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**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

**In Re: Application of Minshall
Stewart Properties, LLC
Square 83, Lots 883 and 884 (Record Lot 83)
2175 K Street, NW
Washington, DC 20037**

BZA Case No. 17594

**MOTION TO ADDRESS THE BOARD'S JURISDICTION AND
DISMISS THE APPLICATION ON THE BASIS THAT THE BOARD
NO LONGER HAS JURISDICTION**

Minshall Stewart Properties, LLC (the "Applicant"), through counsel, respectfully requests that the Board address as a preliminary matter its jurisdiction to hear the above-referenced case, and for the reasons discussed below, dismiss the application. Specifically, the Applicant submits that the Board no longer has jurisdiction for the following reasons:

1. The design of the building has been revised to eliminate the need for the variance relief requested from the loading requirements, and the Applicant has determined that relief from the court width requirement is no longer required.
2. Pursuant to 11 DCMR § 1709.20, the building is a single "receiving building" and, therefore, no forty-five degree setback is required, thus eliminating the need for variance relief.

Accordingly, because variance relief is no longer required, the Applicant requests that the application be dismissed as moot.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17667

EXHIBIT NO. 6

I. FACTUAL BACKGROUND

The Applicant intends to redevelop the office structure located at 2175 K Street, NW, Lots 883 and 884 (Record Lot 83) in Square 73 through the acquisition of Transferable Development Rights (“TDRs”). In December 2006, the Applicant filed an application for variance relief from the following requirements: the required forty-five degree setback (§ 1709.20), the width of the court (§ 776.1), and the loading requirements (§ 2201). Since that time, design modifications have eliminated the need for the requested variance relief from the loading requirements, and the Applicant has determined that relief from the court width requirement is no longer necessary. As discussed below, based on the plain language of 11 DCMR § 1709.20 (“Section 1709.20”) and further research on the subject property, the Applicant believes that relief from the forty-five degree setback requirement is also not necessary.

A. *The Structures Were Construed as One Building by the BZA and Zoning Administrator At the Time of Zoning and Permit Approval.*

The subject property involves one building consisting of two uses: 2175 K Street, NW (the “Office Structure”) and 1099 22nd Street, NW (the “Residential Structure”) (together, the “Building”). The Office Structure is zoned C-3-C and the Residential Structure is zoned R-5-E. Despite the fact that the structures are separated by a zone boundary line, the Residential Structure and the Office Structure are properly considered as one building as that term is defined by the Zoning Regulations. This was confirmed at the time of zoning and permitting approval both by this Board and the Office of the Zoning Administrator, and the structures continue to exist as one building today.

The Commercial Structure and Residential Structure were jointly approved by the Board of Zoning Adjustment (“BZA”) in BZA Order No. 13148 for development as a

single building. See BZA Order No. 13148, dated May 19, 1980 (attached as Exhibit A). The BZA found that the distinct uses required separate elevator cores and roof structures, and accordingly granted special exception approval for separate roof structures of unequal height so that the apartment and office uses could “function as separate and distinct entities for purposes of security, convenience, and energy conservation.” Id. at 2 (FOF 8). The BZA also found that a single vehicular entrance off L Street (in the R-5-E portion of the property) was necessary given the grade change and inconvenience of a K Street entrance, and granted a use variance in order to allow for the office parking to be accessed through the residentially-zoned portion of the structure.

The Zoning Computation Sheet prepared by the Office of the Zoning Administrator prior to the issuance of a building permit also indicates that the structures were evaluated together as one building. See Zoning Computation Sheet, File No. 80-453 (attached as Exhibit B). As such, they share one rear yard and one open court as well as loading and parking, and the building’s lot occupancy and gross floor area are cumulatively considered. Most importantly, the Computation Sheet indicates that the structures were measured together as one building, with a measuring point from the Office Structure’s elevation, as indicated by the calculations at the bottom of the Computation Sheet.

B. The Structures Continue to Exist as One Building.

The structures continue to exist today as one building. An above-ground connection exists between the Office Structure and Residential Structure off the loading area. Moreover, an elaborate easement agreement between the two structures indicates that certain building systems were intended to be shared by both the Residential and

Office Structures.¹ In addition, a covenant between the original developers and the District, dated Sept. 19, 1979, governed certain aspects of the site's development, including in particular the allocation of parking spaces.² This covenant, however, expired by its own terms after twenty-five years (in 2004), and no longer applies to the property.

Most importantly, the two structures are still located on one record lot, Lot 83. The BZA has found that the purpose of the record lot system is to "implement the orderly development of land" and "this system is the ground floor on which the specific land use controls of the Zoning Regulations are built." See BZA Application No. 14621, Mar. 10, 1989, at 3 (FOF 12) (quoting Memorandum from Louis P. Robbins to James J. Fahey, dated April 7, 1977) (both attached as Exhibit C). As a result, absent special exception approval from the Board, multiple buildings are not permitted on a single record lot. Here, the BZA did not consider a request for relief from building lot control at the time of initial approval in 1980, and no such request has been filed since that time. The Building continues to exist as one building on a single record lot, Lot 83.

