

Frank Proshan
3015 11th Street N.W.
Washington, D.C. 20001-3905 U.S.A.
E-mail: frank.proshan@yahoo.com Phone: +1-202-518-1046

May 13, 2016

Via IZIS

Marnique Y. Heath, Chairperson
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

**Re: Statement in Opposition; BZA Application No. 18511B;
1018 Irving Street NW**

Dear Chairperson Heath and Members of the Board:

I write as an interested person and applicant Party to the above-mentioned case, scheduled for hearing on May 24, 2016. Since December 29, 2000, I have been the owner of the rowhouse at 3015 11th Street N.W. (Square 2851, Lot 0103). The Property that is the subject of this Board of Zoning Adjustments case is immediately behind mine, separated from my property only by a 10-foot alley.

The present application for area variances and a special exception should be denied by the Board because of the Applicant's failure to provide any evidence that "the strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of property", as required by 11 DCMR § 3103.7(a). Moreover, the relief requested cannot "be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map" (11 DCMR § 3103) and should therefore be denied.

The Applicant repeatedly misstates the burden of proof that it must bear in order to justify an area variance under 11 DCMR § 3103.7, and provides no evidence of "peculiar and exceptional practical difficulties" in any case.

1. In both its Statement in Support of Area Variance Relief of January 8, 2016 (BZA No. 18511B, Exhibit 9) and its Prehearing Statement of May 11, 2016 (BZA No. 18511B, Exhibit 33), the Applicant mischaracterizes the burden of proof it is required to meet for the area variances requested. It states in Exhibit 9, for example, that the burden of proof for variance relief is that "the strict application of the Zoning Regulations will result in a practical difficulty to the Applicant", and Section III.B of that document reiterates that "To satisfy the second element for an area variance standard, the Applicant must demonstrate 'practical difficulty.'" The same assertions are repeated word-for-word in Exhibit 33. In fact, the burden of proof set out in the DC Zoning Regulations is substantially more demanding: "An applicant for an area variance must prove that as a result of the attributes of a

- specific piece of property described in § 3103.2, the strict application of a zoning regulation would result in ***peculiar and exceptional practical difficulties*** to the owner of property” (11 DCMR § 3103.7(a), emphasis added).
2. The Applicant seems to be referring to a previous version of this regulation, superseded on June 14, 2013 by the present language. We are obliged to assume that the Zoning Commission’s decision to impose this more rigorous standard in 2013 was deliberate, and therefore that *Palmer v. BZA* 287 A.2d 535, 541 (D.C. 1972) no longer governs.
 3. In any case, the Applicant has provided only unsupported assertions and no substantial evidence of practical difficulties that it would incur in the strict application of 11 DCMR § 2507.3, 11 DCMR § 2507.4, and 11 DCMR §2001.3, let alone “peculiar and exceptional practical difficulties”. If there are practical difficulties, they are all such as should have been known to the Applicant prior to its acquisition of the property in 2012.
 4. Moreover, the assertions the Applicant does offer in its submissions, even if they were to be supported by substantial evidence, focus essentially on the profitability of the previously authorized development (“despite the Applicant’s efforts, there is little demand for artist studio space”; BZA No. 18511B, Exhibit 9 and Exhibit 33). Such considerations might arguably be relevant to a demonstration of “exceptional and undue hardship upon the owner of the property” in connection with a use variance (11 DCMR § 3103.7(b)), but any question of financial hardship is only relevant to a *use variance* and not to an *area variance*. Indeed, in its previous Decision and Order in BZA No. 18511, the Board clearly considers financial considerations under its discussion of “undue hardship” and they are unmentioned in the Board’s assessment of “practical difficulty”.
 5. Moreover, even if the Applicant were to supplement the record with substantial evidence of its efforts to find tenants or of the purported lack of demand for artist studio space, it would also have to demonstrate that the market for such space has changed substantially and to its disadvantage between May 7, 2013 (the date it submitted its Amended and Restated Application in the original case [BZA No. 18511 Exhibit 45]) and the present. The Board would otherwise have to conclude that that previous request was not submitted seriously and in good faith, but instead, by the Applicant’s own admission, “to hopefully avoid a more daunting circumstance resulting from an outright denial by the Board” (BZA No. 18511 Exhibit 45).
 6. At an informal discussion with property owners on March 3, 2016 organized by ANC 1A, the Applicant referred to a projected duration of one year for construction. It would hardly be surprising that the Applicant is unable to secure tenants for a building that does not currently exist and would not be available for their use for at least a year. This could hardly be considered “peculiar and exceptional practical difficulties”, but is instead an easily foreseeable and frequently encountered risk that a more prudent investor might not have assumed.
 7. Furthermore, the record for BZA No. 18511B includes no evidence to support the Applicant’s assertion that “the only way the Applicant can do a viable project is through a conversion of the garage to residential/office use” (BZA No. 18511B, Exhibit 9 and Exhibit 33). Indeed, the Applicant’s own prior submission in 2013

