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via IZIS

Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

Re: BZA Application No. 19712-Additional Materials and Information

Dear Members of the Board:

At the hearing on June 20, 2018, the Board requested that the Applicant file additional information to the record, including a timeline of events, a stronger burden of proof argument, and evidence demonstrating the difficulty of selling the larger unit.

Timeline:

- February 12, 2015
  - The first permit (B1504361) was issued in February 2015 (See **Exhibit A**, February 2015 Building Permit). Even though the issued permit says it is for alteration and repair to a "Single Family dwelling", the Applicant has signed an affidavit testifying that the plans approved showed three units (See **Exhibit B**, Affidavit of Bryan Manning).
  - Prior to the Applicant's purchase of the building, it was configured as a flat (2-units), so it was an error on the part of DCRA to list the existing use on the first permit as a "single-family dwelling."

- April 6, 2015
  - After the Permit was issued, Zoning Administrator (the "ZA"), Matt LeGrant, granted approval for minor flexibility from the 900 square foot rule (See **Exhibit C**, Email from ZA).
  - During the hearing in June, the Office of Planning stated that the Zoning Administrator did not have the authority at any point to issue minor flexibility from the lot area requirements (i.e. the 900 sq. ft. rule).
  - The subject of whether the zoning administrator is permitted to grant minor flexibility from the 900 ft. rule is discussed in BZA Order No. 18991 (See **Exhibit D**, BZA Order No. 18891). The Order specifically states in its findings of fact that "Subsection 407.1 of the Zoning Regulations allows minor flexibility to the ZA to permit a deviation from the lot area requirements, subject to specified criteria, where the deviation does not exceed two percent of the minimum area requirements. On August 11, 2014, the ZA issued a Determination Letter which granted minor flexibility pursuant to § 407.1 for the lot area deviation to allow the

proposal for a matter-of-right addition and conversion to a seven-unit apartment house."

- The rules regarding minor flexibility from the 900 sq. ft. rule were changed in June 2015 and there is even a footnote in the order addressing the change in the rules: "As was discussed during the proceedings, § 330.5 has since been amended and such conversions became more restrictive, and § 407.1 was also amended to disallow the ZA from applying its minor deviations when determining the minimum lot area needed for such conversions (Z.C. Order No. 14-11.) However, the amended regulation went into effect on June 26, 2015, after the permit in this case was issued. Therefore, the amended regulation is not relevant to this appeal."

- June 12, 2015
  - While ZC Order No. 14-11 did not become effective until June 26, 2015, the Zoning Commission voted to approve the order on June 8, 2015. This likely alerted DCRA to its initial error in granting the permit, as the permit was not vested by the date specified in the order, July 17, 2014.
  - The first stop work order (See **Exhibit E**, First Stop Work Order) listed the violation as "exceeding the scope of the permit" and the corrective action as "obtain required permit."
  - After receiving the First Stop Work Order, the Applicant immediately appealed to DCRA and a hearing was held on July 2, 2015. The Applicant paid an $8,000 fine and was told by DCRA officials it would be required to do an in-person "walk-through" of the plans and they would need to be approved again by the various disciplines.
  - Despite not having an issued 3-unit permit, the Stop Work Order was lifted and DCRA permitted construction to continue on the three-unit configuration.

- August 3, 2015
  - Zoning re-approved the plans (See **Exhibit F**, Approved Building Plans), affirming that the Applicant was permitted to construct a three-unit dwelling.

- October 22, 2015
  - DCRA issued Building Permit B1500315 (See **Exhibit G**, Three Unit Permit) which approved a "use change from two-family flat to three-unit condo building."

- December 12, 2015
  - In December, the second stop work order was issued (See **Exhibit H**, Second Stop Work Order); under violation it simply stated, "revocation of permit."