Furthermore, the creation of separate Assessment and Taxation Lots ("A&T lots") 883 and 884 for the Office Structure do not affect the underlying record lot. The BZA has found that A&T lots "serve no land control purpose, but are merely ownership descriptions for assessment and taxation purposes." Id. Accordingly, the Board has concluded that the creation of A&T lots do not affect a lot's status as a record lot. Id. at 3-4. Here, the creation of separate A&T lots to govern ownership, assessment, and

¹ These easement rights include (1) mutual easements for footings and underpinnings and (2) an easement for electric service that permits the Residential Structure to construct and maintain, in the Office Structure's Electric Room, all machinery required for the transmission of electricity from the public vault space beneath K Street to the Residential Structure's Electric Room, including a right of access for wires and cables across the second cellar of the Office Structure to the Office Structure's Electric Room.

² The covenant ensured a 1:1 ratio of parking spaces for the condominium, and restricted the Office Structure's allocation to no more than the amount allowable under the Zoning Regulations.

taxation of the office structure is completely consistent with the underlying history of the Building as one building for zoning purposes, yet separate structures for purposes of “security, convenience, and energy conservation.” BZA Application No. 13148 at 2 (FOF 8) (emphasis added).

C. If the Structures Were Separate Buildings, Then the Height of the Residential Building Would Violate the 1910 Height Act and the Zoning Regulations

Both the R-5-E and C-3-C zone districts permit a maximum height of 90 feet as a matter-of-right. Buildings located in the New Downtown Receiving Zone may achieve the maximum height permitted under the 1910 Height Act through the purchase of TDRs. Here, the width of K Street would allow the C-3-C zoned portion of the Building (i.e. the Office Structure) to achieve a height of 130 feet.

As indicated by the Computation Sheet, the building height was measured from the midpoint of the Office Structure’s K Street frontage at elevation 62.82, and the Building has a measured height of 90 feet. The 90-foot height, as measured from K Street, applies to both the Office and Residential components. In other words, the Residential Structure’s 90-foot height is determined from the Office Structure’s K Street frontage.

But for the fact that the two structures are one building, each structure’s height would need to be calculated separately. Specifically, the Residential Structure’s measuring point would need to be either along its 22nd Street or L Street frontage. The BZA previously found that the site slopes downward approximately ten feet from K Street to its L Street frontage. See BZA Application No. 13148 at 3 (FOF 20). Furthermore, the Computation Sheet indicates that the residential frontage along 22nd

Street is located at elevation 56.54 (i.e. more than 6 feet below the office frontage on K Street). Therefore, were the Residential Structure measured from the midpoint of either its 22nd Street or its L Street frontage, the structure would exceed the 90-foot height permitted as in the R-5-E zone and fail to comply with the Zoning Regulations. Appropriate zoning enforcement action should be instituted in that situation.

II. SECTION 1709.20 DOES NOT APPLY TO THE BUILDING BASED ON THE PLAIN LANGUAGE OF THE REGULATION, BECAUSE THE STRUCTURES ARE ONE BUILDING FOR PURPOSES OF ZONING

Because the structures are one building, the building must be considered a single “receiving building” under § 1709.20. Section 1709.20 provides:

If the height of a receiving building exceeds the height that the provisions of this title allow as a matter of right for a building located on an abutting lot, including a lot that is separated from the receiving lot by an alley, no part of the receiving building shall project above a plane at a forty-five degree (45) angle from a line that is as follows:

- (a) Directly above the zone district boundary line between such abutting lot and receiving lot; and
- (b) Above such boundary line by the distance of the matter-of-right height that this title allows for such abutting lot.

Under the above interpretation, the Building is one “receiving building” on one record lot and the Office Structure is not required to set back at a forty-five degree angle from the A&T lot line that represents the zone boundary between the R-5-E and C-3-C portions of the Building. Because it is one building for purposes of zoning, the setback otherwise mandated by Section 1709.20 does not apply in this case to the Office Structure vis a vis the Residential Structure and, accordingly, relief from § 1709.20 is not required.

The Applicant has sought confirmation from the Zoning Administrator that § 1709.20 does not apply to the Building, but has not been able to obtain such a ruling at this time. Therefore, we request that the Board determine, as a preliminary matter,

whether Section 1709.20 applies to the Property, in order to ascertain whether the Board has jurisdiction to hear the application.

III. BECAUSE THERE IS NO NEED FOR VARIANCE RELIEF, THE BZA NO LONGER HAS JURISDICTION IN THIS MATTER AND SHOULD DISMISS THE APPLICATION AS MOOT

The Board is an administrative agency created by the Zoning Enabling Act, and “[t]he powers of the BZA are defined by statute and regulation.” *President & Dirs. of Georgetown College v. D.C. Bd. of Zoning Adjustment*, 837 A.2d 58, 68 (D.C. 2003) (citation omitted). The D.C. Court of Appeals has observed that “[a]n administrative agency is a creature of statute and may not act in excess of its statutory authority.” 837 A.2d at 68 (citation omitted). Further, the Zoning Enabling Act allows both the Zoning Commission and BZA to adopt rules of procedure that will govern the organization and operation of the BZA:

The Zoning Commission may provide and specify in its zoning regulations general rules to govern the organization and procedure of the Board of Adjustment not inconsistent with the provisions of this subchapter, and the Board of Adjustment may adopt supplemental rules of procedure which shall be subject to the approval of the Zoning Commission after public hearing thereon as provided in § 6-641.03.

