

EXHIBIT B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18471 of Universalist National Memorial Church, pursuant to 11 DCMR § 3103.2, for a variance from the use provisions for theater performances on the basement level of a church under §§ 350.4, in the DC/R-5-B District at premises 1810 16th Street, N.W. (Square 177, Lot 802).

HEARING DATE: December 11, 2012
DECISION DATE: December 11, 2012

DECISION AND ORDER

Universalist National Memorial Church, (“Applicant” or the “Church”), submitted this self-certified application on April 27, 2012, as the owner the property at 1810 16th Street, N.W. (Square 177, Lot 802). The Applicant sought variances from the use provisions to permit theater performances by a third party on the basement level of a church located in the DC/R-5-B District. The Board of Zoning Adjustment (“BZA” or “Board”) convened a hearing on the application on December 12, 2011. The Board deliberated on the application at the conclusion of the hearing and voted 4-0-1 to **GRANT** the application subject to conditions proposed by the Applicant and modified by the Board to mitigate any potential adverse impacts of the use.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing.

By memoranda dated September 4, 2012, the Office of Zoning sent notice of the filing of the application to the D.C. Office of Planning (“OP”), the D.C. Department of Transportation (“DDOT”), Advisory Neighborhood Commission (“ANC”) 2B - the ANC within which the subject property is located, Single Member District 2B-03, and the Councilmember for Ward 2.

A public hearing was scheduled for December 11, 2012. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the *D.C. Register* on October 12, 2012 (59 DCR 11797), and also on October 5, 2012 sent such notice to the Applicant, ANC 1B, and owners of all property within 200 feet of the subject property. The Applicant posted placards at the property regarding the application and public hearing in

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accordance with 11 DCMR §§ 3113.14 through § 3113.20 and submitted an affidavit to this effect in accordance with 11 DCMR §§ 3113.19 and 3113.20.

Request for Party Status.

ANC 2B was automatically a party to this proceeding. The Board also received three requests for party status from nearby property owners, one from Patrick Kenneth Jadin, residing at 1614 S Street, N.W. (Exhibit 26), one from Louis Santucci, residing at 1612 S Street, N.W. (Exhibit 27), and one from Lance Salonia, residing at 1603 S Street, N.W.¹

Louis Santucci was not present at the hearing and therefore was not granted party status. The Board granted the requests for party status of Mr. Jadin and Mr. Salonia and, with no objection from the Applicant or either neighbor, the Board directed Mr. Jadin and Mr. Salonia (the “Neighbors”) to consolidate their presentations and proceed as a combined party.

The Neighbors each detailed their opposition to the application in their requests for party status. Among other things, the Neighbors contend that the use of the basement of the church for a theater is disruptive due to increased foot traffic by patrons of the theater.

Government Reports

ANC 2B

In a report submitted October 26, 2009, ANC 2B indicated that, at a regularly scheduled monthly meeting with a quorum present, it voted to support the application, with conditions. (Exhibit 25.) In an effort to confirm its acceptance of the terms and conditions set forth in the ANC resolution, the Applicant submitted a letter to the Board dated, December 11, 2012 (Exhibit 35) listing the conditions and requesting the Board incorporate the conditions within the Order.

DDOT Report

DDOT reviewed the application and prepared a report dated November 30, 2012 which concluded that based on the information there would be negligible impact to the transportation network and therefore had no objection to the requested variance. (Exhibit 30.)

OP Report

OP reviewed the application and prepared a report which stated that it could not recommend approval of the use variance to allow a theater use in the basement of the subject property. (Exhibit 32.) The report stated that the Applicant had not sufficiently made the case proving an exceptional condition resulting in an undue hardship. OP stated that the Applicant did not present any topographical unique or exceptional condition of the property that existed prior to establishment of the theater use. As to the third prong of the variance test, OP noted that the

¹ Mr. Salonia submitted a party status request but it was not reflected in the Exhibit Log. Mr. Salonia produced a stamped copy, at the hearing, showing timely receipt of the request by the Office of Zoning.

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application indicated that theater attendance has so far has ranged from five to 20 persons. OP indicated that it was unclear what impact 48 or more performances annually with attendance of up to 75 persons would have on the surrounding neighborhood. OP further concluded that granting the variance would be contrary and detrimental to the intent and integrity of the Zoning Regulations because a theater use is not permitted in any Residence district. For this same reason the report also concluded that granting the variance would be contrary to the goal of the Dupont Circle Overlay of “maintaining existing residential uses and controlling the scale, location, and density of commercial and residential development.” (11 DCMR § 1501.4(c).) OP’s representative, Arthur Jackson, also testified to this effect at the public hearing.

