defined as "a figure that expresses that portion of a lot lying within lot lines and building lines that is occupied or that may be occupied under the provisions of this title as building area." See Board discussion in the transcript in BZA Case No. 17087 brought by Jeffrey D. Kwaterski (February 3, 2004). (Exhibit C)

"Building area" is defined as "the maximum projected area of a building and its accessory buildings. ... " It does not include "portions of a building that do not extend above the level of the main floor of the main building, if placed so as not to obstruct light and ventilation of the main building or of buildings on adjoining property." Since the portion of the main floor adjacent to the garage is above the level of the garage roof, the garage would not count in lot occupancy. This judgment was confirmed by the Zoning Administrator as recently as January 5, 2005.

"Great weight" should be not be given to the ANC's resolution

First, Section 3115.1 of the Zoning Regulations requires ANC resolutions to be submitted at least seven days before the hearing. A resolution recommending denial was submitted after the hearing. There was no valid justification for this failure. Final plans and testimony as to the need for special exception were submitted to it at its meeting on September 14, 2004. This was followed a few days later by delivery of another set of the same plans. This was some 2 ½ months prior to the BZA hearing, which had already been postponed once. The ANC again took up the matter at its November 10, 2004, meeting which resulted in a resolution seeking another postponement. The Board denied the ANC's request and proceeded with the hearing on November 30. While the Board indicated that the record would remain open for receipt of a letter from the ANC and other specified materials, such waiver of the rules does not extend the obligation to accord great weight to its submision. §3121.5

Secondly, the Zoning Regulations require that, to be given great weight, an ANC resolution must contain, among other things, the following information:

(e) The issues and concerns of the ANC about the appeal or application as related to the standards of the Zoning Regulations against which the appeal or application must be judged... §3121.5

The relevant elements of the special exception are set out in Section 223.2 as follows:

(a) The light and air available to neighboring properties
(b) The privacy of use and enjoyment of neighboring properties
(c) The addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage...

The resolution adopted by ANC 2A at its December 15 meeting did oppose the special exception but, instead of dealing with light, air, privacy or visual intrusion, primarily objected to the legal interpretation of the Zoning Regulations regarding calculation of lot occupancy and other legal interpretations. Friendship Neighborhood Coalition v. DCBZA, 403 A2d 291. See also, Bakers Local Union No. 118 v. DCBZA, 1981, 437 A2d 176.

There was no evidence placed in the record of the BZA, or presented to the ANC regarding (a) or (b), except the Applicant's evidence that these elements were not affected. As for (c), there were complaints that the third floor could be seen from some angles, even though it was set back some 29 feet from the front of the house. There was no evidence, however, that the third floor was out of keeping with its neighbors. It was admitted that neither of the third floors on the West was illegal and at least one of them was approved by the HPRB. Moreover, it was clear from the model that our third floor addition is smaller and drawn further back.

For the above reasons, we urge the Board to grant the special exception requested here, to permit the Donnells to restore the house to single family status and to enhance the neighborhood in which they have chosen to live.

Yours very truly,

Stephen N. Gell

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17154 of Bruno B. Freschi, pursuant to 11 DCMR § 3103.2 for a variance from the lot width and lot area requirements under section 401, a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, and a variance from section 401.6 from the street frontage requirements to allow the construction of a single-family row dwelling in the FBOD/R-3 District at premises rear of 935 26th Street, N.W. (Lot 95, Square 16).

HEARING DATE: May 4,2004
DECISION DATE: June 8, 2004

DECISION AND ORDER

The Applicant in this case is Bruno B. Freschi, the owner of the property located at rear of 935 26th Street, N.W. (Lot 95, Square 16) (the "Property"). Mr. Freschi filed an application with the Board of Zoning Adjustment on February 20, 2004 for area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on the Property, which is located in the FBOD/R-3 District. Except for the relief under section 401.6[1], the zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2. Following a public hearing, the Board voted 4-1-0 on June 8, 2004 to approve the application.

PRELIMINARY MATTERS

Application. The application requests area variances under 11 DCMR § 3103.2, to allow the construction of a single-family row dwelling on an alley lot in the FBOD/R-3 District. The original application proposed by Bruno Freschi (the "Applicant") requested variances from the lot area, lot width, lot occupancy, height, and rear yard requirements of the zoning regulations. Prior to submitting the current application, Mr. Freschi obtained concept approval of the proposed project from the Historic Preservation Review Board. As a result of the HPRB design review process, Mr. Freschi lowered the height to meet matter-of-right guidelines. Accordingly, the Applicant withdrew his request for the height variance during the public hearing.