D.C. Code § 6-641.07(c).

Thus, the powers and operation of the BZA are circumscribed by both the provisions of the Zoning Enabling Act and the Zoning Regulations. Pursuant to the Zoning Enabling Act, the BZA’s powers are limited to (1) hear and decide appeals, (2) hear and decide requests for special exceptions, and (3) authorize, upon an appeal relating to property, a variance from strict application of the zoning regulations. D.C. Code § 6-641.07(g). Section 3100.1 of the Zoning Regulations reaffirms the BZA’s original

jurisdiction to grant variances under Section 3100.3 and special exceptions under Section 3100.4. (Section 3100.2 affirms the BZA's appellate jurisdiction.)

Therefore, it is clear from the plain text of both the Zoning Regulations and the Zoning Act that, in order to trigger the limited original jurisdiction of the BZA, the applicant must either make a request for a special exception based on the specific conditions of the Regulations or request a variance from the strict application of the Regulations based on the standards outlined in Section 3100.3. Conversely, if an applicant no longer requires a variance from strict application of the Regulations because the project conforms with the requirements of the Regulations, and the applicant has not requested any other relief, then the BZA has no original jurisdiction. The BZA has repeatedly ruled that a case is moot when the legal issues presented are no longer "live" or when the parties lack a legally cognizable interest. See BZA Appeal No. 16984 at 3; BZA Application No. 17337 at 4. If the applicant no longer requires any relief, then there are no longer any "live" legal issues and the Board should dismiss the case as moot.

Here, the application turns on whether Section 1709.20 applies to the building at issue. The Board must determine whether Section 1709.20 applies as a threshold matter, in order to ascertain whether it even has jurisdiction over the application. If the BZA determines that the section does not apply, then there no longer exist any areas of requested relief for the Board to review and approve. Accordingly, in that instance, the BZA should dismiss the matter as moot, because there are no longer any "live" legal issues for the Board's consideration.³

³ Alternately, a finding that the section does apply would affirm the Board's jurisdiction, because it would then be able to grant or deny relief from that provision of the Regulations.

IV. CONSIDERATION OF THE MOTION AND DISMISSAL OF THE APPLICATION WILL NOT PREJUDICE ANY PARTY TO THE APPLICATION

In general, the question of whether an administrative body has jurisdiction can be raised at any time, and the Board's consideration of this motion as a preliminary matter and dismissal of the application will not prejudice any party or potential party to this application. First, this motion is being filed seven days prior to the date of the public hearing, which allows all parties and potential parties seven days to prepare and file a timely response to the motion. In order to ensure all interested parties have an opportunity to file a timely response, we have served a copy of this motion by hand or electronic mail on the Office of Planning, the ANC and all individuals who have filed for party status to this Application.⁴ Accordingly, all parties and potential parties will have an opportunity to be heard before the Board on this motion.

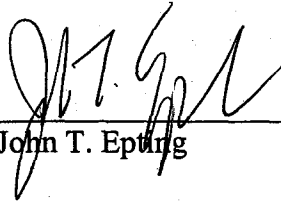
Second, none of the potential parties will be prejudiced regardless of the course of action taken by the Board. If the Board agrees with the Applicant that the Board has no jurisdiction under § 3100.1 (or we obtain a favorable Zoning Administrator's ruling before the hearing) then there will be no hearing before the Board under § 3100.1, but the parties would retain the right to pursue appropriate action under the Board's appellate jurisdiction, § 3100.2. The parties and potential parties would still retain an opportunity to be heard on the merits, and this Board would preside over the determination of the appeal. Alternately, if this motion to dismiss is denied by the Board, we are prepared to proceed with the case on the merits and the parties remain in the same position as before, if the motion had not been filed.

⁴ Where appropriate, we have served the motion on identified counsel for prospective parties.

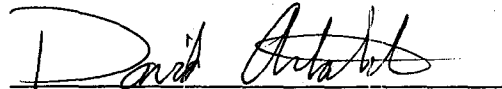
IV. CONCLUSION

For the reasons set forth above Section 1709.20 does not apply to Lot 83, Square 73 because the two structures are one "receiving building" as defined in the section. The Applicant no longer requires variance relief from the strict application of the Zoning Regulations, thereby eliminating the Board's original jurisdiction over the application, and we respectfully request that the Board dismiss the application as moot.

Respectfully submitted,



John T. Epling



David Avitabile

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2007, a copy of the foregoing Motion was served by hand to the following parties as well as individuals and associations that have requested party status (or, when appropriate, identified counsel for those individuals or associations):

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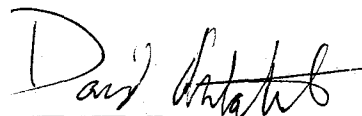
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David M. Avitabile

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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Application No. 13148, of Thaddeus A. Lindner et al., pursuant to Paragraph 8207.11 and Sub-section 8207.2 of the Zoning Regulations, for a variance from the use provisions of the R-5-D District (Sub-section 3105.3) to allow access to a parking garage serving an office building in a C-3-B District and a special exception under Sub-section 3308.2 to allow two roof structures on the same roof in an R-5-D and C-3-B Districts at the premises 1015 - 22nd Street, N.W. (Square 73, Lot 81 and alley proposed to be closed).