FINDINGS OF FACT

The Site

1. The property is located at 1810 16th Street, N.W. (Lot 802 in Square 177) in the DC/R-5-B zone district.
2. Lot 802 is an 11,750 square-foot rectangular corner lot located at 16th and S Street, N.W.
3. The lot is improved with a three-story church building with basement built in 1930 and is a contributing structure in the Sixteenth Street Historic District.
4. The church is approximately 21,642 square feet in size and occupies approximately $\frac{3}{4}$ of the site.
5. Universalist National Memorial Church, a nonprofit, owns and operates the church.
6. The basement of the Church has contained a performance space (including built-in stage) since it was constructed in 1930. The original auditorium includes a dedicated film projection booth at one end and a raised stage with theatrical lighting dimmers, theater curtains, and other stage equipment at the other end.
7. This performance space, known as Perkins Hall, is 7,400 square feet in size and is authorized for 225 occupants.
8. Perkins Hall has no air conditioning and it cannot be heated without heating the entire church. As a result the space has become underutilized. Additionally, Perkins Hall is not accessible to persons with disabilities.

The Surrounding Area

9. Square 177, which includes the property, is bordered by an alley to the west, townhouses to the north, 16th Street to the east, and S Street to the south.

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The Proposal

10. At a point in time prior to the filing of this application, the Church entered into a lease agreement to permit a professional theater company, known as the Spooky Action Theater, to use Perkins Hall as its principal performance space.
11. The Church's existing certificate of occupancy does not authorize a separate theater use not operated by the church. (Exhibit 11.)
12. A theater use is first permitted in the C-2 Zone District. (11 DCMR 721.6 (c).)
13. Once performances began, neighbors in the immediate vicinity were disturbed by the theater's patrons using the rear alley entrance of the church. This led to complaints filed with the Department of Consumer and Regulatory Affairs, which after investigation concluded that the theater was operating without the necessary certificate of occupancy.
14. The Zoning Administrator however agreed not to then take enforcement action provided that an application for a use variance was filed. A temporary certificate of occupancy was then issued for the use.
15. The Applicant has agreed to limit performances to 48 annually and to limit attendance to 75 persons.
16. Only the front entrance of the building may be used to access performances.
17. The Applicant is not proposing any expansion to the building.
18. Current and future permitted church-related activities previously held in this space would continue under this proposal.

Exceptional Conditions

19. The building was built in 1930 and is a contributing structure in the Sixteenth Street Historic District.
20. The Church building suffered significant damage requiring expensive repairs and restoration due to the magnitude 5.8 earthquake experienced by the District on August 23, 2011.
21. A "Needs Assessment" was performed and lists seven proposed phases for rehabilitation of the Church at a cost totaling \$959,000 - \$1,056,000.
22. The Church theater's programming is part of its outreach effort to provide access for community events and to engage the larger community in the life of the Church.

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Undue Hardship

23. The Church's congregation has dwindled to approximately 40 members and its annual budget is well under \$200,000. It can no longer afford the services of a minister.
24. The decline in active Church members and budget has resulted in building maintenance becoming a hardship since having fewer members results in reduced financial resources for repairs.
25. The basement of the Church is underutilized and not economically viable unless an income-producing use, such as theater use, is allowed. No permitted non-church uses are suitable and/or viable for this space.
26. In addition to providing the Church with financial remuneration, the theater group has committed to installing a separate HVAC system dedicated to this space and to making the space accessible to persons with disabilities.

No Substantial Harm to Public Good and No Substantial Impairment of the Zone Plan

27. The use of the rear entrance to the Church's building for access to the basement for theater use – from the alley – has been discontinued and will not be allowed in the future.
28. Once the Church prohibited the use of its rear entrance to gain access to the performance space, the use of that space by Spooky Action Theater no longer caused any noise to be generated outside of the Church building.
29. DDOT concluded that there would be negligible impact to the transportation network.
30. The current activities by the theater have not caused any noticeable traffic or parking problems because the vast majority of its patrons walk or take public transportation to the site and those who drive are typically accommodated by a parking arrangement that the Applicant has made off-site.
31. The danger of falling stone or other potential adverse conditions caused by the earthquake can be mitigated by the repairs and restoration undertaken by the Church with income generated by the theater use.
32. Permitting a small theater use with no more than 48 performances annually and with no more than 73 persons in attendance will not jeopardize the residential character of the surrounding neighborhood.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797; D.C. Official Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application

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of the Zoning Regulations. As stated above, the Applicant here seeks a use variance pursuant to § 3103.2 from the use provisions applicable to the DC/R-5-B District pursuant to § 350.4.