- February 2016- September 2016
  - After recognizing that DCRA would not allow construction to continue for three units, the Applicant converted the building to two units by uninstalling a range on the lowest level and connecting both levels via a stairway.
  - After converting the unit and obtaining a C of O for a two unit configuration, the Applicant attempted to sell the lower, four-bedroom, four-bathroom unit for the first time. It was first put on the market for $899,900, then $872,900, then

$849,900 and finally $799,900. After failing to sell for 84 days, the unit was finally taken off the market. (See **Exhibit I**- Real Estate Report).
    - The units (upper unit and larger lower level unit) were put on the market again around May/June of 2016 but only the upper unit sold.

- September 2016-Present
    - Once the upper unit sold and the Applicant realized the lower unit would not sell, it was sold to the Applicant. The unit was then split up into two units and rented out in May 2017. The rental leases ended in July 2017 and the units are currently empty except for the top unit.

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BURDEN OF PROOF

Exceptional Situation

The exceptional situation arises out of the permitting history, described above in the timeline. In *Monaco v. DC Board of Zoning Adjustment,* the Court of Appeals held that the zoning history of a property could be considered in making a determination of uniqueness. The Applicant cited a number of cases in its prehearing statement that affirm zoning history for a property, specifically an Applicant's reliance in good faith on actions of DCRA officials, can be considered an exceptional situation.

The Applicant would not be in this position—requesting variance relief for a third unit—had it not received preliminary approvals and a permit to construct a third unit. The Applicant had every reason to proceed with the permitted conversion in good faith without fear of interruption or modification. At the time of purchase in July 2014, conversions and minor flexibility from the 900 sq. ft. rule were both permitted under the zoning regulations. The Office of Planning did not approve Case No. 14-11 until June 8, 2015 at which point it retroactively applied the rule to all permit applications that had not been submitted by October of 2014. The first report in the case file for 14-11 was not even filed until June 24, 2014—after the Applicant formed the LLC in order to purchase the Subject Property.

The Applicant acted in good faith by constructing exactly what was approved in the original permit dated February 12, 2015, and what was confirmed shortly thereafter by the Zoning Administrator in April 6, 2015. Further, after the First Stop Work Order DCRA permitted the Applicant to continue construction on the three-unit configuration. Zoning approved the plans in August 2015. Then, the plans were officially approved via the second building permit in October 2015. Even after the Applicant was issued the Second Stop Work Order on December 13, 2015, DCRA lifted the fines because the Applicant demonstrated at the hearing that it built according to what was approved in the October 2015 Permit. On numerous occasions, DCRA encouraged the Applicant to move forward with the three-unit configuration. By the time the Stop Work Order was issued in December 2015, the construction was substantially complete and construction costs totaled $525,000.

Practical Difficulty

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. In reviewing the standard for practical difficulty, the Court of Appeals stated in Palmer v. Board of Zoning Adjustment, 287 A.2d 535, 542 (D.C. App. 1972), that "[g]enerally it must be shown that compliance with the area

restriction would be unnecessarily burdensome. The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case." In area variances, applicants are not required to show "undue hardship" but must satisfy only "the lower 'practical difficulty' standards." Tyler v. D.C. Bd. of Zoning Adjustment, 606 A.2w 1362, 1365 (D.C. 1992) (citing Gilmartin v. Bd. of Zoning Adjustment, 579 A.2d 1164, 1167 (D.C. 1990).

As discussed above, the plans submitted for the first permit—issued in February 2015—were the same three-unit plans in **Exhibit F**. Moreover, the Zoning Administrator granted minor deviation for the three-unit configuration in April 2015. By this point, the Applicant spent significant money on architectural design, preparation of plans for a building permit application, and pursuing the application. Then, after the First Stop Work Order, DCRA encouraged the Applicant to continue with the three-unit configuration. Zoning re-approved the three-unit configuration in August 2015, as demonstrated by the stamped plans in **Exhibit F**. Then, DCRA issued a permit for the three-unit configuration in October 2015. At this point, the Applicant had performed costly renovations based on these approvals and representations from DCRA. These circumstances lead to a practical difficulty because the Applicant has lost a significant amount of money and time based on its reliance on assurances by DCRA and a validly issued permit. When the 3-Unit Permit was revoked in December 2015, construction was substantially complete, and the Applicant had spent $525,000 on construction costs alone.