Notice of Application and Notice of Hearing. By memoranda dated February 25, 2004, the Office of Zoning advised the D.C. Office of Planning, the Zoning Administrator, the Department of Transportation, the Councilmember for Ward 2, and the Advisory Neighborhood Commission (ANC) 2A, the ANC for the area within which the subject property is located, of the application. The Board scheduled a public hearing on the application for May 4, 2004. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on February 26, 2004, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 2A notice of the May 4th hearing. Notice was also published in the D.C. Register. The Applicant's affidavit of posting

[1] The Board voted to amend the application to include relief under this section on its own motion.

and maintenance indicates that two zoning posters were posted beginning on April 19, 2004, in plain view of the public.

Requests for Party Status. ANC 2A was automatically a party in this proceeding. The Board granted party status in opposition to the application to the Foggy Bottom Historic District Conservancy ("FBHDC"), members of which reside in the immediate area of the subject property. The Board granted this request, over the objection of the Applicant, based upon the FBHDC's unique interest in the proposal's impact on the zone plan. The Board also granted party status in opposition to Lisa Farrell, who resides at 2523 Queen Anne's Lane, N.W., adjacent to the subject property. The Board denied party status to Dr. Nam Pham, who filed a request but did not appear at the public hearing.

Applicant's Case. The Applicant presented testimony and evidence from Bruno B. Freschi, an architect recognized by the Board as an expert in architecture, regarding the Property, the proposed project, and the HPRB review process. The Applicant also presented testimony from Gladys Hicks, recognized by the Board as an expert in zoning, about the zoning implications of the proposed project.

Office of Planning ("OP") Report. OP submitted a report and testified that it had reviewed the application for compliance with the standards for granting an area variance. In its report dated April 27, 2004, the OP recommended that the application be approved with respect to variances relating to lot area and lot width and that the application be denied with respect to the requested lot occupancy and rear yard setback. OP observed that a side yard setback may be required and that a special exception may be required for the roof structure setback. During the public hearing, OP testified that the application was referred to the National Park Service and Water and Sewer Authority. The National Park Service noted no concern with the proposed project. The Water and Sewer Authority also noted no concern, provided neither water nor sewer pipes are installed to the garage.

Department of Housing and Community Development ("DCHD") Report. DHCD reviewed the application and recommended against approval, finding Square 16 is already densely developed. DHCD expressed concern that the size and scale of the proposed house is too large for the existing lot. It also expressed concern that the proposed house will affect the light, air, and views of the adjacent apartment buildings and alley dwellings.

ANC Report. ANC 2A, at its regularly scheduled meeting held on April 21, 2004, voted 3-0 to support the application for all requested variances. The ANC report noted with approval that Mr. Freschi had modified the project to accommodate changes suggested by HPRB and the Commission of Fine Arts.

Party and Persons in Opposition to the Application. Lisa Farrell, the owner of a row dwelling located at 2523 Queen Anne's Lane, testified in opposition to the application. She expressed concern that the project would adversely affect the light and air, privacy, and the property value of her home. FBHDC also testified in opposition to the application, arguing that the lot was too small for a dwelling, that the proposed project does not qualify as a row house, and that the applicant failed to demonstrate undue hardship. The Board received letters in

opposition to the application from members of the surrounding neighborhood. Generally, these letters argued that the application should be denied because it requests too many variances.

Closing of the Record. The record was closed at the end of the hearing, except for specific documents requested by the Board. The Board requested that the Applicant provide information demonstrating the date of subdivision of Lots 94 and 95. The Applicant submitted a copy of the subdivision plat, which demonstrated that the subdivision occurred on January 6, 1969.

FINDINGS OF FACT

A. The Property and the Surrounding Area.

1. The property that is the subject of this application is Lot 95 in Square 16, located at the premises known as rear of 935 26th Street, N.W. The Property is an alley lot located behind and to the east of 935 26th Street, N.W. (Lot 94 in Square 16). Lot 94 is improved with a four-story, 1970s, single-family row dwelling, which also is owned and occupied by the Applicant. Immediately to the south of the Property, are two of the 1960s three story, brick, row dwellings that front on Queen Anne's Lane. Immediately to the north is a four-story apartment building. The Property abuts Hughes Mews, a thirty foot wide alley, to the east. Across the alley to the east is an eight-story apartment building.