stated that “Pursuant to the lot area requirement in an R-4 District, the lot could be subdivided into multiple lots for single-family dwellings. This option, however, again would not allow the Applicant to recoup the costs of renovation and remediation required for the Property to be habitable” (BZA No. 18511, Exhibit 34). The Applicant has provided no evidence to explain why a solution that it itself deemed to be unviable in 2013 should now become viable in 2016.

8. Even if we might imagine that it would be more profitable for the Applicant to construct residences for sale or rent than to maintain artists’ studios for rent, it is not the purpose of an area variance to maximize an investor’s profit. In any case, it is the Applicant’s duty to demonstrate that a strict application of the zoning regulations would give rise to “peculiar and exceptional practical difficulties” rather than easily foreseeable financial risks. The Applicant has provided no evidence concerning the financial viability of the revised request and there is thus no reasonable basis to assume that the Board will not be presented in another year or two with yet another application for further variances.

Having now abandoned any intention to construct artist studios, the Applicant cannot continue to benefit from the height variance previously granted by the Board in its Decision and Order in BZA No. 18511; any variance above the permitted height of 12.4’ must be fully justified anew.

9. The Applicant’s original Application BZA No. 18511 proposed to add two stories to the existing one-story structure, with the resulting three-story structure reaching a total height of 39.5 feet, vastly exceeding the maximum allowed height of 12.4 feet. The DC Office of Planning concluded at that time that “The relief cannot be granted without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map. The height of alley buildings is limited by the width of the alley in all zones, and the proposed height is more than triple the height permitted for the subject alley lot” (BZA No. 18511, Exhibit 31).
10. In its public meeting of April 30, 2013, several members of the Board of Zoning Adjustment expressed their concurrence with the views of the DC Office of Planning and the concerns expressed by neighboring property owners with specific regard to the proposed height. After the Board had begun to vote on a motion to deny Application BZA No. 18511, and after a majority of Board Members had expressed their intention to support that motion, the Board instead agreed with the Applicant’s request to table Application BZA No. 18511 to allow the Applicant to revise it.
11. The Applicant subsequently submitted an Amended and Restated Application substituting artist studios for the prohibited residential use (BZA No. 18511, Exhibit 45). The ceiling height proposed at that time was 19.5 feet. In its Decision and Order in case BZA No. 18511, the Board permitted a variance in the permitted height, finding that “**Since the additional height will permit the adaptive reuse of a vacant industrial space into matter of right artist studios and a compatible non-residential use**, the Board concludes that no impairment to the zone plan will result” (emphasis added). The height variance was thus granted as **part of a package** wherein the prohibited residential use

was taken off of the table, and it is doubtful that the Board at that time would have granted even a minor height variance for a prohibited residential use.

12. The Applicant no longer intends to construct matter-of-right artist studios, but instead returns now with a proposal to construct prohibited residential structures. It cannot therefore rely upon the previously granted height variance (if the Board decides to extend the validity of the previous Order under case BZA No. 18511A), since the basis for that variance no longer applies. Any variance above the permitted height of 12.4' must therefore be fully justified anew, now that the matter-of-right artist studios are no longer part of the proposal.

The Applicant provides no evidence to justify any further increase in the height of the second story beyond that permitted under the January 2014 Decision and Order, if that order is deemed not to have expired. Indeed, even the previously permitted height is no longer justified because of the change to residential use.

