BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

RE: Application of Tonya Harris, TON, Inc., for Variances from Number of Stories and Building Height Requirements and for Special Exception from Lot Occupancy Requirements for 906 T St., NW	)	Case. No. 17218 Hearing Date: 11/16/04

REPLY TO WRITTEN ARGUMENT OF APPLICANT

Submitted by
Westminster Neighborhood Association

Preliminary Statement

1) This responds to Applicant's written Hearing Testimony/Argument of Applicant which was filed on or about the day of the hearing in this matter, November 16, 2004, and personally served on the parties at the beginning of the hearing. This Reply sets forth the legal standard applicant must meet for her requested variances and special exception, analyzes the case law applicable to the facts as presented in this case, and argues that applicant has not met her burden of proof for a grant of either the variances or the special exception.

Factual Evidence Presented

2) The Application of Tonya Harris, TON, Inc., request variances from both the number of stories and the building height requirements of § 400.1 and for a special exception from the 60% maximum lot occupancy requirement of § 403.2 for her property at 906 T Street, NW. This property is zoned R-4. The applicant, Ton, Inc, is the owner of the subject property. Applicant Tonya Harris is the president of TON, Inc. A full hearing was held before the BZA on November 16, 2004.

3) The Office of Planning issued a report which does not recommend approval of the requested variances for the fourth story or height requirements, but recommends approval of the special exception for the rear addition. ANC 1B is on record as supporting the application. However, such support was based on the "uniqueness of the applicant."

BZA
Case No. 17218
Exhibit No. 43

Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO. 43

Based on the factors enunciated in § 3103.2, there is a significant question as to whether such a ground has any relevancy to the issues in this proceeding. The Westminster Neighborhood Association (WNA), voicing the concerns of the community, is on record as opposing both the variance requests and the special exception request.

4) The subject property is a detached house in an R-4 district that previously was a single-family home. The community in which it is located obtained historic preservation status in 1998.

5) Applicant submitted testimony that she purchased the property in 2001 and that her initial DCRA application, approved September 19, 2001, was to renovate this structure so that the three stories above the ground would be a single family home and the basement unit would be a rental unit.

6) Applicant subsequently decided to increase the size of this building and submitted a revised application to DCRA February 1, 2002, which was issued April 8, 2002, to permit conversion from a single family dwelling to a two family flat. This plan showed the basement and first story to be the first unit and the second, third, and a newly constructed fourth story to be the second unit. It also extended the rear of the building to permit a stairwell egress which was required due to the new construction. A fourth story is not permitted in an R-4 zone. This fourth story also increased the height to approximately 42 feet, exceeding the maximum height requirement of 40 feet. The rear extension increased the lot occupancy beyond the 60% maximum to 64.6/%. This application was nonetheless approved by DCRA. The issued permit stated that it was for a "2 family flat; 3 stories plus basement and Loft." Testimony indicated that the HPO signed off on this permit on the assumption that it was similar to the application approved September 19, 2001 and was not aware that the fourth story had been added to this application.

7) The testimony of applicant Tonya Harris indicated that neighborhood opposition to this construction was strong and persistent during the construction and that the DCRA

inspection office was continually contacted about such construction. However, it was not until July 2002 that a DCRA inspector visited the site and issued a stop-work order. After further investigation by DCRA, it determined that the current application permitted this construction and such construction continued. The neighbors continued to complain and there were additional inspections. WNA claims such inspections were held in August 2002; applicant claims they were in October 2002[1]. From such investigations, it became clear that DCRA had improvidently granted approval of the applicant's building permit due to the fourth story not being permitted in an R-4 zone, the building height exceeding 40 feet, and the total building footprint exceeding 60% of the lot occupancy. At that time, applicant had knowledge that she would need to apply to the Board of Zoning Adjustment for variances and a special exception. Due to financial difficulties, applicant claims she did not make such application to the BZA until July 2004.

