GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 13965, of Timothy O. Temple, pursuant to Paragraph 8207,11 of the Zoning Regulations, for variances from the minimum lot area requirements (Sub-section 3301.1) and the parking requirements (Sub-section 7202.1) to use all floors and basement of the subject premises as a five unit apartment building in an R-4 District at the premises 216 3rd Street, S.E., (Square 790, Lot 808).

HEARING DATES: May 25 and June 16, 1983
DECISION DATE: July 6, 1983

FINDINGS OF FACT:

1. The application was first scheduled for the public hearing of May 25, 1983. The Chair continued the case to the public hearing of June 16, 1983 because of the lateness of the hour.

2. The subject site is located on the east side of 3rd Street, between Pennsylvania Avenue and C Streets, S.E. and is known as premises 216 3rd Street, S.E. It is in an R-4 District.

3. The site is generally rectangular in shape containing approximately 1,412 square feet of land with approximately 21.2 feet of frontage on 3rd Street. The site is improved with a three-story brick row dwelling with basement constructed around 1900. The site is generally flat.

4. To the north of the site is a pharmacy, at the southeast corner of the intersection of Pennsylvania Avenue and 3rd Street, which is a part of a strip of commercial development along Pennsylvania Avenue in the C-2-A District. Other commercial uses abutting the site to the north and northeast are a variety of office, retail and restaurant uses fronting on Pennsylvania Avenue in the C-2-A District.

5. To the east, the site is abutted by a ten foot wide public alley, followed by the rear yards of commercial establishments along Pennsylvania Avenue in the C-2-A District. To the southeast are the rear yards of residential dwellings fronting on C Street in the R-4 District.

6. Immediately to the south of the site and attached to the subject structure are row dwellings containing two to six units in the R-4 District.

7. To the west of the site across 3rd Street are row dwellings in the R-4 District.

8. The site is located in the Capitol Hill community.

9. The subject structure is now used as a five unit apartment house. One unit is in the basement, one on the first floor, two on the second floor and one on the third floor. Each unit has a separate entrance, bath and kitchen facilities. The units are all presently occupied. The applicant requests a variance to allow those units to remain.

10. The present valid Certificate of Occupancy, No. 67609, dated October 17, 1968, is for use of the subject property as a flat.

11. The applicant purchased the subject property on November 4, 1963, as a five unit apartment house permitted under Certificate of Occupancy No. A11111 issued to Kemper Simpson, dated August 8, 1951, for an apartment house. There was no designation of the number of units or the Certificate of Occupancy.

12. On March 12, 1962, Kemper Simpson, the previous owner of the subject property, applied for a change in the certificate of occupancy from apartments to a two-family flat. The application was filed prior to the sale of the property to the applicant.

13. The applicant was not informed by the previous owner before or after settlement that an application to change the certificate of occupancy from apartments to a flat had ever been filed for the property.

14. The certificate of occupancy applied for on March 12, 1962, for a flat was issued as No. B-34245 dated May 20, 1964. Certificate of Occupancy No. B-34245 was issued in the name of the previous owner and was not received by the applicant, who was then the owner of the subject property.

15. The applicant did not became aware of the certificate of occupancy for a flat until October 17, 1968, when he attempted to apply for a certificate of occupancy in his own name for a five unit apartment house. At such time he was informed by the permit office that the subject property was limited to use as a two-family flat under the previously issued Certificate of Occupancy No. B-34245, dated May 20, 1964.

16. Upon learning of the certificate of occupancy in the name of the previous owner which limited the use of the property to a flat, the applicant filed for and was issued in his name Certificate of Occupancy No. B-67609, dated October 17, 1968, for use of the premises as a flat. This was the only lawful occupancy permit he could receive.

17. In 1970, the applicant sought variance relief from this Board in Appeal No. 10370, dated August 25, 1971, to permit use of the premises for five apartment units. The BZA granted the application but limited the use to three apartments, one on each floor and none in the basement. In the record before the Board, there was no indication of the chronology of facts recited in Findings 11 through 15.

18. The applicant testified that he has no recollection of Appeal No. 10370 heard in 1970 because of personal matters at that time. He did not file an application for a certificate of occupancy following the issuance of the Board's Order, and no certificate of occupancy for a three unit apartment house was issued.

19. The applicant testified he had been unable to locate a copy of the previous Certificate of Occupancy No. A-11111 permitting apartments until February, 1983.

20. The attached row dwellings immediately south of the site are located on lots generally similar in configuration to the subject lot and have structures of similar architectural design and use. The premises at 218 3rd Street, S.E., under Certificate of Occupancy No. B-29094, dated July 17, 1961, is permitted to be used as a flat. The premises at 220 3rd Street, S.E., under Certificate of Occupancy No. B-74820, dated May 25, 1971, is permitted to be used as a six unit apartment house. The premises at 222 3rd Street, S.E., under Certificate of Occupancy No. B-117433, dated October 31, 1979, is permitted to be used as an apartment house for five units. The premises at 224 3rd Street, S.E., under Certificate of Occupancy No. A-9844, dated May 18, 1951, is permitted to be used as an apartment house.

21. There is a ten foot wide north-south public alley at the rear of the subject property and the attached row dwellings immediately to the south which is accessed from C Street, S.E. The ten foot alley terminates at the north lot line of the subject lot. For approximately the width of the subject lot, the ten foot alley widens into a funnel shape to a width at its northern end of twenty feet.