2. The Property is 18.17 feet wide, 51 feet deep and has a square footage of only 926.67 square feet. It presently is paved with asphalt. In the past, it has been used for parking by the previous owner of Lot 94, the adjacent lot, and other residents of Hughes Mews.

3. Lot 94 is improved with a four-story, 1970s, single-family row dwelling, which also is owned and occupied by the Applicant. Immediately to the south of the Property are two of the three-story brick row dwellings that were constructed in the 1960s as part of the Hughes Mews development that fronts on Queen Anne's Lane. Immediately to the north is a four-story apartment building. The Property abuts Hughes Mews, a thirty-foot wide alley, to the east. Across the alley to the east is an eight-story apartment building.

4. The area is essentially residential with a mix of densities, including major, ten-story condominiums and smaller, single-family row dwellings.

5. Pursuant to Zoning Commission Order No. 714, effective April 17, 1992, the Property is included within the Foggy Bottom Overlay District (FBOD) with an underlying R-3 zone designation. Prior to that Order, the Property was located in the R-5-B Zone District. The Property also is located in an historic district.

6. The subject property was created in 1969 as a result of a subdivision. Lots 94 and 95 at one time comprised a single lot. The lot was subdivided per a subdivision plat dated January 6, 1969. Because the lot was created after 1966, it is subject to the street frontage requirements of section 401.6 if it is "to be used and occupied by a row dwelling".

7. Most of the row dwellings that constitute the Hughes Mews development are located on lots that are now nonconforming with respect to the requirements of the current R-3 zoning.

B. The Proposed Project

9. The proposed project will consist of a three-story, thirty-foot tall single-family row dwelling with a roof deck and a bay window. The dwelling will feature two bedrooms, a den, three bathrooms, and a garage.

10. The total square footage of the proposed row dwelling is between 1,700 and 1730 square feet.

11. The proposed project will be constructed from lot line to lot line and will provide no side yards and this meets the definition of a row dwelling.

B. The HPRB Process

12. The HPRB initially expressed concern about the proposed height of the house and the penthouse located on the roof. In response, the applicant lowered the height by 1.6 feet, which allows the proposed project to be constructed within the matter-of-right height requirements. The applicant also removed the equipment initially proposed to be housed on the roof and limited the use of the roof structure so as to provide only roof access. The applicant also relocated the roof access structure to the north side of the Property to reduce any impact on the row dwellings to the south.

13. The HPRB staff report and recommendation, which was adopted by HPRB, noted that Mr. Freschi had reduced the footprint and height of the proposed rooftop penthouse in response to HPRB's concerns. The report found that the Property's distance from any of the lower, historic buildings in the area, and the proximity of three and four-story non-contributing structures suggests that the height of the proposed building is not incompatible with the character of the historic district. The report recommended that HPRB approve the scale and general massing of the concept.

C. Zoning Relief Required

14. Under § 401.3, the minimum lot area for a row dwelling in the R-3 Zone is 2,000 square feet. The lot area of the Property is 926.67 square feet, which is 1073.33 square feet less than the 2000 square foot minimum lot area required under § 401.3.

15. The additional variance relief the applicant requests are minor. The applicant proposes a rear yard of 18 feet, which is only 2 feet less than the 20 feet required by § 404.1. The proposed project will have a lot occupancy of 63.3%, which is only 3.3% greater than the maximum lot occupancy of 60% permitted under § 403.2. The width of lot for the Property is 18.17 feet, only 1.83 feet less than the 20 foot requirement set forth in § 401.3.

16. Section 401.6 requires that each lot created after February 15, 1966, to be used and occupied as a row dwelling, shall have street frontage measured along the street a distance

equal to at least 40% of the required width of lot and in no case less than fourteen feet. "Street" is defined in § 199.1 as "a public highway designated as a street, avenue, or road on the records of the Surveyor of the District of Columbia." The proposed project provides frontage only on an alley, which is not a "street" under the above definition.