HEARING DATE: January 23, 1980

DECISION DATE: February 2, 1980

FINDINGS OF FACT:

1. The application was amended at the public hearing to include a special exception under Paragraph 3308.2 to permit roof structures with enclosing walls of unequal height.
2. The subject property is located on the east side of 22nd Street, N.W., between K and L Streets and is known as 1015 - 22nd Street, N.W. The K Street frontage is in a C-3-B District and the L Street frontage is in an R-5-D District.
3. The subject lot is approximately 33,113.26 square feet in land area. A service lane runs in front of the K Street frontage of the subject site.
4. The subject site is presently utilized as a parking lot.
5. The applicants propose to construct an office building, with office and/or retail uses on the first floor and first cellar, on that portion of the site presently zoned C-3-B. The R-5-D portion of the site will be developed as a condominium as part of the same project as the office building.
6. The applicants have applied for a closing of a portion of the public alley in Square 73, (S.O. No. 77-309) to effectuate the proposed development.

7. In connection with the alley closing application, the applicants have reached an agreement with the District of Columbia signing on behalf of the ANC-2A Commissioners regarding development of the subject site. A covenant has been executed by all parties which restricts development of the site and the number of parking spaces provided in a manner acceptable to the ANC-2A Commissioners. The number of residential parking spaces on the site is to be one for each dwelling unit or sixty-seven spaces and the number of commercial spaces is to be limited to the minimum number required, or fifty-six spaces.

8. The apartment and office uses of the project are designed to function as separate and distinct entities for purposes of security, convenience and energy conservation.

9. The applicant's architect testified that a separate elevator core is required for efficient servicing of the separate residential and office/retail functions of the proposed structure.

10. The architect testified that separate penthouses are required to enclose the lift mechanisms for each elevator core.

11. While it would be possible to connect each of these separate penthouses by a wall twenty feet in length so as to create a single roof structure in compliance with Section 3308.12, such a solution would involve additional design cost and complexity and detract from the use of the proposed roof garden areas of several of the apartment units.

12. The separate uses within the proposed structure have different floor to floor levels at the top floor.

13. The roof structure for the commercial portion of the project is of conventional design with height being dictated by the elevators. Applicants intend for this portion of the roof structure to be 18.5 feet in height.

14. Applicants propose that the roof structure for the residential portion of the structure be thirteen feet eight inches in height, or four feet ten inches lower than that for the commercial area.

15. The architect testified that the residential elevator core area is lower than the commercial area because the duplex units in the apartment structure do not require elevator service to the top floor.

16. The architect testified that the mechanical equipment to be located on the roof for the apartment building takes up far less space than that for the commercial portion because of the individual servicing of the apartment units for utilities.

17. The proposed height of the roof structure in the residential portion of the structure is suggested by the dimensions of the accessways to the roof gardens. Access to the roof garden areas from the apartments below requires an enclosed roof structure for each access stair.

18. The architect testified that standardization of the height of the roof structure in the residential portion of the project with that in the commercial portion would involve the addition of approximately five feet of unnecessary height or dead space to the residential elevator core. Additionally, approximately ten feet of unnecessary wall would have to be added to the covered walkways, which would have a negative aesthetic impact and increase shadows to the detriment of the proposed roof garden use.

19. The applicants' proposal for more than one roof structure and roof structures of unequal height will not substantially restrict the light and air or otherwise adversely affect the surrounding uses.

20. The site has a difference in elevation between its K Street and L Street frontages of approximately ten feet.

21. The grade change and inconvenience of ingress and egress from the service road at the K Street frontage makes access to the proposed parking garage from L Street most practical.

22. Single access to the parking garage from L Street is also necessary to allow for better security control of the building.

23. The architect testified that garage access from a point other than the lower grade point at L Street would impose needless design difficulties and a loss of rentable area.

24. The proposed access from L Street to the commercially zoned portion of the parking garage is not inconsistent with existing surrounding land uses and is more compatible with such uses than requiring access either from 22nd Street, K Street or the public alley at the rear of the site.

25. Advisory Neighborhood Commission - 2A made no recommendation on the application.

26. There was no opposition to the application.

27. At the public hearing the Board requested that an alternative roof structure plan be submitted for its consideration prior to the public meeting.

28. The applicants submitted an alternative roof structure plan approved by the Board at its February 6, 1980 public meeting and marked as Exhibit No. 25 of the record.

CONCLUSIONS OF LAW:

Based on the record and the findings of fact contained herein, the Board concludes that due to conditions relating to the building, the size of the building lot, architectural design and the type uses to which the site will be devoted, full compliance with Section 3308.2 of the Zoning Regulations, relating to the number of roof structures, would be unduly restrictive and unreasonable. Similarly, strict compliance with Section 3308.12 relating to uniformity of roof structure height would involve needless additional expense and have a negative aesthetic impact. The Board concludes that the applicants have basically satisfied the requirements of Sub-section 3308.2 and Paragraph 3308.12 of the Zoning Regulations and that the special exception can be granted as in harmony with the general purpose and intent of the Zoning Regulations and Maps and will not tend to affect adversely the use of neighboring property in accordance with said Regulations and Maps.

