GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17218 of Tonya Harris, TON, Inc., pursuant to 11 DCMR § 3103.2, a variance from the number of stories and building height requirements under § 400, and pursuant to 11 DCMR § 3104.1, a special exception under § 223, to allow a rear addition to an existing flat (two family dwelling), not meeting the lot occupancy requirements (§ 403), in the R-4 District at premises 906 T Street, N.W. (Square 362, Lot 233).

HEARING DATES: October 12, 2004, November 16, 2004
DECISION DATE: December 7, 2004

DECISION AND ORDER

This application was filed on July 15, 2004 by the owner of the property that is the subject of this application, Tonya Harris ("Applicant"). The Applicant was directed by the Zoning Administrator ("ZA") of the Department of Consumer and Regulatory Affairs ("DCRA") to file for relief with the Board of Zoning Adjustment ("Board" or "BZA") after the ZA reviewed her plans for conversion of a single family row dwelling into a flat. The application requests special exception relief pursuant to 11 DCMR § 223 to permit a lot occupancy greater than that permitted in the R-4 district. The application also requests variance relief from 11 DCMR § 400 to permit a height and number of stories greater than that permitted in the R-4 district.

The Board held a public hearing on the application on October 12, 2004, at which certain preliminary matters were dispensed with. The hearing was continued to, and completed on, November 16, 2004. At a public meeting on December 7, 2004, the Board voted 4-1-0 to grant the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated July 16, 2004, the Office of Zoning ("OZ") gave notice of the application to the Office of Planning ("OP"), the D.C. Department of Transportation ("DDOT"), Advisory Neighborhood Commission ("ANC") 1B, the ANC within which the subject property is located, Single Member District 1B-02, and the Councilmember for Ward 1. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the *D.C. Register* and, on July 30, 2004, mailed notices to the Applicant, ANC 1B, and all owners of property within 200 feet of the subject property providing notice of the hearing.

Requests for Party Status. ANC 1B was automatically a party to this proceeding. Mr. Chuck Baxter, a neighbor, and the Westminster Neighborhood Association, represented by Mr. Lynn Johnson, both applied for party status. The Board granted party status to the Westminster Neighborhood Association., a 501 (C) 3 non-profit organization whose mission is to preserve and improve the aesthetics and living conditions in the geographical area in which the property is

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located.. The Board denied party status to Mr. Baxter upon finding that his property would not be impacted in a unique or significantly different manner from his neighbors and that his interests could be adequately represented by the Westiminister Neighborhood Association.

Applicant's Case. The Applicant appeared with her attorney and testified in her own behalf. The Applicant explained that she received a building permit from DCRA on September 19, 2001, based on a surveyor's plat and drawings clearly showing the full extent of the construction and renovation proposed. Due to changes in the plans, a second building permit was issued by DCRA on April 8, 2002, also based on a full set of amended plans. On July 3, 2002, DCRA issued a stop work order, stating that the Applicant was doing work not shown on her plans. The issuer of the stop work order, however, was unaware of the changes to the plans and the second permit sanctioning them. When he was so informed, the stop work order was lifted. Sometime after the stop work order was lifted, the Applicant testified that she received phone calls from the ZA, who had received complaints from her neighbors about the extent of her construction. After re-reviewing the plans, the ZA referred the Applicant to the Board for the relief requested here.

After explaining the history of her situation, the Applicant and her attorney explained how the application met the tests for special exception and variance relief.

Government Reports. By memorandum dated September 28, 2004, OP recommended approval of the special exception relief, but recommended against approval of the variance relief. OP opined that variance relief should not be granted because the extraordinary or exceptional situation or condition claimed by the Applicant to satisfy the first prong of the variance test did not arise out of a physical condition of the property itself. OP further stated that granting the extra height and story would substantially impair the intent and integrity of the Zoning Regulations. OP, however, also stated that the extra height and story would not significantly affect the use and enjoyment of neighboring properties and its determination about the impairment of the Zoning Regulations appears to stem from its concern that granting this variance "could open the door for similar relief requests in the future."

ANC Report. By letter dated November 6, 2004, ANC 1B indicated that, at a regularly-scheduled and properly noticed meeting on November 4, 2004, at which a quorum was present, the ANC voted 7-1-1 to support both the special exception and variance relief requested in the application.

FINDINGS OF FACT

The subject property and the surrounding area

1. The property that is the subject of this application ("subject property") is located in an R-4 zone district at 906 T Street, N.W., in Square 362, Lot 233.

2. Properties to the east, west, and south of the subject property are zoned R-4 and properties in the neighborhood to the north are zoned C-M-1. The immediate area consists mainly of moderate density residential uses.