17. Section 2507 expressly permits the construction of a one-family dwelling on an alley lot that abuts an alley thirty feet or more in width and which provides access to a street through an alley or alleys not less than thirty feet in width. Hughes Mews, on which the Property fronts, is thirty feet wide and provides access to 26th Street, N.W. through Queen Anne's Lane, which also is thirty feet wide.

D. Exceptional Condition

18. The Board finds that the Property is affected by an exceptional and extraordinary situation in that it is exceptionally narrow and shallow, and it is extremely undersized. The lot is 18.17 feet wide and 51 feet deep and is less than 1,000 square feet in area. Although none of the nearby lots are large, this lot is small even by the standards in the area.

E. Practical Difficulty

19. Because of the exceptional and extraordinary narrowness and shallowness of the lot, it would be difficult for an architect to design a habitable, livable home that would provide adequate living space and adequate light and air without the additional rear yard and lot occupancy variances.

F. Lack of Substantial Impact

20. The Board finds that the granting of the requested variances would not create a detrimental effect on the zone plan or the neighborhood, because the proposed project represents a contextual design that reflects the height, massing, and window fenestration predominant in the area. Nor will it deprive Ms. Farrell of light and air. The proposed project will complement both the row dwellings located in the Hughes Mews development to the south and the existing modern, high-rise condominium and apartment buildings located to the north and east of the Property. Accordingly, the proposed project will provide an appropriate buffer between the row dwelling and high-rise uses. The three similar unattached row dwellings located on Hughes Mews demonstrate that the proposed row dwelling will not be out of context with the surrounding area simply because it is not attached on either side. The proposed bay window will not cause a substantial detrimental impact on neighboring properties because it does not exist at the ground level, has a footprint of only two feet, and is located to the north side of the Property, the side opposite the row dwellings to the south.

G. Consistency with Zone Plan

21. The Board finds the proposed project will be consistent with the zone plan.as the dwelling falls within the design plan for an R-3 District. Section 320.1 provides that the R-3 District is designed essential for row dwellings, but also includes areas within which row dwellings are mingled with one-family detached dwellings, one-family semi-detached dwellings, and groups of three (3) . Thus, the proposed row dwelling is consistent with the underlying R-3

Zone. The proposed project also is consistent with the goals of the FBOD, which include preserving the low-scale residential character of the area (§ 1521.1), providing a scale of development consistent with the low scale harmony of rhythmic residential townhouses (§ 1521.3(a)(2)), and enhancing the residential character of the area (§ 1521.3(c)). Based on the testimony of Mr. Freschi, Ms. Hicks, and ANC 2A, the Board finds that OP's concerns that the proposed project will increase the density in the area beyond what is contemplated in the Zoning Regulations are unfounded. The addition of a modest single-family dwelling in a residential Zone District will not adversely affect the density of the area.

CONCLUSIONS OF LAW AND OPINION

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. As stated above, the applicant here seeks relief from the certain area requirements to allow construction of a new single-family dwelling.

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 Board concludes that the applicant has met the test for the granting of the requested area variance relief. It finds the subject property is affected by an exceptional or extraordinary situation or condition, that the strict application of the Zoning Regulations will result in practical difficulties to the applicant, and that the intent, purpose, and integrity of the Zone Plan will not be impaired by granting the requested variances.

The Board concludes that the Property is affected by an extraordinary and exceptional situation in that the Property is exceptionally shallow, narrow and small. The Board also concludes that a strict application of the Zoning Regulations will result in practical difficulty to the applicant because no dwelling can be constructed on the Property without variance relief. In addition, the applicant faces practical difficulties in designing a project that will provide adequate light and air to the interior living space. As to the street frontage requirement, the Board finds that the unique zoning history of the property justifies the grant of this relief.

Finally, the Board finds that granting the requested variance relief will not cause substantial detriment to the public good and will not impair the intent, purpose, and integrity of the Zone Plan. Pursuant to 11 DCMR § 320, the R-3 Zone District is designed essentially for

row dwellings. The proposed project also furthers several goals of the Foggy Bottom Overlay District. The proposed project will maintain and enhance the low scale residential character of the neighborhood as described in 11 DCMR § 1521.2. It also will enhance the low scale harmony of rhythmic townhouses prevalent in the area. 11 DCMR § 1521.3(a). Moreover, the applicant has accommodated the concerns expressed by Ms. Farrell and FBHDC by lowering the height of the building and the roof structure and by relocating the bay window and roof structure away from the dwellings abutting the Property to the south.