As to the requested variance, the applicant must establish a hardship inherent in the property itself. The Board concludes that a combination of factors affecting the subject site, including its split zoning, frontage on a service lane, and frontages on both L and K Streets at a grade differential of ten feet, constitute an extraordinary or exceptional situation or condition affecting the subject site. Strict application of the Zoning Regulations proscribing access to the commercially zoned and utilized portion of the garage from the R-5-D District would impose peculiar practical design and security difficulties upon applicants. The requested relief will not adversely affect surrounding land uses. The Board concludes that the applicants have met the prerequisites for variance relief, and that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zoning plan. Accordingly, it is ORDERED that the application is GRANTED SUBJECT to the CONDITION that the ROOF STRUCTURE PLANS shall be as APPROVED by the Board and Marked as Exhibit No. 25 OF THE RECORD.

VOTE: 4-1 (Theodore F. Mariani, Charles R. Norris, Connie Fortune
and Leonard L. McCants to GRANT; William F. McIntosh
opposed as to the roof structures ONLY).

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

ATTESTED BY: Steven E. Sher
STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: 19 MAY 1980

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS "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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER
THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN
APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS
FILED WITH THE DEPARTMENT OF LICENSES, INVESTIGATIONS, AND INSPECTIONS

LI-2-3
5/1/58DISTRICT OF COLUMBIA GOVERNMENT
DEPARTMENT OF LICENSES AND INSPECTIONS
ZONING DIVISION

80-453

FILE NO.....

ZONING COMPUTATION SHEET - COMMERCIAL USE

1. Owner K-22 ASSOCIATES		2. Location 1001-22 ND ST. N.W.		3. Square 73
4. Lot 83	5. Zone R-5-D/ C-3-C	6. Use of Building or Structure OFFICE BLDG APT. HOUSE	7. New ☒ Addition to ☐ Alter existing ☐	
8. Type of Structure Conforming B2A Nonconforming	9. Use of Structure Conforming ☒ Nonconforming	10. Width of Adjacent Streets L ST = 90' K ST = 147.67' 22 ND ST = 90'	11. Width of Adjacent Alleys 4' 5' 30'	
12. Width of Restriction Lines NONE	13. Application of Act of June 1, 1910 Height of Bldg. 167.67 Excess Height NONE	14. Type of Lot Corner ☐ Through ☒ Triangular ☐ Alley ☐ Interior ☐	15. Number of Dwelling Units 67	
16. Lot Area Required 33,813.86 Provided	17. Lot Occupancy C 100% = 33,113.26 Allowed 75% RES = 11,815.5 RES 12,425.26 COMM. NONE PROVIDED	18. Gross Floor Area TOTAL = 203,898.41 Total COMM = 94,340.5 RES = 109,557.84 TOTAL = 203,898.35	19. Cellar Area Total	20. Floor Area-F 6.0 RES = 110.1 6.5 COMM = 95.50 Allowed RES. 109.58 Provided COMM. 94.34 TOTAL = 203.82
21. Number of Residential Parking Spaces Required - 17 Provided - 67 Open Area	22. Number of Commercial Parking Spaces Required - 56 Provided - 56 Open Area	23. Number of Loading Berths Required - 2 Provided - 2 1 @ 12' x 45' 1 @ 15' x 20'		
24. Height of Bldg. Allowed 90' to first floor 90' to high point of roof 90' Grade, to first floor - 1' to ceiling top story - 1' to high point of roof - 1'	25. Number of Stories Allowed N/P 11- RES Provided 8- OFFICE Basement - Cellar -	27. Required / Provided Rear Yard Depth - 25.14 - 45' Side Yard Width - NONE - NONE Open Court Width - 10' - 39.42 Closed Court Width Closed Court Area		

REMARKS:

CORRECTIONS.

(Consider Alley Comm. use)

(1) ~~SECTION 201-202 TO BE DELETED WITH REQUIREMENT OF ZONING REGULATIONS~~ JAN 21 1981

(2) ~~SOME OF THE WHEEL CHAIRS ARE NOT PROTECTED BY THE SIDE PARKING SPACES~~ (TWO OF THE SPACES ARE USED FOR PARKING AND ALLEY CLOSING)

~~THE FOLLOWING TOPO APP. 7-16-80~~

~~NO CORRECTIONS ON ALLEY FRONT~~
BLIND SIGN CENTER OF ALLEY

STRUCTURE APPROVALS REFER TO EXHIBIT A* 1314.8 (18.5' OFFICE, AND 13.67' FOR RES.)

52.82 FF OFFICE 62.82
62.82 FF RES 56.54

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 14621 of the Portsmouth Construction Corporation, pursuant to Sections 3200.2 and 3201.2 of the Zoning Regulations, from a decision of the Zoning Administrator dated April 1, 1987 which provides that the subject premises must be subdivided in compliance with Section 101.6 to permit construction of a single family dwelling in an R-1-B District at premises 3227 Livingston Street, N.W. (Square 2024, Lot 24).