13. I acknowledge and welcome the Applicant's good faith efforts to reduce the masonry parapet height from 27'9" (as shown in the Architectural Plans and Elevations submitted on January 8, 2016 [BZA No. 18511B, Exhibit 7]) to 26'4" (as shown in the Revised Architectural Plans of May 10, 2016; [BZA No. 18511B, Exhibit 34]), through the substitution of an open railing.
14. The Applicant has nevertheless provided no evidence to demonstrate that two stories cannot be accommodated within the previously-authorized ceiling height of 19.5 feet. The maximum ceiling height of the 2014 Decision and Order permits ample ceiling heights for both stories in conformity with the D.C. Building Code, which establishes a minimum ceiling height of 7'6" (D.C. Building Code section 1208.2). Within the previously-authorized height of 19.5 feet, and allowing 12 to 15 inches for the ceiling of the first story and floor of the second story, each story can be 9 feet or higher. The Revised Architectural Plans (BZA No. 18511B, Exhibit 34) appear to suppose ceiling heights of approximately 10 feet on each story, far above the minimum required by the Building Code.
15. Moreover, the arguments offered in 2013 to justify the ceiling height of 19.5 feet are no longer applicable. In its Supplemental Submission of March 23, 2013, the Applicant argued that "in order to create quality art studios, large windows are necessary on the second floor. These windows reach all the way to the ceiling and the parapet adds a proportionate scale to the significantly masonry building" (BZA No. 18511, Exhibit 45). Given that the Applicant has now abandoned any intention to create artist studios, the height of the windows, and therefore the height of the ceiling, can no longer be justified. With a consequent reduction in the window height, the masonry parapet could also be further reduced, while still maintaining the "proportionate scale".
16. Any additional increase in the second-floor ceiling height cannot therefore be justified on the basis of "peculiar and exceptional practical difficulties", as required for an area variance. Indeed, the previously authorized height of 19.5' would allow a parapet height much lower than what is now proposed, given the change in intended use.

17. For most of the year, we residents west of the proposed structure would rarely see the morning sun, even from our second story windows, and those east of the proposed structure would be in shadows very early in the afternoon. Back yards of neighbors on all four sides would be unable to support plants or gardens. This reduction in sunlight can only be considered to harm the public good, and every inch of additional height that is permitted for ceilings or parapets only increases that harm.

The rooftop structure proposed in the Revised Architectural Plans of May 10, 2016 exceeds the area permitted for a penthouse under special exception relief; it instead constitutes “occupiable space” or a “habitable room” and should therefore be considered as a third story.

18. In conformity with 11 DCMR § 411.5, “a penthouse, other than screening for rooftop mechanical equipment or a guard-rail required by Title 12 DCMR (CONSTRUCTION CODE SUPPLEMENT OF 2013) for a roof deck, shall not be permitted on the roof of a detached dwelling, semi-detached dwelling, rowhouse, or flat in any zone.” By virtue of its size (not clearly specified in the Revised Architectural Plans but apparently 135 square feet or greater), the proposed third-story structure does not fall within the special exception for penthouses permitted under 11 DCMR § 411.5 (b): “Contains only stair or elevator access to the roof, and a maximum of thirty square feet (30 sq. ft.) of storage space ancillary to a rooftop deck.” Indeed, the area of the third-story structure is twice the total required for a stairway (approximately 36 sq. ft. for a 10’ total rise) and storage space (maximum 30 sq. ft.).
19. It is also apparent from the Revised Architectural Plans that the rooftop structure is intended as a continuation of the living room, since there is no door isolating the second story living area from the stairway to the third story. It is clearly intended to function as “occupiable space” or as a “habitable room”, as defined in 11 DCMR § 199, and therefore constitutes a third story, bringing the overall height of the proposed structure back almost to the height that would clearly have been rejected in the case of BZA No. 18511.
20. The proposed third-story structure is particularly problematic because it is intended to facilitate gatherings on the rooftop deck, at any hour of day or night, and with substantial risk of creating noise and disturbance that would interfere with the peaceful enjoyment of neighbors.
21. Faced with this new proposal, I can only reiterate the earlier report of the DC Department of Planning: a third story cannot be permitted “without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map. The height of alley buildings is limited by the width of the alley in all zones, and the proposed height is more than triple the height permitted for the subject alley lot” (BZA No. 18511 Exhibit 31).

The proposed residential use would increase the density of the neighborhood and increase the impacts of noise, crowding, vehicular traffic and other disturbances on neighbors at

all hours of day or night, thus causing substantial detriment to the public good and substantially impairing the intent, purpose, and integrity of the zone plan.