8) There is considerable disagreement among the parties as to how much of the construction of the fourth story was completed by applicant during the period from when she obtained initial DCRA approval for the fourth story (April 8, 2002) and until she had knowledge that she needed BZA variances (August or September 2002). Applicant claims that she had the fourth story exterior structure and roof fully completed during that time period. The WNA claims that the fourth story collapsed during this period and that at the end of the period applicant had only the exterior walls completed, but not the roof. In any event, it appears that little interior work had been completed by this time. WNA submitted exhibits showing that applicant did not apply for her major plumbing permit until October 28, 2002 and did not apply for her major electrical permit until January 17, 2003.

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[1] But see Applicant's exhibit, titled "Timeline to Board of Zoning Adjustments" which shows that on September 30, 2002, the zoning administrator discussed with applicant the need to "Delete Loft Area/ Amend Permit/Submit to BZA."

Consideration of Variance Requests

9) The applicant has the burden of proof pursuant to 11 DCMR 3119.2. If sufficient evidence has not been submitted into the record to permit this Board to make findings of fact on every element of a claim, the Board must deny the applicant's request.

10) For a variance, applicant must meet all three conditions of § 3103.2, to wit:

> 1) A unique shape of the property or other extraordinary or exceptional situation or condition of the property;
>
> 2) That the strict application of any regulation would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner; and
>
> 3) That any relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the zoning regulations and map.

Turning to the first condition, there was considerable disagreement among the parties as to whether the Board may consider the applicant's contacts with or reliance on a governmental body, such as DCRA, and its erroneous stamp of approval to applicant's plans, as an 'extraordinary situation' for purposes of this regulation. While WNA argued at the hearing that the Board should not consider this factor, it now recognizes that this Board may consider this factor and, in fact, has done so on at least two previous occasions. In *Luis De Azcarate, et al, v. District of Columbia Board of Zoning Adjustment*, 388 A.2d 1233 (D.C. 1978), the BZA found that an applicant's reliance on zoning office personnel indicating that applicant was in compliance could constitute an extraordinary situation of the property.

11) In the instant case, DCRA approved the fourth story application on April 8, 2002. It was not until August or September 2002 that applicant was informed that this approval should not have been granted and that she needed the requested variances and special exception. Applicant did do at least part of her construction of this fourth story

during this time period when she, arguably in good faith, proceeded with this construction.[2] The analysis should not end here, however. Recognizing that reliance on a governmental body's indication of approval is one of the considerations BZA may take into account, it still needs to determine the extent of such reliance. In *DeAzcarate*, the applicant met with zoning office personnel on three separate occasions, with such personnel implicitly indicating on each occasion that the lot in question conformed to its area requirements. Further, the reliance on the government agency's implicit approval was only one of four factors the DC Court of Appeals considered relevant in affirming BZA's granting of a variance in that case. The other factors were that (1) the original property owned by the applicant could have been divided into three conforming lots had the owner had prior knowledge that DCRA would not be granting approval of the subdivision; (2) the applicant ~~and~~ had already built houses on the other two newly created lots; and (3) the dispute was caused by the zoning officials' erroneous action.

12) The BZA has also considered reliance on a governmental body's indication of approval in *Lawrence A. Monaco v. District Columbia*, 407 A.2d 1091 (D.C. 1979). In granting a variance to extend the Republican National Committee offices, located in an R-4 district, BZA noted that both the Zoning Commission and the BZA had given several prior approvals to this multi-phase project and that the applicant had relied on such approvals. Again, this was not the only factor considered by BZA in finding a unique or extraordinary situation in that case. As stated by the D.C. Court of Appeals, 407 A.2d at 1093:

> In sum, the BZA considered four factors in applying the uniqueness or other extraordinary circumstances test:
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> A. The Republican National Committee's close relationship to Congress and location of property near Congress;
> B. existence of stage I of the office building;

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[2] Ultimately, the applicant has the responsibility for determining whether her plans are in conformity with all applicable regulations. The applicant here also had an architect working with her who arguably should have advised her that this fourth story in an R-4 zone required variances.

C. past actions of the Zoning Commission and BZA which led them to begin construction in that location;
D. the right of first refusal and restrictive covenant held by the House Office Building Commission which limits the use and design of the building.

Applicant in the instant case has not shown any other factors which BZA might properly consider in finding her property unique or having some extraordinary situation. It is a rectangular lot, approximately 1800 square feet in size, that has historically contained a very adequate house containing a full basement and three full floors above ground. Without more, BZA should not find that applicant's property meets the extraordinary situation as contemplated by § 3103.2.