HEARING DATE: July 8, 1987
DECISION DATE: July 8, 1987 (Bench Decision)

FINDINGS OF FACT:

1. The subject site is located on Livingston Street, N.W. with Morrison Street, N.W. to the north, 33rd Street to the west, and Nebraska Avenue, to the south and east. The property is located in an R-1-B District.

2. Lot 24 comprises 5,300 sq. feet and is unimproved; the lot has never been developed. Lot 24 was created and recorded as a lot of record on August 31, 1911 in Book 42, Page 21 in the Office of the Surveyor of the District of Columbia. The property is 40 feet wide, as are the majority of the lots in the vicinity. The remainder of the lots in Square 2024, and adjacent Square 2023 and 2025 have been fully developed with single family dwellings.

3. The Appellant proposes to develop the property as a single family residence.

4. Lot 24 and the identical Lot 25, just to the west, were owned by the same owner for 40 years. The owner constructed a house on Lot 25 in 1941. Lot 24 was purchased by Mr. Allen in 1945 and kept vacant with the ultimate intent to develop it with a single family dwelling.

5. The subject record lot is compatible in square footage and lot width with the majority of other lots in the vicinity and complies with the 80 percent rule for pre-1958 lots, as specified in Section 401.2. Almost every lot in Square 2024 and adjacent squares were developed with single family dwellings prior to 1958 Zoning Regulations.

6. In September 1981, the prior owner of the property applied for a single assessment and taxation (A & T) lot to combine the record lots (Lots 25 and 25) solely for tax assessment purposes. A & T Lot 828 was created. The prior owner testified that he was assured that the establishment of a tax lot would not affect his right to use or develop the properties.

7. The prior owner testified that when he decided to sell the properties separately, the lots were divided into two tax lots (Lots 830 (24) and 825 (25)). The boundaries of the lots were not changed in any manner and the lot width of each lot remained 40 feet wide.

8. The Appellant and the prior owner of the property testified that neither took any actions to change the property's status as a record lot. The Appellant purchased the property in reliance that it was a record lot. An official building plat was issued by the Surveyor's Office and a building permit was issued by the Department of Consumer and Regulatory Affairs (DCRA). The Appellant began in good faith to implement his plans in reliance on the city's actions.

9. The Assistant Surveyor of the District of Columbia confirmed through certification of official records of the Office of the Surveyor that Lot 24 has been and continues to be a validly existing lot of record (Book 202, Page 49).

10. The D.C. Department of Finance and Revenue continues to appraise and tax the lot as a buildable lot.

11. The Zoning Administrator denied the applicant's building permit application. The Zoning Administrator determined that based upon the actions of the previous owner in obtaining lots for assessment and taxation purposes, the provisions of Section 401.2 were no longer applicable and variance relief was necessary from the lot width requirements of Section 401.3 and the subdivision requirements of Section 101.6.

12. The Board notes a D.C. Corporation Counsel Opinion, Creation of Assessment and Taxation Lots within Record Lots, April 6, 1977 memorandum to James J. Fahey, Acting Chief, Zoning Regulation Division, Department of Housing and Community Development, from Louis P. Robbins, Principal Deputy Corporation Counsel. The Corporation Counsel Opinion provides that:

This is to confirm my oral advice to you that it is legally permissible to create assessment and taxation Lots (A & T Lots) within a recorded lot.

The two land description systems relevant hereto are "lots of record" and "A & T lots". Each has its own purpose and function; each has its own basis in law.*** The purpose and intent of the record lot system is to implement the orderly development of land by providing for specific subdivision controls. This system is the ground floor on which the specific land use controls of the Zoning Regulations are built.*** Thus, it is clear that the record lot system and the Zoning Regulations are integral parts of a regulatory scheme to control development in the District of Columbia and ownership of land plays no part in this scheme. A & T lots, on the other hand, serve no land control purpose, but are merely ownership descriptions for assessment and taxation purposes.

Section 1302.2 [101.6] must be viewed in the context of the two lot designation systems; the A & T lot which is created for assessment and taxation purposes and only serves that function and the record lot which is created as the cornerstone of land development control.*** The creation of an A & T lot is not a "division", it is merely the recognition of ownership of a particular piece of real property for assessment and taxation purposes as required by law. Corporation Counsel Opinion, at 1-3.

13. The property owners adjacent to Lot 24, at 3221 Livingston (Lot 69) and 3229 Livingston (Lot 25), intervened in this proceeding in support of the Zoning Administrator's ruling.

14. The Board finds that the intervenors to this proceeding and the Appellant have reached an agreement as to issues related to the development of a single family dwelling for Lot 24.

15. By letter dated May 13, 1987 and reiterated by a letter dated June 29, 1987, Advisory Neighborhood Commission (ANC) 3G stated that it supported the findings of the Zoning Administrator that Lot 24 was not a building lot. The Board finds that the ANC report provided no basis for this finding.

CONCLUSIONS OF LAW AND OPINION

Based on the foregoing Findings of Fact and the evidence of record, the Board concludes that the Appellant's have demonstrated that the Zoning Administrator's decision was in error. The Board concludes that the creation of an assessment and taxation lot, without physical changes to the boundaries of a lot, does not affect in any way a lot's

status as a record lot. The Board concludes that the system of record lots as found in the Office of the Surveyor of the District of Columbia controls for zoning purposes.