Under the three-prong test for variances set out in the Zoning Act and re-stated at 11 DCMR § 3103.2, a property owner must demonstrate that (1) its property has an exceptional size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulties or undue hardship if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. A showing of “practical difficulties” must be made for an area variance, while the more difficult showing of “undue hardship,” must be made for a use variance. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). The D.C. Court of Appeals has held that the exceptional situation or condition standard goes to the “property” not just the “land”; and that “property generally includes the permanent structures existing on the land.” *Clerics of St. Viator v. D.C. Bd. of Zoning Adjustment*, 320 A.2d 291, 293-294 (D.C. 1974) (footnote omitted).

Turning to the first prong of the variance test, the Board finds that the property is subject to an exceptional situation. The basement space is large (7,400 sf) with an authorized capacity of 225, but is underutilized by the declining membership of the Church. Built in the 1930’s, the Church building is aging and requires increasing ongoing maintenance that the Church is no longer able to afford. Further, on August 23, 2011, a magnitude 5.8 earthquake hit the D.C. area resulting in extensive damage to the Property and the basement of the Church cannot be economically used by the Church, except occasionally, unless it is put to a viable income-producing use such as a theater use.

The D.C. Court of Appeals has held that “the Board of Zoning Adjustment does not err in considering the needs of a public service ‘as possible ‘other extraordinary and exceptional situation or condition of a particular piece of property’.” *Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1099 (D.C. 1979) and the Board finds such an extraordinary and exceptional situation on the facts presented here.

As to undue hardship, the Court of Appeals has interpreted the *Monaco* doctrine for public services as also applying to this test as well. In *National Black Child Development Institute, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 483 A.2d 687 (D.C. 1984), also a use variance, the Court of Appeals indicated that “in *Monaco*, we permitted the BZA to apply a more flexible standard for determining hardship when a ‘public service,’ or nonprofit entity, is the applicant.” 483 A. 2d at 690 (emphasis added).

The Applicant has established that strict application of the Zoning Regulations in this case will result in undue hardship as a result of 1) a declining membership of approximately 40 active members, 2) managing the Church with a minimal operating budget and without the financial means to hire a full time minister, 3) the need to plan for extensive repairs needed for the Church’s building caused by the earthquake and the effects of its age and 4) no permitted uses of the basement area have been proven viable or suitable for the existing Church use of the Property.

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The theater provides, among other things, three functions: it allows the Church to convert the auditorium space with limited functionality to one that permits use of the space on a year-round basis with access to persons with disabilities, furthers the Church's mission of community outreach and service, and provides a source of needed income. The relationship with the theater company is an important partnership that not only helps the Church's building stay vibrant and busy throughout the week, but offers much needed income from the theater, which is expected to be over \$30,000 in 2013. Most importantly, the theater use provides necessary funds to be used by the Church to restore and repair the damage caused by the earthquake and make other repairs to the aging building.

In these respects, the Church's situation is identical to that analyzed by the Court of Appeals in *Clerics of St. Viator, supra*. There, the drop in the number of young men entering the priesthood caused maintenance of the large seminary to be a hardship. Similar to the subject property, the decline in active Church members has also resulted in building maintenance becoming a hardship for the Church since fewer members result in reduced financial resources for repairs of an aging facility. Similarly, in *Application No. 18272 of KS FBC, LLC* (June 2012) the Board granted area (variance relief for a commercial development that would provide financial support for the maintenance needs of an existing Church building. There the Board concluded that without "a viable project, the church will not be able to generate the revenue necessary to undertake \$5 million worth of deferred maintenance, establish a reserve for ongoing maintenance and sustain its core religious ministries, some of which operate at a deficit."

Turning to the third prong of the variance test, the Board concludes that the requested use variance can be granted without creating adverse impacts on nearby residential properties. First, the use of the rear entrance to the Church's building for access to the basement for theater use by audiences, performers, and theater staff – from the alley – has been discontinued and will not be allowed in the future. Second, experience shows that once theater access from the rear entrance was prohibited, the Spooky Action Theater performances ceased generating noise outside of the Church building. Third, the activities by the theater have not caused any noticeable traffic or parking problems because the vast majority of its patrons walk or take public transportation to the site, and those who drive are typically accommodated by a parking arrangement that the Applicant has made off-site. DDOT has also confirmed that there will be negligible impact on the transportation network. Fourth, the danger of falling stone or other potential adverse conditions caused by the earthquake can be mitigated by the repairs and restoration undertaken by the Church with income generated by the theater use.