3. The lot is 1803.25 square feet in size and is improved with a 4-story plus basement single-family dwelling, which, though it is built in row-dwelling style, is detached on both sides.

4. The Applicant has renovated the dwelling, constructed an addition, and converted it to a flat, or two-family dwelling, which is permitted as a matter-of-right in the R-4 zone district. *See,* 11 DCMR § 330.5(b).

5. The dwelling, with the inclusion of a rear brick enclosure covering a wrought-iron fire escape leading to the third floor, occupies approximately 64.6% of the lot.

6. R-4 zoning permits only a 60% lot occupancy, but § 223 permits a 70% lot occupancy as a special exception. *See,* 11 DCMR § 403.2.

7. The dwelling is 41.75 feet high and has four stories.

8. R-4 zoning permits only a 40-foot height and three stories. *See,* 11 DCMR § 400.1.

Zoning history

9. Applicant submitted her first building permit plans to DCRA on July 25, 2001 and the first building permit for the project was issued on September 19, 2001.

10. The first permit authorized general demolition, construction and renovation. This permit does not specify a height, but does specify three floors and states that the dwelling was "to be occupied as detached row house with basement unit." Exhibit No. 35.

11. After modifying her renovation plans, the Applicant applied for a second permit, which was issued on April 8, 2002. This permit does not specify a height, but does specify that the dwelling is to be used as a "2 family flat" with "three [stories] plus basement and loft." Exhibit No. 35.

12. The plans submitted to DCRA for the second permit showed the fourth story and increase in height over 40 feet, as well as the rear fire escape enclosure.

13. Both sets of building permit documents and plans, those for the first permit issued, and those for the second, were approved by DCRA.

14. The Historic Preservation Office also approved both sets of plans – the first set in July, 2001, and the second set in February, 2002.

15. In July 2002, after construction was well underway, a DCRA inspector issued a Stop-Work Order for the subject property. The Stop-Work Order stated that there had been a "[m]isrepresentation of facts on which permit application and plan approval was

based. Construction of an additional story without zoning approval...." Exhibit No. 40.

16. The Stop-Work Order, however, was based on the original plans and the original permit. Apparently, the inspector who issued it was unaware of the second permit. When the Applicant showed him the second permit, he verified it and immediately lifted the Stop-Work Order.

17. Once the Stop-Work Order was lifted, construction continued, with final close-ins obtained in September, 2002.

18. In October, 2002, when the renovation was under roof and nearly complete, the Applicant received telephone calls from DCRA and the OZ Compliance Review Specialist citing complaints from the neighbors about the construction on the subject property. The ZA informed the Applicant that, after re-reviewing the plans, the building was determined to be out of compliance with the zoning regulations and that she would have to appear before the Board for relief.

19. Sometime after she was informed that she would need to appear before the BZA, the Applicant began to run out of money, causing delays in her activities with regard to the subject property. By June, 2003, she had obtained all the closing permits on the subject property, apparently hoping to re-finance it.

20. Also in June, 2003, the Chief of the Zoning Review Branch in DCRA sent the Applicant a letter setting forth the special exception and variance relief she needed to request from the Board. Exhibit No. 6.

21. In late 2003 or early 2004, the Applicant obtained more funds and finally completed the construction on March 15, 2004.

22. Finally, in April, 2004, the Applicant retained counsel and this application was filed on July 15, 2004.

The requested relief

23. The building on the subject property exceeds the maximum height allowed in the R-4 zone district by one story, but only by 1.75 feet of actual height.

24. The fourth story is set back from both the front and back of the dwelling, and therefore does not run the length of the house from front to back. It is minimally intrusive on the view from the street, and is partially blocked by the conically-shaped roof of the third story whish rises immediately in front of it.

25. The Applicant cannot remove the top story of the building to create three stories with a mezzanine or loft space because this loft space would be looking into two bathrooms on the floor below.

26. The Applicant cannot remove the top 1.75 feet of the building because interior structural members and the HVAC and sprinklers systems are all located within the top two feet of the building.

27. The Applicant would also encounter a serious financial hardship in removing either the fourth story or the top 1.75 feet of the building.

28. The building on the subject property exceeds the maximum lot occupancy in the R-4 zone district by 83 square feet or 4.6%.

29. The overage in lot occupancy is caused by the rear addition of a brick structure enclosing a wrought-iron fire escape leading to the third floor. The enclosing structure extends approximately eight feet, seven inches from the rear of the original building.