To demonstrate how the reliance on DCRA's approvals impacted the financial aspects of the project, consider three scenarios:

A. Financial Projections: Two Units from the Beginning.

Had DCRA informed the Applicant at the beginning that it would not be allowed to obtain minor flexibility and three-units, the Applicant would have either not purchased the property or designed the building completely differently than its current two-unit configuration. Even if the Applicant could redesign the lower unit into a more marketable unit without a huge loss, it would not have made sense from a marketing and design standpoint to have a larger unit on the bottom two floors as is the current case. Typically, in a two-unit configuration with three floors, the most marketable design is to have a two-story unit on the first and second floors and convert the basement into a smaller second unit. Then, a purchaser could either buy both units and rent out the second unit, which makes the building more marketable; or it would be more marketable to families, as discussed in the real estate report. In that scenario, the upper unit could sell for $760,000 and the lower unit could sell for $500,000 (See **Exhibit I**- Real Estate Report). The construction costs would have been slightly less in this scenario because the lower unit would have been designed with as a 1-bedroom unit with an open floor plan. (See **Exhibit J**- Financial Projections and **Exhibit K**- Construction Budgets for 2 units v. 3 units). Considering the cost of purchasing the building was $680,000, the estimated cost of construction is $410,000, and the total sales price of both units, the Applicant would have had been able to make at least $120,000 more on the project than it would in its current 2-unit scenario. That price does not even include the other expenses incurred as a result of the Applicant's reliance on DCRA's approvals. The Applicant would have been able to sell the units in 2015 or 2016, limiting additional carrying costs, loan extensions, and legal fees relating to resolving this issue.

B. Financial Projections: Application is Denied.

If the Applicant is forced to keep the two-unit configuration, it will have to sell the large lower unit as is (four-bedroom, four-bathroom) for $635,000 according to the real estate report (**Exhibit I**). As the purchase price for the building was $680,000, the upper unit already sold for $620,000 and construction costs totaled $525,000, the Applicant would be left with $50,000 as a result of reliance on DCRA's approvals. Considering the Applicant incurred other costs besides the construction costs (carrying costs, legal expenses etc.), the Applicant would certainly end up losing money on its investment as a result of its reliance on DCRA's approvals.

The real estate report also notes that there are no comps for a four-bedroom, four-bathroom unit. Alternatively, the Applicant could reconfigure the lower unit to include three bedrooms which would be slightly more marketable. While other three bedrooms in the area could sell for $760,000, the odd layout of having a two-story unit on the first and basement floors (as opposed to first and second floors) would be less marketable and is projected to sell for $695,000. However, the Applicant would be in a worse financial scenario than if it had left it in its current four-bedroom, four-bathroom configuration, as the cost of renovation would be at least $120,000 (See **Exhibit L**- cost of renovation to adjust current layout).

C. Financial Projections: Application is Approved.

If the Applicant receives BZA approval, it would be able to split the lower unit into two, two-bedroom, two-bathroom units and sell the first-floor unit for $550,000 and the basement unit for $500,000. The Applicant is only requesting what was approved by DCRA and has been shown on its plans since at least February 12, 2015 (See **Exhibit F**).

No Harm to the Zoning Regulations

Relief can be granted without substantial detriment to the public good and can be granted without impairing the intent, purpose and integrity of the Zone Plan. The permitting history is unique in that the Applicant is only requesting relief because it detrimentally relied on assurances by DCRA and spent a significant amount of money as a result. The degree of relief is minimal, only a 1.5% deviation—only 40 square feet—and the Applicant would sustain a significant financial loss after relying on the validly issued 3-Unit Permit.

Sincerely,

Martin P Sullivan

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Martin P. Sullivan, Esq.
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Date: September 11, 2018

Cc: Elisa Vitale, Office of Planning
ANC 1A