13) Turning to the second part of § 3103.2, a determination first needs to be made as to whether the applicant needs a use variance or an area variance. The applicant is not requesting any different use of this property and WNA agrees with applicant's position that she needs to meet only the standard for an area variance. Accordingly, applicant must show that compliance with the applicable zoning regulation would cause "peculiar and exceptional practical difficulties" for the owner of the subject property. See *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976). This standard of proof consists of two elements. The applicant must demonstrate that (1) compliance with the area restriction would be unnecessarily burdensome, *A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment*, 338 A.2d 428, 431 (D.C. 1975); and (2) the practical difficulties are unique to the particular property. *Barbour,* at 327.

14) One issue that needs clarification is whether BZA should consider the unnecessarily burdensome standard *prior* to erection of the fourth story or *after* it has been erected. Generally an applicant comes to BZA for a variance prior to construction and this standard would be applied at that time. If that is done here, then applicant has not produced any record evidence that compliance with either the maximum three story requirement in R-4 districts or the maximum 40 feet requirement would be unnecessarily burdensome for her. As shown by the drawings submitted by applicant, this property contained a

generously proportioned home without the fourth story. Even if applicant wanted to subdivide this property into two units–which is her present intention–there is more than sufficient space in the basement and first floor for one two-bedroom unit and also in the second and third floor for a second two bedroom unit. There has been no showing that the fourth story is needed for converting this property to a two unit condominium. This is not a case where BZA should apply a more flexible standard, such as when the applicant is a public service or non-profit entity. Applicant, according to her testimony, is and has been a real estate developer for several years. She has requested these fourth story variances solely to increase the value of the upper unit for purposes of sale.

15) Assuming for the sake of argument that BZA should consider the unnecessarily burdensome standard *after* the construction of the fourth story–a position BZA has not historically adopted–applicant still fails to meet this standard. Applicant argues that she relied on the DCRA's approval of her application for the fourth story when she constructed the fourth story. If this were a use variance, it is clear that BZA could consider this argument.[3] For an area variance, however, this detrimental reliance does not necessarily carry the same weight. Nonetheless, the Board has considerable latitude in what it may consider under an area variance request. As shown by *William Gilmartin, et al. v. District of Columbia Board of Zoning Adjustment*, 579 A.2d 1164 (D.C. 1990), the BZA has the flexibility, if not the obligation, to consider a number of factors including, but not limited to: 1) the weight of the burden of strict compliance; 2) the severity of the variance requested; and 3) the effect the proposed variance would have on the overall zone plan.

[3] See *Lawrence A. Monaco v. District Columbia*, 407 A.2d 1091 (D.C. 1979), which considered a use variance and the applicable stricter standard of undue hardship. It there stated that "applicants' good faith, detrimental reliance on previous zoning actions can also be relevant to determine undue hardship, the second branch of the variance test."

Given this flexibility, the Board may want to consider applicant's claim that she relied on DCRA's erroneous approval when she constructed at least part of the fourth story.[4]

16) Looking, then, to applicant's reliance on DCRA's approval of her permit, BZA needs to determine how much of the fourth story construction was completed during applicant's detrimental reliance period and the financial cost of such reliance. The exhibits submitted by WNA show that applicant had not even started the interior electrical and plumbing work prior to her having knowledge that DCRA's approval was improvidently granted. At most, applicant had the fourth story exterior brick walls erected and the roof installed. Even assuming she had completed this work–which WNA strongly contradicts– there was no record evidence presented by applicant of her costs for this part of the construction. Without such financial information, there is no way for this Board to properly determine the significance of applicant's detrimental reliance. In fact, the record is barren of any financial information on the cost of this fourth story addition. What is just as problematic for applicant is that she also failed to provide any cost estimates or other evidence with respect to the difficulty in removing the fourth story. While applicant summarily claimed that she did not have the funds to remove the fourth story, she failed to provide any evidence of her financial assets or liabilities so that the Board could adequately weigh the burden on the applicant of removing this structure. In *Barbour v. District of Columbia Board of Zoning Adjustment, supra*, the court affirmed BZA's denial of an area variance where the primary evidence of practical difficulty was the financial burden on the applicant of the construction so that it would conform with the zoning regulations.