30. The structure enclosing the fire escape does not extend to the roof of the building, is not visible from the street, and has no windows facing neighboring properties.

31. This fire escape was required by the D.C. Fire Marshall in order to provide a second means of egress from the dwelling unit that occupies the upper stories of the building.

32. There is a 15-foot alley immediately to the west of the subject property and beyond the alley is a comparable building with 3 stories and a basement.

33. Although the building on the subject property is built to the property line to the east, because there is no attached row house, there is an open gap of approximately 10 feet between the building and the next row house to the east.

34. As the building on the subject property extends toward the rear, its east wall borders the rear property line, and therefore, the rear yards, of the dwellings on 9th Street, which are set perpendicularly to the subject building.

35. The subject property has a rear yard of approximately 31.41 feet and beyond that is a rear alley of 15 feet. Including these lengths, and the length of the rear yard of the nearest adjacent building to the south, the building on the subject property is approximately 65 feet from this nearest adjacent building to the south.

36. No burdensome traffic, noise, light or other offensive activity will result from the extra 1.75 feet of height or the extra 4.6% of lot occupancy requested by the Applicant.

CONCLUSIONS OF LAW

The Special Exception

The Board is authorized to grant special exceptions where, in its judgment, the relief will "be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely, the use of neighboring property." 11 DCMR § 3104.1, D.C. Official Code §6-641.07(g)(2) (2001). Each special exception permitted, however, must also meet all the conditions enumerated in the particular section pertaining to it. In this case, the Applicant had to meet the requirements of both § 3104 and § 223 of the Zoning Regulations.

The Applicant is requesting a special exception from the lot occupancy requirements in the R-4 zone district to permit the retention of the brick structure enclosing a wrought-iron fire escape stair at the rear of the property. The fire escape itself was mandated by the D.C. Fire Marshall and is therefore necessary. The brick structure is not large and does not extend to the full height of the building. It is not visible from the street and leaves open almost 32 feet of rear yard behind the building. The structure has no windows facing neighboring properties and has no effect on the use and enjoyment of neighboring properties. The structure abuts the alley to the west and the rear yards of properties fronting on 9th Street to the east. It is not situated particularly closely to any other building and will not unduly affect the light and air available to any nearby building.

The Board concludes that granting the special exception is in harmony with the general purpose and intent of the Zoning Regulations and Maps. The rear fire escape enclosure adds a small addition to the footprint of the flat, an otherwise matter-of-right use. It does not impair the purpose and intent of the Zoning Regulations and was erroneously permitted by DCRA. In fact, the brick enclosure may be more attractive and in keeping with the nature of the building and the residential neighborhood than the open wrought-iron stairway would be.

The Variance

The Applicant also requests an area variance to permit a greater number of stories and a greater height than is permitted in the R-4 zone district. The Board is authorized to grant a variance from the strict application of the Zoning Regulations in order to relieve difficulties or hardship where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the 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 the property...." D.C. Official Code § 6-641.07(g)(3) (2001), 11 DCMR § 3103.2. Relief can be granted only "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." *Id.* An applicant for an area variance must make the lesser showing of "practical difficulties," as opposed to the greater showing of "undue hardship," which applies in use variance cases. *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535, 541 (D.C. 1972). The Applicant in this case, therefore, had to make three showings: uniqueness of the property, that such uniqueness results in "practical difficulties" to the

Applicant, and that the granting of the variance would not impair the public good or the intent and integrity of the zone plan and regulations.

In determining uniqueness the Board is directed to look at the property, including the physical land and the structures thereon, but it can also consider "subsequent events extraneous to the land." *De Azcarate v. Board of Zoning Adjustment,* 388 A.2d 1233, 1237 (D.C. 1978); *Capitol Hill Restoration Society v. Board of Zoning Adjustment,* 534 A.2d 939, 942 (D.C. 1987). The Court of Appeals has opined that the Board must be able to consider such events in order "to weigh more fully the equities in an individual case." *National Black Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687, 690 (D.C. 1984). *See also, Downtown Cluster of Congregations v. Board of Zoning Adjustment,* 675 A.2d 484 (D.C. 1996) (market conditions); *French v. Board of Zoning Adjustment,* 658 A.2d 1023 (D.C. 1995) (previous chancery use); *Tyler v. Board of Zoning Adjustment,* 606 A.2d 1362 (D.C. 1992) (economic factors); *Gilmartin v. Board of Zoning Adjustment,* 579 A.2d 1164, 1168 (D.C. 1990) (easement); *United Unions v. Board of Zoning Adjustment,* 554 A.2d 313, 317-318 (D.C. 1989) (historic preservation requirements); *National Black Child Development Institute v. Board of Zoning Adjustment,* 483 A.2d 687 (D.C. 1984) (changes in zoning regulations); *Capitol Hill Restoration Society v. Zoning Commission,* 380 A.2d 174 (D.C. 1977) (private restrictive covenant); *Clerics of St. Viator v. Board of Zoning Adjustment,* 320 A.2d 291 (D.C. 1974) (societal changes).

The category of "events extraneous to the land" has been broadly interpreted by the Court of Appeals. Under the category of "events extraneous to the land" fall events which have a more direct connection to the property in question and arise out of the "zoning history" of the property. The Court of Appeals has held that this zoning history "can be taken into account in the uniqueness facet of the variance test" because "those past actions [of government officials] are the critical factors" which have helped to cause the "present predicament." *Monaco v. Board of Zoning Adjustment,* 407 A.2d 1091, 1097 and 1098 (D.C. 1979). *See also, Beins v. Board of Zoning Adjustment,* 572 A.2d 122, 129 (D.C. 1990).

In the instant case, the Applicant claims that her "present predicament" was caused largely by DCRA, and to a lesser extent by the Historic Preservation Office, both of which approved her plans. DCRA issued the second permit based on plans plainly showing the extra height, the fourth story, and the rear fire escape enclosure. When the DCRA inspector issued the Stop-Work Order for these specific problems, DCRA was, essentially, given a second chance to correct its error, which it failed to do, leaving the Applicant to complete the subject building in violation of the Zoning Regulations.

In *Monaco,* use and area variances were upheld based almost entirely on events extraneous to the land, including, most importantly, "past actions of zoning authorities" which, in that case, amounted to no more than "the zoning authorities' informal assurances." *Id.* at 1097 & 1101. In the instant case, there was much more than "informal assurances." There was the issuance of a building permit and the affirmative revocation of a Stop-Work Order based on that permit. The Applicant was entitled to, and did, rely on these actions of DCRA in completing her project. The Board concludes that the zoning history constitutes the uniqueness necessary to satisfy the first prong of the variance test.

The Applicant has now built her building and would encounter serious practical difficulties in trying to remove the extra story and/or the extra height in order to bring the building into compliance with the Zoning Regulations. If the top story or the extra 1.75 feet of height were removed, not only would the Applicant be forced to expend funds in demolishing part of what was just built, but many of the internal systems in the building, such as the HVAC and the sprinkler systems, would have to be re-configured, costing more labor and more money. Neither removal of the extra story nor removal of the extra height is economically or structurally practical. The Board therefore concludes that strict application of the Zoning Regulations would result in exceptional practical difficulties to the Applicant.

The 1.75 feet of extra height does not change the matter-of-right use of this residential building. It does not cause any adverse impact on the surrounding neighborhood, in which there are several other buildings of equal or possibly greater height. Nor does it pose any detriment to the public good. The Board concludes that granting the height variance requested here does not substantially impair the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

"Great Weight" to the ANC's and OP's recommendations

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC and to the recommendations made by the Office of Planning. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). ANC 1B recommended approval of both the special exception and the variance and the Board agrees with this recommendation.

OP recommended approval of the special exception, but denial of the variance. OP's recommendation of denial, however, was based partly on the fact that the Applicant's claimed uniqueness did not arise out of the property itself. The Board finds that this is too narrow an interpretation of the first prong of the variance test, as explained by the many Court of Appeals cases cited earlier. OP also based its recommendation of denial on its determination that granting the variance substantially impairs the intent of the zone plan and "could open the door for similar relief requests in the future." The Board is not persuaded that the zone plan is impaired and reiterates that its decisions are made on a case-by-case basis. Therefore, granting a variance here does not lead to the granting of any other variances. Each variance request must meet the 3-pronged test and is decided on its own facts.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for a special exception under § 223 from the lot occupancy requirements of § 403 applicable to the R-4 zone district and for a variance from the story and height requirements of § 400 applicable to the R-4 district. It is therefore **ORDERED** that the application is **GRANTED.**

VOTE: **4-1-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., John A. Mann, II, and Ruthanne G. Miller, to grant; Kevin L. Hildebrand, to deny.)

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

Each concurring Board member has approved the issuance of this Order granting the application.

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

FINAL DATE OF ORDER: MAR 0 4 2005

UNDER 11 DCMR 3125.9, "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 FOR THE BOARD OF ZONING ADJUSTMENT."

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 THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY

BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 17218

As Director of the Office of Zoning, I hereby certify and attest that on MAR 0 4 2005 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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