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September 20, 2005

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

Re: BZA Case No. 17358
2352-56-60 High Street, S.E. (Square 5799, Lot 976)

Legal Memorandum

Dear Mr. Griffis:

It is our view that Safe Haven, Inc. may renovate the structures in accordance with its plans without having to obtain a variance from the Board of Zoning Adjustment. The proposed project meets every test of matter-of-right development whether it is considered under Section 2002 (nonconforming uses within structures) or 2001 (nonconforming structures devoted to conforming uses.)

Section 2002 speaks to non-conforming uses within structures. Section 2002.3 provides as follows:

> A nonconforming use shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment or amendment of this title, or to another structure.

The non-conforming use is a 36 unit apartment house in an R-3 Zone District. When it was built, it conformed to the requirements of the then current zone designation of R-5-A. The current proposal is to renovate the building and reconfigure the apartments into smaller units resulting in 48 units. Since we are not expanding any of the living space but merely dividing it up differently, there is no "extension to portions of the structure not devoted to that nonconforming use." We are not *expanding* but, rather, *contracting* the residential use, because the smaller units will decrease the potential population from 120 to 90.

BZA
Case No.
Exhibit No.
Board of Zoning Adjustment
District of Columbia
CASE NO. 17358
EXHIBIT NO. 31

Section 2001 covers expansions of nonconforming structures. If this project were considered under that provision, the work proposed to be done meets the requirements for matter-of-right development. 2001.3(a) provides that enlargements may be made to the structure provided the structure shall conform to percentage of lot occupancy requirements. The site permits 40 per cent lot coverage. We are covering only 29 per cent. 2001.3 (b) provides that "the addition or enlargement shall (1) conform to use and structure requirements" (which it did when built) and (2) "neither increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined." Since there is no addition or extension of the structure, this provision is also satisfied.

In its report to the Board, OP quotes from § 2002.4 as follows:

> Ordinary repairs, alterations, or modernizations may be made to a structure or portion of a structure devoted to a nonconforming use. Structural alterations shall not be allowed, except those required by other municipal law or regulation provided, that structural alterations shall be permitted to a lawfully existing non-conforming flat or apartment house located within a Residence District.

OP concludes that "the proposed structural alterations to increase the number of apartment units are not required by municipal law or regulations and therefore a variance is needed." OP seems to ignore the last proviso which we believe is controlling here. The subject property is a "nonconforming apartment house" in a "residence district" and, therefore, structural alterations are allowed by § 2002.4.

Admittedly, by increasing the parking from 12 to 19 spaces, there is an expansion. However, it is not an expansion of the "structure". Moreover, provision of parking beyond what is required is not proscribed. Thus, if the applicable parking requirement is one space for each three residential units, the provision of three extra spaces is permitted. On the other hand, if the applicable requirement is one for each 600 square feet, as OP suggests, or even one per residential unit, the additional parking is permitted since it does not create a greater non-conformity. Rather, the additional parking brings the building more into conformity.

For these reasons, we urge the Board to dismiss this case on the grounds that the relief being sought is not required for zoning approval.

Yours very truly

Stephen N. Gell