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[4] Applicant arguably attempts to raise the defense of estoppel, claiming that she relied on DCRA's approval to construct the fourth story. Estoppel, however, is judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws. *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 925 (D.C. 1980); *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 10 (D.C. 1978). Accordingly, estoppel is rarely applied except in the clearest and most compelling circumstances. *Wieck*, 383 A.2d at 11.

17) In considering the other factors set out in *Gilmartin*, consideration also needs to be given to the severity of the requested variances. A variance for a fourth story has rarely, if ever, been granted by BZA in R-4 Districts. The City's Zoning Plan specifically excludes fourth stories in these Districts for obvious reasons, among them being density and aesthetics. The community in which this property is located is also in an historic preservation district, making such fourth stories even more problematic.[5]

18) In considering the third prong of §3103.2–and the last factor enumerated in *Gilmartin*–the applicant must show there will be no "substantial detriment" to the public good and that the variances will not "substantially impair" the zone plan. These two conditions are stated in the conjunctive so that both conditions must be met by the applicant. WNA testified, and the photo exhibits of record readily reflect how this fourth story is apparent from the street frontage on T Street. It disrupts the skyline of the entire block of the 900 block of T Street where all the houses are identical in height. This entire fourth story now towers above that height. WNA also submitted testimony from one neighbor with a home directly east of the applicant's property on 9th Street. The owner, James Rawlings, testified that the applicant's building lies directly on the property line between her property and the three houses to the east of applicant's house. He testified that this fourth story towers above these adjacent houses' back yards and constricts the light, air, and view that he and his neighbors otherwise used to have. What is clear from this testimony as well as the other evidence submitted by WNA is that aesthetics have become a significant element in this community. The photographs of record show residential houses on this block of considerable architectural prominence and detail. The restoration of many of these structures are notable. It is beyond purview that applicant's fourth story addition

[5] As stated above, there was testimony that the Historic Preservation Office improvidently granted approval to applicant's construction plan for this fourth story, mistakenly believing that the plan submitted in February 2002 was identical for this purpose to the one submitted in September 2001 when applicant was only planning to construct a small cover on the fourth story for a stairwell exit to the third floor deck.

and rear extension detract from the aesthetic and historic character of the neighboring properties.

Consideration of Special Exception Request

19) Having shown that the applicant has not met her burden of proof regarding her requested variances for a fourth story, it is unclear what the rear stairway requirements would be for this property without a fourth story. There was no evidence presented as to whether the various construction regulations in effect require another stairway if the property is limited to its existing three stories.

20) For applicant to prevail, she must show that the rear addition, containing only a stairwell, will be in harmony with the Zoning Regulations and Maps and will not tend to affect adversely the use of the neighboring property as stated in §3104.1. WNA presented testimony that no other houses on the side of T Street on which this property is located have any rear extensions of this magnitude and that the applicant property's rear extension is a visual eyesore. Such extension is a further constriction, in terms of light, air, and view to the neighbors' houses located directly east of applicant's property. Due to applicant's property being located on an alley, this extension is also visible to the public from the street. It is also within easy eyesight of the community's recently restored playground in the 900 block of Westminster Street.

21) Based on these considerations, WNA argues that applicant's special exception request be denied without prejudice at this time, subject to her re-applying should she determine and show that she needs a rear stairwell for only three floors above ground.

Conclusion

22) The Applicant must present sufficient evidence to meet all three requirements of § 3103.2 pertaining to variances. She has met none of them. She has not shown any extraordinary situation of the subject property. She has not shown that compliance with the height and number of stories would be unnecessarily burdensome, nor that there exists any

practical difficulties which are unique to this property There is sufficient record evidence showing that this fourth story will cause substantial detriment to the public good and substantially impair the zone plan. As to applicant's requested special exception for the rear addition, the record shows that it will not be in harmony with the Zoning Regulations and Maps and would affect adversely the use of the neighboring property.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of November 2004, a copy of the foregoing Reply to Written Argument of Applicant was served by messenger on:

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