As to whether the granting of this variance would cause substantial detriment to the zone plan and to the purposes of the Overlay, the Board is not persuaded that it would. OP's argument is simply that the theater use is not permitted in a Residence District. If the Board were to accept that argument it could never grant a use variance for a commercial use in a Residence zone. That of course cannot be the case. The question is whether the introduction of the particular commercial use would jeopardize the residential character of the neighborhood. The Board agrees with the ANC that it would not. As the ANC's resolution points out, not all commercial uses are categorically prohibited in the R-5 zone. Rather, certain commercial uses, such as

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convenience stores in apartment houses and commercial adjuncts to hotels and are permitted by special exception. Those uses are part of and complementary to a larger permitted use, and for that reason may be compatible within a residence zone. Similarly, this theater use will be contained within a large building devoted to a permitted institutional use. Indeed, the Church is allowed as a matter of right to use this space for its own mission-related performances. The only difference here is that the performances are being offered by a third party. Lastly, this order imposes conditions limiting both the number of third party performances and attendees. The Board is confident that such a relatively small and infrequent use will do no harm to the fabric of this neighborhood.

Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10 (d)(3)(B)) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. As noted, the ANC supported the application with conditions that the Board has adopted in this order.

The Board is also required under D.C. Official Code § 6-623.04 (2001) to give "great weight" to OP recommendations. In its report, OP opined that the Applicant did not sufficiently establish any uniqueness or exceptional condition of the property and undue hardship and that granting of the application would be contrary to the intent and integrity of the Zoning Regulations. For the reasons stated in this Decision and Order, the Board does not find OP's advice to be persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that the application is **GRANTED** to allow zoning relief pursuant to 11 DCMR § 3103.2, for a variance from the use provisions for theater performances on the basement level of a Church under §§ 350.4, in the DC/R-5-B District at premises 1810 16th Street, N.W., subject to Exhibit 29A (plans), and **SUBJECT** to the following **CONDITIONS**:

1. This approval shall be for a period of THREE (3) YEARS beginning on the date upon which the order became final.
2. The total number of "performances" by the residential theater shall be limited to 48 per year. Performances shall include only formal theater-sponsored and benefitted scheduled events in which tickets are advertised and offered in advance to the general public. Performances shall not include Church-sponsored and benefitted events, theater auditions, rehearsals, and dress rehearsals which are not open to the public and tickets are not sold or offered, and other small scale and customary theater developmental activities, including free workshops, readings, open houses and other fundraising activities and other development activities for theater professionals and the public.
3. For outside residential theater performances, seating shall be limited to 75.
4. The current residential theater, Spooky Action Theater, or any subsequent residential theater, shall not sublet this space to other theaters or organizations. Such restriction shall be included in the lease between the Applicant and the residential theater.

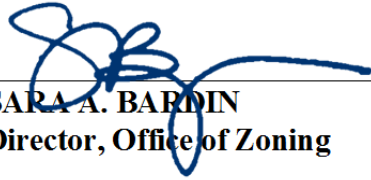
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5. Public access to the theater for the general public, staff and performers shall be limited to the main entrance to the Church on 16th Street. Access from the alley shall be limited for ADA purposes and service activities.
6. For Friday and Saturday night performances, the residential theater shall seek to make arrangements for off-street parking for staff, performers, and patrons.
7. During the times of residential theater performances, the Applicant shall ensure that the gathering of people outside the premises of the Church during pre-performance waiting, intermissions, smoke-breaks, or post-performance socializing shall not disturb the peace, order or quiet of the residential neighborhood.
8. The Applicant shall remove any trash associated with the residential theater performances no later than the day after the performance.
9. The Church shall meet with the ANC annually to discuss any concerns and the need to implement any new mitigation measures.
10. The Church shall create a mission for charitable and educational activity in which the rental theater shall be a participant.

VOTE: **4-0-1** (Lloyd J. Jordan, Jeffrey L. Hinkle, Nicole C. Sorg, and Michael G. Turnbull to APPROVE; one Board seat vacant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
A majority of Board the members approved the issuance of this order.

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: April 17, 2013

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSE OF SECURING A BUILDING PERMIT, OR THE APPLICANT FILES A

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REQUEST FOR A TIME EXTENSION PURSUANT TO § 3130.6 AT LEAST 30 DAYS PRIOR TO THE EXPIRATION OF THE TWO-YEAR PERIOD AND THAT SUCH REQUEST IS GRANTED. NO OTHER ACTION, INCLUDING THE FILING OR GRANTING OF AN APPLICATION FOR A MODIFICATION PURSUANT TO §§ 3129.2 OR 3129.7, SHALL EXTEND THE TIME PERIOD.

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ. (ACT), THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, GENDER IDENTITY OR EXPRESSION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, GENETIC INFORMATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION.