DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

In re: 1231 Morse Street, Inc., Appellant,	)	BZA Appeal No. 17657

District of Columbia's Response to the Board's Inquiries

The District of Columbia Department of Consumer and Regulatory Affairs ("District" or "Appellee"), by and through Undersigned Counsel, responds to the Board of Zoning Adjustment's ("BZA") inquiries posed during the October 2, 2007 hearing and in support thereof so states:

Statement of Facts

In September 2005, the District issued a Building Permit to 1231 Morse Street, Inc. ("Morse Street') to build an addition to a single family dwelling converting the existing structure to an eleven unit apartment building. This structure was located in an R-4 district. In February 2006, the District issued an Emergency Demolition Permit to Morse Street in response to concerns of the building's structural integrity. Subsequent to Morse Street receiving the Emergency Demolition Permit and working on the structure, the entire single family dwelling was destroyed. After the single family dwelling was destroyed by an Act of God, accident or negligence, the District issued Stop Work Orders, Notice to Revoke Permits, and a Zoning Determination letter all of which served to prohibit continued conversion construction at the site.

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Summary of the Case

Morse Street appealed the Zoning Administrator's determination that pursuant to 11 D.C.M.R. § 330.5(c), the conversion of a single family dwelling into an eleven unit apartment building could not continue because the single family dwelling was destroyed. Due to the Zoning Administrator's determination that the conversion is prohibited, the District could not approve the building plans or issue building permits which would allow the continuation of this project.

During the course of the October 2, 2007 hearing on the Zoning Determination Letter appeal, this Board posed three questions to the parties and requested supplemental briefing on the issues. The questions posed are:

I. Whether Morse Street acquired a vested right to continue construction;

II. Whether there was a "rebuilding" of the destroyed single family dwelling; and

III. Whether proof of a landowner's "willfulness" destruction of a structure - subject to a grandfather clause - negates the right to continue conversion construction.

The District responds to each inquiry as follows:

I. Whether Morse Street Acquired A Vested Right To Continue Conversion Construction

Morse Street does not have a vested right to continue conversion construction because the 1958 grandfather status was lost when the previous structure - single family dwelling - was destroyed. District of Columbia Zoning Regulations specify that the R-4 district "is designed to include those areas now developed primarily with row dwellings" and it "shall not be an apartment house district as contemplated under general residence (R-5) districts." 11 DCMR §§ 330.1, 330.3 (R-5 districts are the most flexible of urban

residential districts allowing many types of buildings including apartment houses as a matter of right.) Furthermore, as the "primary purpose [of the R-4 district] is stabilization of remaining one-family dwellings" allowing Morse Street to continue conversion construction of an eleven unit apartment building when the required pre-1958 building does not in fact exist, is contrary to the zoning purpose and out of character with the area's residential development. Morse Street should not be allowed to build the eleven unit apartment building because this action ignores the Zoning Regulations for R-4 districts and essentially allows a multi-family dwelling in a single family dwelling community.

Although there is a general rule in zoning law that there is a vested right to build a structure if a builder incurs substantial expense after issuance of a building permit, this rule is only applicable in cases where there is a zoning ordinance change which would prohibit the landowner's intended use. *Wermager v. Cormorant Township Bd.*, 716 F.2d 1211 (8th Cir. 1983); *Relay Improvement Ass'n v. Sycamore Realty Co.*, 661 A.2d 182 (Md. 1995); *Board of Supervisors v. Cities Service Oil Co.*, 193 S.E.2d 1 (Va. 1972). Furthermore, the "vested rights" doctrine requires a landowner to "act in conformance" with the issued building or special use permit. *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P.3d 39 (Ariz. 2002). Additionally, as no legal authority exists in the District of Columbia on this specific issue - "vesting rights" when the Zoning Regulations have remained the same from the time of issuance of the Building Permit until the adverse

action taken by the District - this Board must enforce the Zoning Regulations as enacted. D.C. Code § 6-641.07(e).[1]

From the landmark case of *Euclid v. Ambler Realty Co.*, the Supreme Court has recognized that residential character of a neighborhood and its desirability as a place of detached residences are utterly destroyed by the construction of apartment houses. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). For this reason, comprehensive zoning plans incorporated as regulations like the one enacted in the District of Columbia, serve to regulate and restrict the location of apartment houses. Specifically, 11 DCMR § 330.5(c) regulates and *restricts* the construction of apartment buildings in the R-4 district. The zoning restriction specified in 11 DCMR § 330.5(c) allows construction of an apartment house in an R-4 district, as a matter of right, *only by converting a pre-1958 building*. The District's legislative body determined that maintaining the residential character and restricting unfettered development of apartment houses in the R-4 district would best be accomplished through conversion of pre-1958 buildings.[2] Hence when the pre-1958 building was destroyed, Morse Street lost the right to continue conversion construction as a matter of right and vesting of property rights in the building permit could not and did not occur.