Votes on Motions:

VOTE: 3-0-2: Board Motion to DENY Applicant's Motion to Strike Party Opponent's Exhibit 42 post-hearing document. (Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to Deny; Geoffrey H. Griffis and Kevin L. Hildebrand, not present, not voting).

VOTE: 3-0-2: Board Motion to **GRANT** Applicant's Motion to Allow Applicant to Respond to Opponent's Exhibit 42 (Ruthanne G. Miller, John A. Mann II, and Curtis L. Etherly, Jr. to support; Geoffrey H. Griffs and Kevin L. Hildebrand, not present, not voting).

VOTE: 3-0-2: Board Motion to amend application to provide relief from Section 401.6. (Ruthanne G. Miller, Curtis L. Etherly, and John A. Mann II to support; Geoffrey H. Griffis and Hildebrand, not present, not voting).

It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: 4-1-0: (Ruthanne G. Miller, John A. Mann II, Curtis L. Etherly, Jr., and Geoffrey H. Griffis (by absentee vote) to approve, as amended; Kevin L. Hildebrand (by absentee vote) to oppose.

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: SEP 0 9 2004

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

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Application No. 17007 of Application of Kathleen Peoples and Philip Sedlak, pursuant to 11 DCMR § 3104.1 for a special exception to allow an existing rear yard addition to a semi-detached single-family dwelling under 11 DCMR § 223, not meeting the side yard requirements of section 405 and the lot occupancy requirements of section 403 in the R-4 District at premises 1018 Constitution Ave, N.E. (Square 964, Lot 46).

HEARING DATE: May 20, 2003
DECISION DATE: June 3, 2003

DECISION AND ORDER

This application was submitted on February 28, 2003 by the owners of the property, Kathleen Peoples and Philip Sedlak (collectively, "Applicants").

Following a hearing on May 20, 2003, and public meeting on June 3, 2003, the District of Columbia Board of Zoning Adjustment ("BZA") voted 4-0-1 to approve the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. The District of Columbia Office of Zoning mailed memoranda dated March 13, 2003 providing notice of the application to: the Councilmember for Ward 6, Advisory Neighborhood Commission 6A, Single Member District /ANC 6A03, the Department of Transportation, and the District of Columbia Office of Planning ("OP"). Pursuant to 11 DCMR § 3113.13, the Office of Zoning mailed letters of notice of the hearing dated March 25, 2003 to the Applicants, ANC 6A, and all owners of property within 200 feet of the subject property. On April 30, 2003, the Applicants posted notice of the hearing at the subject property.

Request for Party Status. ANC 6A was automatically a party in this proceeding. The Board granted a request for party status from David and Janet Pritchard, the owners of a property abutting the subject property.

Applicants' Case. The Applicants stated that the special exception was needed to allow the existing two-story addition to the rear of a single-family dwelling they constructed to increase the living space in the house. The Applicants sought and received a building permit to construct the addition. The permit was later found invalid by an order of this Board. *Appeal No. 16811 of David and Janet Pritchard* (2002) The Applicants submitted photographs of the addition, building plans and elevations.

Government Reports. By memorandum dated May 13, 2003, the OP recommended approval of the special exception. According to OP, the special exception relief will be in harmony with the

general purpose and intent of the Zoning Regulations and Zoning Maps, and would not tend to affect the use of neighboring property adversely.

ANC Report. None.

Persons in Opposition to the Application. The party in opposition, David and Janet Pritchard ("Party in Opposition"), contended that the proposed addition would block light to their property and obstruct the view from the rear of their property.

Hearing. The Board held a public hearing on the application on May 20, 2003. Testimony and evidence was provided by the Office of Planning, the Applicants, the Applicants' architect, and the Party in Opposition.

FINDINGS OF FACT

1. The subject property is located at 1018 Constitution Ave., N.E. (Square 964. Lot 46) in the Capitol Hill neighborhood of Ward 6. The lot is on the north side of Constitution Ave., N.E.

2. The subject lot is rectangular in shape, 26 feet wide and approximately 90.5 feet deep, and has a north-south orientation.

3. The site is improved with a two-story, single family semi-detached house built in 1889.

4. The house is at the end of a line of row houses. It shares a common party wall with the neighboring row house to the west. To the east, an alley runs along the property line. The original dwelling has a seven-foot wide side yard.

5. The eastern side of the lot line of the subject property coincides with the rear lot lines of five lots developed with row dwellings, fronting on 11th St., N.E., including the Party in Opposition's property, 204 11th St., N.E.

6. A fence extends along the east-side of the property line.

7. The Applicants constructed a two-story addition to the rear of the original dwelling. The addition extends the full width of the lot.

8. The addition did not add any new windows facing neighboring properties from the second level.

9. The deck in the rear of the second level of the addition is angled so as to minimize intrusion to neighboring properties.

10. The lot area of the subject property is 2,357 square feet. The original dwelling and the addition occupy 1226 square feet of the lot. The original dwelling plus the addition occupy 52% of the lot.

11. The lot is zoned R-4. The predominant land use in the vicinity of the subject property is row houses.

CONCLUSIONS OF LAW

The Applicants seek a special exception under 11 DCMR § 223 to allow an existing two-story addition to the rear of a single-family semi-detached dwelling in the R-4 zone. This application was required as a consequence of this Board's decision in **Appeal No. 16811 of David and Janet Pritchard** (BZA 2002), which held that an addition may not "convert a semi-detached dwelling to a row dwelling under circumstances where it is not possible to construct a common division wall". Because one side of the subject property abutted an alley, there was no adjacent structure to share a common division wall, and therefore a side yard was required.

Before going into the merits of this application, the Board wishes to stress the narrowness of the *Pritchard* ruling. As noted in **Appeal No. 16935 of Southeast Citizens for Smart Development,** the *Pritchard decision* did not make single semi detached dwellings illegal if one side of the structure sat on a lot line (and was thus free standing on both sides). Nor did *Pritchard* require two side yards for new structures on lots with row dwellings on either side. Row dwellings, when permitted as a matter of right, may be constructed on all lots, except in the narrow circumstances that existed with respect to this subject property.

The Pritchard decision is thus limited to its facts.

As to this application, the Board is authorized to grant special exceptions where, in the Board's judgment, a special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps. See D.C. Official Code § 6-641.07(g)(2) (2001); 11 DCMR § 3104.

Pursuant to § 223, the Board may permit, by special exception approval, an addition to a one-family dwelling that does not comply with requirements pertaining to minimum lot dimension, lot occupancy, rear and side yards, courts, and nonconforming structures, subject to the conditions enumerated in § 223.

The Applicants' property does not comply with requirements pertaining to lot occupancy and side yards.

Lot occupancy. The maximum permitted lot occupancy for a semi-detached dwelling in an R-4 district is 40 percent. 11 DCMR § 403.2. Pursuant to 11 DCMR § 223.3, the lot occupancy of the dwelling, together with the addition, may be as high as 70 percent in the R-4 zone, if approved by the Board consistent with the requirements of section 223. The lot occupancy of the subject property, including the addition, is 52 percent.

Side yard. A one-family dwelling in an R-4 zone that does not share a common division wall with an existing building or a building constructed together with the new building must have a

side yard on each resulting free-standing side. *See* 11 DCMR § 405.3. Because this structure did not share a common division wall on its eastern side, the addition cannot intrude into the required side yard.

11 DCMR § 223 provisions. The Applicants seek approval of the already completed addition to the dwelling that does not comply with requirements pertaining to lot occupancy and side yards. The Board may grant such approval as a special exception subject to the provisions enumerated in section 223. The provisions include that the proposed addition must not have substantially adversely effect on the use and enjoyment of any abutting or adjacent dwelling or property, and in particular (a) the light and air available to neighboring properties must not be unduly affected; (b) the privacy of use and enjoyment of neighboring properties must not be unduly compromised; and (c) the addition, together with the original building, as viewed from the street, alley, and other public way, must not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage. 11 DCMR § 223.2.

The Board concludes that the addition does not unduly affect the light and air available to affect neighboring properties, including the property owned by the party in opposition. In forming this conclusion, the Board reviewed the photographs and other graphical evidence submitted by the applicants and by the Party in Opposition, and considered their testimony. The Applicants testified that the addition did not unduly affect the light and air available to neighboring properties, did not compromise the privacy of neighboring properties, change the character of the property when viewed from the street. The Party in Opposition offered testimony that the addition blocked light and air available to the rear yard and back window of their house. The Party in Opposition submitted testimony that the addition blocked thirteen percent of the light available to the rear of their property. The Party in Opposition was unsure, however, how much of that thirteen percent was blocked by the portion of the addition that the Applicants could have built as of right, and without resort to a special exception. The Board is of the opinion that the addition does not unduly affect the light and air available to the Party in Opposition, nor to other neighboring properties.