22. The Applicant wishes to secure an area variance from 11 DCMR § 2507.3 in order that Lots 220 and 221 would no longer be used for artist studios, as permitted by 11 DCMR § 2507.5, but would instead become dwellings, each with three bedrooms. Whether intended as single-family dwellings or as apartments,¹ each of the two residences would be inhabited by up to six persons, for a total of twelve new residents – in a neighborhood that is already one of the most densely populated in the District of Columbia.
23. The proposed residential use was problematic to neighbors in 2013 not only because of the increased population density, but because the attendant impacts of noise, crowding and annoyance would not be confined to working hours (as was promised for the office use, and would have been likely for the artist studios) but could instead occur at all hours of day or night. Such increased density thus represents a real likelihood of harm to the public good.
24. The design of the two residences seems to be intended to maximize the likelihood that they will each house large numbers of people. Three bedrooms, each with a full private bath, and two parking spaces per residence are higher than the current averages per unit in the immediately surrounding area. Lower density (which could easily be achieved for example with two larger bedrooms and a single parking space, per residence, rather than three and two respectively) would substantially reduce the impact of the proposed structures on neighbors, while also reducing vehicle traffic through the exceptionally narrow alley.
25. Given the property's proximity (approximately ¼ mile) to the Columbia Heights Metro Station and to Priority Corridor Network Metrobus Routes on 14th Street and Georgia Avenue, the number of proposed parking spaces is particularly problematic.² Even if the Zoning Regulations of 2016 have not yet taken effect, their approach to parking spaces is informative. The intention of Chapter 7 of those regulations is to “minimize negative impacts on adjacent property, urban design, the pedestrian environment, and public spaces” (§ 700.1). The minimum number of vehicle parking spaces for a single dwelling residential unit is one, and for a two-dwelling flat is also one (§ 701.5), while the number proposed by the Applicant is two per unit (plus two for the office space in Lot 219). The excessive number of parking spaces proposed creates further traffic hazard in the narrow alley and increased detriment to the public good.
26. The Applicant has therefore failed to demonstrate that the proposed variances are those least likely to have a negative impact on the intent, purpose, and integrity of the zone plan. To demonstrate “peculiar and exceptional practical difficulties”, as required for an area variance, the Applicant should be expected to show that there do not exist lower-impact, lower-density alternatives that would minimize the

¹ While the Applicant's Statement of Support of January 8, 2016 refers to “a 2-unit apartment house” (BZA No. 18511B, Exhibit 9), the Prehearing Statement of May 10, 2016 refers confusingly to “two row dwellings a 2-unit apartment house” (BZA No. 18511B, Exhibit 33).

² Note also that the Revised Zoning Self-Certification (BZA No. 18511B, Exhibit 35) misstates the number of parking spaces provided by the proposed construction.

relief required. In fact, it has provided no evidence to justify the requested variances, let alone evidence that it has explored and excluded lower-density alternatives.

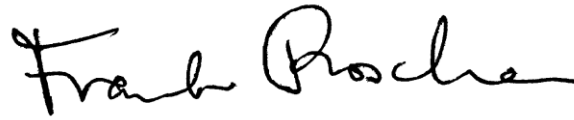
The case records for BZA No. 18511, BZA No. 18511A, and BZA No. 18511B together raise serious questions about the Applicant's seriousness and good faith.

27. The Applicant's submissions in the present case are vague, incomplete and/or misleading. The omission of any elevation drawings of the present structure that would accurately show its actual height seriously impairs the Board's ability to assess the impact of the proposed changes. Similarly, the lack of dimensions for the rooftop structure/third story for Lot 220 makes it difficult to determine that it exceeds by 100% or more the maximum allowed for a penthouse if a special exception were to be granted (BZA No. 18511B, Exhibit 34).
28. The cumulative record of the three cases raises serious concerns about whether the Applicant has operated with the requisite degree of seriousness, attention and good faith. As suggested above, there is no evidence provided at this date to demonstrate that the relief requested in Application BZA No. 18511B is required to remedy problems that were not readily known or knowable to the Applicant at the time it acquired the property in 2012 and at the time in 2013 that it submitted its Amended and Restated Application (BZA No. 18511, Exhibit 45). If it did not have confidence at that time that the office/artist studio structure it was proposing could be economically viable, it should have withdrawn its Application BZA No. 18511 and taken due care to explore other possible options.
29. Since the January 2014 Decision and Order, there has been little or no change in the external circumstances potentially affecting the viability of the office/artist studio approach – certainly, the Applicant has provided no evidence of such changed external circumstances. The present Application, which effectively reverts to a three-story residential structure like the one that was proposed and rejected in 2013, represents an attempt by the Applicant to abuse the Board's good will and should be denied.

Given the numerous deficiencies in Application BZA No. 18511B pointed out above, both in form and in substance, as well as the substantial detriment to the public good and impairment of the intent, purpose, and integrity of the zone plan that would result from its approval, the Board should deny the variances and special exception requested.

Thank you for your attention to this statement.

Sincerely yours,

A handwritten signature in black ink that reads "Frank Proschan". The signature is written in a cursive, flowing style.

Frank Proschan

cc. Martin P. Sullivan
ANC 1A
Toks Ladejobi
Office of Planning