In this case, the "vested rights" doctrine is not analogous because the Zoning Regulations have not changed as the regulations have consistently required the existence of a pre-1958 building for conversion construction to occur. This Zoning Regulation

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[1] Only the Zoning Commission has the authority to change Zoning Regulations – not this Board. *See* D.C. Code § 6-621.01(e).

[2] §§ 3104.1 and 3104.3 of the Zoning Regulations, effective May 12, 1958; as amended August 7, 1981; November 5, 1982; January 22, 1988; November 3, 1989; April 30, 1999; December 8, 2000; October 20, 2000; March 22, 2002 and September 14, 2007.

prohibiting construction of apartment buildings in R-4 districts is not new and Morse Street knew or should have known of this restriction. Additionally, the "vested rights" doctrine does not apply because Morse Street cannot "act in conformance" with the issued building permit because the permit required the pre-1958 building to exist for the conversion to conform to the approved building plans and building permits. Therefore, Morse Street does not have a vested interest in the authorized building permit or approved building plans and the Zoning Administrator was without the ability under District law to allow the continued conversion construction.

II. Whether There Was A "Rebuilding" Of The Destroyed Single Family Dwelling

Morse Street has not rebuilt the destroyed single family dwelling. Instead, the site is the equivalent of new construction due to the destruction of the single family dwelling by either an Act of God, accident or negligence. In fact, Morse Street does not seek to rebuild or reconstruct the pre-1958 building that was destroyed. Rather, Morse Street seeks to erect an eleven unit apartment building in the R-4 district by altering the approved building plans and building permits through in improper appeal before this Board,

Due to the destruction of the single family dwelling, whether by an Act of God, accident or negligence, Morse Street must seek special exception from this Board. 11 DCMR § 3104.1. Notwithstanding Morse Street's efforts to usurp the process to erect an apartment building in an R-4 district, the Zoning Regulations do not allow a rebuilt or reconstructed structure to receive pre-1958 grandfather clause treatment. 11 DCMR § 330.5(c)("the conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by §§ 401.3 and 403.2.")

A determination as to whether reconstruction or rebuilding of a structure is permissible is dependent on particular provisions of the applicable zoning ordinances. *Am. Jur. 2d, Zoning and Planning* § 205. Although the District is silent on this novel issue, in other jurisdictions it is not a novel issue. In these cases, a court first determines the legal status of the structure. *State ex rel. Covenant Harbor Bible Camp of Central Conference of Evangelical Mission Covenant Church of America v. Steinke*, 96 N.W.2d 356 (Wis. 1959). When a court is determining whether an owner is allowed or prohibited from building a structure, or in this case converting a structure, the Court always starts its analysis with whether it is a "nonconforming structure" or structure devoted to a "nonconforming use." *Id.*; *Fidelity Trust Co. v. Dowing*, 68 N.E.2d 789 (Ind. 1946); *Cole v. Battle Creek,* 298 N.W. 466 (Mich. 1941). District of Columbia law defines a nonconforming structure as:

> [A] structure, lawfully existing at the time this title or any amendment to this title became effective, that does not conform to all provisions of this title or such amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements.

11 DCMR § 199. District of Columbia law defines nonconforming use as:

> any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective, that does not conform to the use provisions for the district in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a

> conforming use, subject to the further provisions of §§ 3104.2 and 3104.3.

Id.

Even if Morse Street constructed a building to replace the destroyed pre-1958 single family dwelling, the grandfather status allowing conversion is destroyed. *Service Oil Co. v. Rhodus*, 500 P.2d 807 (Colo. 1972). In *Service Oil* the court held that the effect of a casualty which substantially destroys a nonconforming structure is to sever the improvements from the real estate. *Id.* Thus, if the owner of a nonconforming use suffers the destruction of his improvements, he becomes the owner of unimproved property, which may be restricted as to use without a denial of due process. *Id.* The analysis is the same for Morse Street's attempt to build a structure not allowed as a matter of right in an R-4 district. Morse Street's grandfather status which permitted the conversion of the pre-1958 single family dwelling ended with the casualty of the building. The conversion construction cannot be authorized by the Zoning Administrator because the Zoning Regulations prohibit building an apartment house in a R-4 district without conversion of a pre-1958 building.

In this case, the pre-1958 single family dwelling that was destroyed by either an Act of God, accident or negligence, was neither a nonconforming structure nor a structure devoted to a nonconforming use. It was a single family dwelling which is allowed as a matter of right in an R-4 district. Therefore, the jurisprudence which provides the general rules and analysis for reconstruction and rebuilding is not applicable here because the destroyed single family dwelling was a conforming structure allowed as a matter of right in an R-4 district and Morse Street is not seeking to rebuild the original structure for use

as a single family dwelling. Therefore, this Board should not allow Morse Street to misconstrue the legal authority allowing rebuilding or reconstruction.

III. Whether Proof Of A Landowner's "Willfulness" Destruction Of A Structure - Subject To A Grandfather Clause - Negates The Right To Continue Conversion Construction

The District is not required to prove willful destruction of the single family dwelling to negate the right to continue conversion construction. Willfulness - similar to intent - is more closely akin to criminal law and not contemplated in the Zoning Regulations.

Courts analyze willfulness similar to voluntary destruction under the confines of nonconforming uses and nonconforming structures. *Bornscheuer v. Corbett*, 6 A.D. 2d 835 (N.Y. 1958) (tearing down of a hedge and wire fence is an abandonment of rights to maintenance thereof and erection and maintenance of a subsequent wood fence may not be considered as a continuance of the hedge and wire fence); *Sitgreaves v. Board of Adjustment of Town of Nutley*, 54 A.2d 451 (N.J. 1947) (owner may only restore original building where nonconforming use existed and may not enlarge without express permission from appropriate authorities because the spirit of the Zoning Act is to restrict rather than increase any nonconforming use). Under the courts' general analyses of voluntary destruction cases for nonconforming uses and nonconforming structures, landowners lose the right to continue their projects because "the spirit of zoning is to restrict rather than increase a nonconforming use and to eliminate such uses as speedily as possible." *Rathkopf, Law of Zoning and Planning* (1956 Ed.) Vol. 2, p. 75. Similarly, courts have held that in the case of accidental destruction, zoning provisions are construed against landowners when the landowner's actions seek to change, extend or

increase rights. *Moffatt v. Forrest City*, 350 S.W.2d 327 (Ark. 1961); *Circerella, Inc. v. Jerusalem Tp. Bd. of Zoning Appeals*, 392 N.E.2d 574 (Ohio 1978). The landowner's right to restore or reconstruct is preserved only when the landowner seeks to return to the original use or structure. *Id.* That is not the case here as Morse Street seeks to build an apartment building – not a single family dwelling.

Even though the District does not need to prove willfulness or intent to destroy the pre-1958 single family dwelling to negate the right to continue conversion construction, the fact remains that the building's walls collapsed after repair and demolition work performed by Morse Street. So whether it was an Act of God, an accident or negligence, the entire structure was destroyed and now Morse Street cannot complete an "addition." Also, notwithstanding the absence of proof of willfulness on the part of Morse Street with the destruction of the pre-1958 building, this project should not continue because Morse Street does not seek to restore or reconstruct the pre-1958 building. The construction plans of Morse Street are more akin to those landowners who seek to "change, extend or increase rights" and as such the applicable zoning provisions in this matter should be construed against Morse Street and in favor of the District as the District seeks to "stabilize the remaining one-family dwellings" in R-4 districts. *See* 11 DCMR § 330.2.

In sum, it would be against public policy to grant Morse Street's remedy because it would encourage unethical developers to allow for the destruction of a piece of property knowing they can avoid Zoning Regulation restrictions by seeking relief from this Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing District of Columbia's Response to Board's Inquiries was mailed and electronically served this 12th day of October 2007, to the following:

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I hereby certify that on October 12, 2007 a copy of the foregoing District of Columbia's Response to the Board's Inquiry were personal served and sent first class mail William Shelton, Chairperson, ANC 5B at 1437 Montana Avenue, N.E., Suite 5, Washington, D.C. 20018 and Commissioner Elise Bernard, ANC 5B08, at 1220 Florida Avenue, N.E., Washington, D.C. 20002.

Lauren N. Goss