The Board further concludes that the addition does not unduly compromise the privacy of use and enjoyment of neighboring properties, including the Party in Opposition's property. A fence provides privacy at ground level. The addition did not add any new windows facing neighboring properties from the second level. The deck in the rear of the second level of the addition is angled so as to minimize intrusion to neighboring properties.

The Board further concludes that as viewed from the street, the addition does not substantially intrude upon the character, scale and pattern of houses along the subject street frontage. The Board notes that the predominant use on the subject street frontage is row houses. The addition is consistent with the predominant use, and in fact, the addition renders the applicant's property more consistent with character, scale, and pattern of houses along the subject street frontage than it was previously.

The Board concludes that a special exception is in harmony with the general purpose and intent of the Zoning Regulations and Maps. The neighborhood is comprised mainly of row houses and it is only because of some unusual features of the Applicants' property that a special exception is

required. We do not believe that our granting this special exception will adversely affect neighboring properties.

For the reasons stated above, the Board concludes that the Applicants have satisfied their burden of proof

Finally, the Board observes that the surface of the addition that faces the Party in Opposition's property is finished with an unappealing cement material. 11 DCMR § 223.4 authorizes the Board to require special treatment in design, building materials or other features for the protection of adjacent or nearby properties. The Board finds that the application of a new finish to the addition will protect the Party in Opposition from visual intrusion on the character of the rear of their property.

Accordingly, it is therefore **ORDERED** that the application is **GRANTED.**

It is further **ORDERED** that the Applicants shall apply a final finish to the side of the addition facing the opposing party's property of a smooth parch or stucco finish that would be painted in a light color, and that will allow for the attachment for an additional veneer for a trellis type system.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. to approve; Anthony J. Hood to approve by proxy; David A. Zaidain not hearing the case, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP -7 2004

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

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR

BOARD MEMBER ZAIDAIN: No objection.

VICE CHAIR MILLER: No objection.

CHAIR GRIFFIS: Very well. Then I'll take it as a consensus. The Board will move this to the 2nd of March, '04.

MR. MOY: Okay. The next case then is a motion for reconsideration of Application No. 17087 of Jeffrey D. Kwaterski, pursuant to 11 DCMR section 3103.2, for a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, a variance from the closed court area requirements under section 406, and a variance from the nonconforming structure provisions under subsection 2001.3, to allow a rear garage with roof deck addition to a single-family row dwelling in the R-4 District at premises 1366 Quincy Street, N.W., Square 2826, Lot 25.

The Board completed testimony on the application and issued a Bench decision on December 9, 2003. On January 6, 2004, the Board on its own motion or rather the final order was issued on December 10, 2003. Then on January 6, 2004, the Board on its motion moved to reconsider Application No. 17087. And then I'll leave it at that. That completes my briefing, Mr. Chairman.

CHAIR GRIFFIS: Excellent. Thank you very much, Moy, and that is correct. On the 6th on our own motion of which, of course, we needed to waive our rules in order for time, because the order had already been issued. And I think this is just for opening on this, our own motion for reconsideration, I think it's an excellent exercise that we, of course, don't want to do very often, but is appropriate for the Board to do when we look at an application and we have just been through the Public Hearing and have, in fact, decided and realized that it may not have been exactly as it should have been.

And I will be specific with this case, but to make the point and the larger point that I don't think this Board is afraid of or should be afraid of reanalyzing its recent or even past decisions or actions. I think it shows some great strength that the Board can do that.

Now, that being said, I don't think we have made an error in this application at all. I think the final outcome actually was appropriate. However, in further really analysis of the application on my own and I know with discussion with other Board Members, the reason why we brought a motion for reconsideration is the fact that we may have found,

and I'll see if the Board agrees with me in the deliberation that is about to follow, we may have found that the requested relief was far and above what was actually required of this applicant. And therefore, on our own motion bringing it back, hopefully, with no undue stress on those involved.