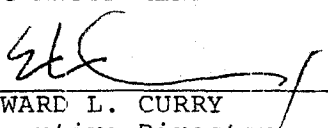
The Board concludes that the owners of Lot 24 have taken no actions to change the status of (Lot 24) as a record lot. The D.C. Surveyor's Office issued a plat showing the lot as a record lot. The Board further concludes that Lot 24 continues to be a record lot.

Accordingly, it is ORDERED that the Appellant's appeal is hereby GRANTED, and the decision of the Zoning Administrator is overturned.

VOTE: 4-1 (Charles R. Norris, Carrie L. Thornhill, Paula L. Jewell, and Lindsley Williams to grant; William F. McIntosh opposed).

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

ATTESTED BY:


EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: MAR 10 1989

UNDER 11 DCMR 3103.1, "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 BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS ORDER, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

14621order/BJW27

Memorandum Government of the District of Columbia

TO: James J. Fahey, Acting Chief
Zoning Regulation Division
Department of Housing and
Community Development

Department,
Agency, Office: Corporation Counsel

FROM: Louis P. Robbins *LR*
Principal Deputy Corporation Counsel

Date: April 6, 1977

SUBJECT: Creation of assessment and taxation lots within recorded lots.

This is to confirm my oral advice to you that it is legally permissible to create assessment and taxation lots (A & T lots) within a recorded lot. The issue has arisen because you have questioned whether Section 1302.2 of the Zoning Regulations precludes such action, unless the A & T lots so created meet all of the criteria set forth in said section. Section 1302.2 provides:

Where a lot is hereafter divided, the division shall be effected in such manner as not to violate provision of these regulations for yards, courts, other open space, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to said lot or any lot created.

As defined in the Zoning Regulations (Sec. 1202) a lot is

Lot: the land bounded by definite lines which when occupied or to be occupied by a building or structure and accessory buildings, includes the open spaces required under these regulations. A lot may or may not be the land so recorded on the records of the Surveyor, District of Columbia.

The problem, simply stated, is whether the creation of an A & T lot is a "division" within the meaning and reach of Sec. 1302.2. My opinion that A & T lots are not controlled by Sec. 1302.2 is based, in the first instance, on review and consideration of the statutory and regulatory bases for the several descriptions of land in the District of Columbia.

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D.C. OFFICE OF ZONING

RECEIVED

The two land description systems relevant hereto are "lots of record" (or "record lots") and "A & T lots." Each has its own purpose and function; each has its own basis in law. A record lot is a particular piece of real property recorded and designated by lot and square in the official records of the District of Columbia Surveyor. The designation of record lots is controlled by the provisions of Sec. 1-601, et seq., D.C. Code, 1973 ed., and the District of Columbia Subdivision Regulations which were promulgated pursuant to Sec. 6-613 of the Code. A record lot is created by subdivision and each such lot must meet certain criteria, including compliance with the Zoning Regulations (Art. II, Sec. 5(d), Subdivision Regulations), in order to be so designated and recorded. The purpose and intent of the record lot system is to implement the orderly development of land by providing for specific subdivision controls. This system is the ground floor on which the specific land use controls of the Zoning Regulations are built. Therefore, the Zoning Regulations provide that (with exceptions not relevant hereto) building permits for erection, construction or alteration of structures will not be issued unless such structures are located on record lots (Sec. 8103.3). Thus, it is clear that the record lot system and the Zoning Regulations are integral parts of a regulatory scheme to control development in the District of Columbia and ownership of land plays no part in this scheme.

A & T lots, on the other hand, serve no land control purpose, but are merely ownership descriptions for assessment and taxation purposes. The designation of A & T lots is governed by Secs. 47-701 and 47-703, D.C. Code, 1973 ed., which provide as follows:

§ 47-701. Assessments to be made in the name of the owner.

All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided, according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed "owner unknown."

§ 47-703. Assessments to be by lot and square.

Real estate in the city of Washington, except such as may be exempt by law from taxation, shall be assessed according to the number of the squares and lots thereof, or parts of lots, and upon the number of the square or superficial feet in each square or lot, or parts of a lot, and in the county the agricultural lands shall be assessed by the acre, and suburban lots by the square foot, as in the city of Washington.

Section 1302.2 must be viewed in the context of the two lot designation systems; the A & T lot which is created for assessment and taxation purposes and only serves that function and the record lot which is created as the cornerstone of land development control. The key words in Sec. 1302.2 are "lot" and "divided" in the first phrase thereof. "Lot" in that phrase includes record lots and A & T lots. But, "divided" only refers to the subdivision process by which record lots are created. The creation of an A & T lot is not a "division," it is merely the recognition of ownership of a particular piece of real property for assessment and taxation purposes as required by law.

Further support for this construction of Sec. 1302.2 is found in Secs. 4(a), 4(b) and 4(c), Art. I, Subdivision Regulations, which read as follows:

(a) No land or ground in the District of Columbia shall be subdivided for purpose of creating a lot of record, except in conformity with these regulations.

(b) Where a lot of record is subdivided for the purpose of creating another lot of record, such shall be effected in a manner as not to violate the provisions of these regulations or any other District of Columbia regulations.