I believe that this will and should have been formulated as a special exception under section 223. My point goes to if you look at the definition of building area. Of course, as you all recall, this was to allow a rear garage addition into a row dwelling. One of the aspects of the variance case that we found did meet the test and was approved was the uniqueness of the property. One of the aspects of the uniqueness was the dramatic site topography in the rear, which allows the garage to be built and constructed below the main level of the house.

If you look at the definition in section 199 of building area, the garage itself would not be counted towards the building area and, therefore, would not go into the lot occupancy, therefore, would not need the amount of relief required of a variance under section 403, but rather would come under special exception under 223, which does cover, in fact, the rear yard requirements, the closed court requirements

and the issue of nonconforming structure provisions under 2001.3.

So I would like to, under our motion for reconsideration, to change the application in relief requested and change it to, as I said, the special exception or 223 and simultaneously, make a motion of approval of the special exception in Application No. 17087, and ask for a second on this.

VICE CHAIR MILLER: Second.

CHAIR GRIFFIS: Thank you very much, Ms. Miller. The other aspects in terms of not being counted towards building, one of the critical pieces, that it has to be found through the definition as laid out, that it has to be found that it would not impair the light and air to the adjacent properties. If you recall the factual evidence in the case, is that there is masonry walls on each side or some type of structure, if I'm not remembering incorrectly, that this would actually align with.

It would be near implausible for one to say that this impacted the light and air when there is already a solid structure on each of the adjacent properties and on the property line itself. And therefore, I think it comes completely and fully underneath that analysis that I have laid out.

But let me open it up to others for any further discussion or deliberation on the motion for special exception approval.

COMMISSIONER MAY: Well, let me say that I agree, Mr. Chairman, with just about everything that you said, except that I felt that the first time around that the relief that had been granted was in excess of what was merited. I didn't think that the case qualified for a variance and had voted against it.

But I was concerned about it, at the time, in that it didn't seem to me that the -- and I didn't really come to a conclusion in my mind that, in fact, the relief that had been requested was the appropriate relief. In other words, it seemed to me that because of the slope, that this didn't fit the normal mold for extending the structure into the rear yard of the property, and because it was all below the first floor or the main floor of the building that a lot of the rules that would otherwise kick in don't, like the lot occupancy is not affected by a structure that is below the floor, the first floor or at or below the level of the main floor. So I was concerned about that.

So I'm glad that it has now come back to us for reconsideration, because I think it's

thoroughly appropriate and I am much more comfortable with the idea of granting a special exception for rear yard in this circumstance, rather that a variance. Where I did not believe that this would meet the test for a variance, I do believe it meets the test for a special exception with regard to the rear yard and the closed court.

I'm not even sure that the closed court necessarily even applies, and we'll look at that very carefully, but in any case, if we're talking about a section 223 type special exception, that I would support it. Whereas, I did not support the variance.

CHAIR GRIFFIS: Good. Others? Very well. I think we can rely on the record that was presented before us and also on the past deliberation, which was actually under the variance test, which is a higher threshold to prove in consolidating our deliberation on the special exception for this.

We have a motion then for approval of the special exception and it has been seconded. If there is any other deliberation, comments. If not, then I would ask for all those in favor to signify by saying aye.

ALL: Aye.

CHAIR GRIFFIS: And opposed? And I think

we can issue a very quick summary order on that one also.

MR. MOY: The staff would record the vote on the motion of the Chairman, seconded by Ms. Miller, also in favor of the motion, Mr. Zaidain, Mr. May. The vote is recorded as 4-0-1, Mr. Etherly not participating on the case.

The next application is No. 17100 of Jesus Is The Way Church, pursuant to 11 DCMR section 3104.1, for a special exception for a change of nonconforming use under subsection 2003.1, or in the alternative, pursuant to 11 DCMR section 3103.2, a variance from the use provisions, to allow a coffee/sandwich shop under subsection 330.5, in the R-4 District at premises 129 through 131 15th Street, N.E., (first floor only), Square 1069, Lot 801.

Staff notes that the advertisement has been amended. The application has been amended to reflect the requested zoning relief only for the property at 129 15th Street, which was noted for the Board at the Public Hearing on January 13, 2004.

On that date, the Board completed testimony on the application and scheduled its Decision on February 3, 2004. The Board requested the following posthearing documents. First is a