(c) No part of a lot of record shall be sold or transferred unless, prior thereto, such lot shall be subdivided in conformity with these regulations nor shall any subdivision containing any part of such lot be admitted to record unless the requirements of this paragraph have been complied with.

These sections provide the same result as Sec. 1302.2, i.e., a subdivision creates a record lot and such must be in compliance with the Subdivision and Zoning Regulations, and distinguish the subdivision (or division) action from a sale.

Finally, consideration of Sec. 8103.3 of the Zoning Regulations and its legislative history demonstrates that the ownership system of lot designation is completely consonant with the record lot system and that there is no reason to prohibit the creation of A & T lots within a recorded lot.

Sec. 8103.3 provides:

Hereafter except as provided in Section 7516 and the Act of Congress of June 28, 1898 (30 Stat. 520, Chapter 519, Section 5), a building permit shall not be issued for the proposed erection, construction or conversion of any principal structure, unless the land therefor has been subdivided so that each structure shall be on a separate lot of record."

Section 8103.3 was added to the Zoning Regulations in 1964 together with Section 7615 which permits two or more principal buildings to be located on a recorded lot. These amendments had been recommended to the Zoning Commission by a special committee appointed by the Board of Commissioners in 1959 to study modifications to the Building and Zoning Regulations. In its report dated September 3, 1963 to the Zoning Commission recommending adoption of these amendments, the Zoning Advisory Council described Sec. 8103.3 as "the most drastic policy change during the more than four decades of zoning control in the District of Columbia." The Advisory Council observed that under Section 1302.2 of the Regulations effective controls could not be implemented. The Advisory Council observed that under that section anyone could legally file a building plat reflecting an outline survey of the land to be improved and include within the outline land which had already been used as required area for another building. It further observed that an applicant might not even own the land he proposed to use. By requiring that building permits for future construction would not be issued unless the proposed construction was to be on land which had been subdivided and recorded in the Office of the Surveyor, the abuses associated with the outline surveys would be eliminated and effective controls could be implemented. Thus, under this new approach future developments would be examined for compliance with the Zoning Regulations completely in refer-

ence to a recorded lot. In this manner, land, which had been used in order to meet various zoning requirements for improvements on a recorded lot (rear yards, side yards, floor area ratio, etc.) could not thereafter be used for other improvements. Additional improvements, other than those permitted on the recorded lot, must be located on a separate recorded lot. If the subdivision contains land already required under the Zoning Regulations for a prior improvement, it cannot be approved.

This procedure contrasts dramatically with the situation existing in connection with outline surveys where there was no adequate means of checking whether the land had previously been used to meet zoning requirements. In its report, the Zoning Advisory Council significantly noted that through the recorded lot control the "creation or sale of properties by outline survey in circumvention of yard, coverage, bulk and minimum lot size requirements as provided by the zoning rules would be effectively prohibited by direct regulation;****"

The addition of Section 8103.3 to the Zoning Regulations clearly provides for implementation of the Zoning Regulations solely in relation to a lot of record for new construction which requires a building permit. The nature of ownership of the land comprising the lot of record is not germane. The Zoning Advisory Council made this distinction abundantly clear when it stated in its report, "At this point it should be stressed that metes and bounds sales will not be prohibited by the proposed change; but only that such transactions may not be made the basis for permits to improve the land with the building." (Emphasis supplied.) Thus, if the owner of a lot of record were to sell a portion of that lot under circumstances where the portion sold was required under the Zoning Regulations for the improvement on that lot, the part sold could not be used in connection with any future development on another lot. The future development would require its own lot of record and the part of the prior lot could not be incorporated in any other lot of record unless the remaining existing lot of record complied with applicable zoning requirements.

In construing Sec. 1302.2 in light of Sec. 8103.3, it is clear that, with the limited exception of land subject to the Permanent Highway Plan, 1/

1/ Sec. 7-109 of the D.C. Code prohibits subdivision of land included in the Permanent Highway Plan. Sec. 7-114 of the D.C. Code preserves to the owner of such property the right to build on his land. Thus, outline survey may still be used in these limited instances where land falls within a part of the Permanent Highway Plan which has not been acquired

the lots referred to are recorded lots. Land which is not the subject of a recorded lot can no longer be used as a basis for a building permit. Thus, in essence, the only lot cognizable at the present time for building purposes under the Zoning Regulations is a lot recorded in the Office of the Surveyor. Sec. 1302.2 prohibits the division of that lot in a manner violative of zoning requirements. Since Sec. 8103.3 requires a recorded lot for building purposes, the only way a recorded lot can be divided in a manner significant for zoning requirements is by a resubdivision. The creation of A & T lots within a recorded lot has no relation to zoning controls and does not constitute a "division" of the recorded lot within the meaning of Sec. 1302.2.

To construe Sec. 1302.2 as precluding the creation of A & T lots within the recorded lot would plainly clash with the legislative history of Sec. 8103.3 and would not effect any purposeful result. A & T lots cannot be used for building purposes. Effective control of development is by the recorded lot and since a part of an existing recorded lot cannot be subdivided and incorporated into a new lot in violation of the Zoning Regulations the fact that an A & T lot exists in no way affects zoning controls.

LPR