22. Three restaurants and a dry cleaning establishment in the commercial area north of the subject property contiguous to the public alley use the alley for service and delivery activities including trash pick-up. None of the other row dwellings to the south have off-street parking

except 224 3rd Street, S.E. which has frontage on C Street and has access to its rear yard parking from C Street.

23. The rear yard of the site is approximately twelve feet deep and the configuration of the lot lines at the rear is irregular. Two sets of stairs, one to the first floor and the other to the basement, protrude into the rear yard by approximately 5.5 feet, further reducing its useable area.

24. There is restricted two hour residential permit parking allowed on neighborhood streets. Metered parking is permitted on Pennsylvania Avenue.

25. An apartment house in the R-4 District is required to provide one off-street parking space for every three units. A flat also requires one space for every three units. Under the rules of interpretation of the Zoning Regulations, the flat would thus require one space and the five unit apartment house two spaces. Pursuant to Sub-section 7201.2, when the use of the building is changed, the incremental difference in the parking requirement must be provided. The subject property would thus be required to provide one-off street parking space. No space is provided, requiring a variance of 100 percent.

26. The R-4 District require 900 square feet of lot area per unit in order to convert a building to apartments. The proposed use would require a lot area of 4,500 square feet. The subject lot provides 1,412 square feet, requiring a variance of 3,088 square feet or sixty-seven percent.

27. The Office of Planning, by report dated May 10, 1983, recommended approval of the application. The Office of Planning did not condone the untimely effort by the applicant to seek to ratify the illegal apartment use of the premises. The Office of Planning, however, was of the opinion that there were situations and conditions related to the use history and physical restraints of the site which supported the granting of the requested variances for the following reasons:

a. The subject building occupies a vast portion of the lot. The lot was established prior to 1958 at a size under the current required minimum lot size.

b. The five separate apartment units have existed continuously for twenty years.

c. No vacant land abuts the site which the applicant could acquire to expand the lot in compliance with the 900 square foot provision.

d. Adjoining row dwellings to the south have similar apartment uses and physical characteristics of the subject property. Such uses exist without apparent adverse effect.

e. The existing ten foot alley is too narrow to allow vehicles to manuever. Vehicles must back out of the alley. It is used by commercial service and delivery vehicles. Vehicular access to the rear yard is impractical.

f. There is not enough room in the rear yard to provide a nine foot by nineteen foot parking space.

g. Public transportation is available in the area. Employment centers, shopping and recreational facilities are within easy walking distance.

The Office of Planning was of the opinion that the variance would not create any substantial adverse impacts or impair the intent, purpose or integrity of the zone plan for the city in accordance with Paragraph 8207.11. The Board concurs.

28. The Capitol Hill Restoration Society, by letter dated May 25, 1983, opposed the application on the grounds that the property has been inappropriately used as apartments for the past twenty years. The property was issued a certificate of occupancy for a two-family flat in 1964 to a person who at that time no longer owned the property. The Society recommended that the proper way to reverse that action was through an appeal and not through the requested variances. The Board for reasons discussed in its conclusions does not concur with the reasoning of the Society. As to the Society's recommendation that an appeal is the proper procedure the Board finds that an appeal is now untimely. The appeal could have been pursued in the first instance or alternatively with the filing of the application. This election was not pursued.

29. Advisory Neighborhood Commission 6B, by report dated May 10, 1983, supported the application. The ANC was of the opinion that the certificate of occupancy No. B-34245 was invalid. The ANC considered that Certificate of Occupancy No. A-11111 should be the valid and existing certificate of occupancy for the building. The ANC was puzzled and disturbed as to why a long period of time had elapsed before the applicant applied for proper certificates. The ANC believed the applicant when he said he was ignorant of the proper procedures and that now he is trying to conform to the law. The ANC particularly noted that this application was initiated by the applicant and not by the District. The ANC was of the opinion that the relief

can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the zone plan. The Board concurs with the recommendation of the ANC.

30. No one appeared at the public hearing in opposition to the application.

31. A letter of opposition was received into the record from a tenant of the subject premises. The tenant alleged that the applicant was aware that he was operating an apartment house for many years, and still is, without a valid certificate of occupancy and that the applicant has been reaping rewards from illegal activity. The tenant also argued that the present testimony of the applicant contradicted his prior testimony in BZA Case No. 10370 wherein the Board limited the use of the structure to three apartments with no use of the basement as a unit. The tenant did not appear at the public hearing, and the Board could not explore his allegations with him. The Board finds that the most creditable explanation of the applicant's actions is that set forth by the applicant.

CONCLUSIONS OF LAW AND OPINION:

Based on the findings of fact and the evidence of record the Board concludes that the applicant is seeking area variances, the granting of which requires the showing of a practical difficulty inherent in the property itself. The Board concludes that there are practical difficulties unique to the subject property's use as a five unit apartment house. The structure was occupied as a five unit apartment house with a valid certificate of occupancy prior to the adoption of the current Zoning Regulations. The applicant upon purchasing the subject property in 1963 was unaware that the former owner had applied for a change in the certificate of occupancy from apartments to a two-family flat in 1962. The certificate of occupancy was issued after an excessive period of time by government authorities in 1964 and it was in the name of and sent to the former owner. The applicant did not become aware of the change in status of the property until 1968, when he applied for and was issued a certificate of occupancy for a flat in his own name. The applicant, then sought relief from this Board in 1970 to legalize the five unit apartment house. This Board approved the use of the subject property as a three unit apartment house without knowledge that the flat certificate of occupancy should not have been issued. The applicant was in a personal circumstance wherein he was not able to completely and competently tend to his business affairs. He did not file for a certificate of occupancy for the three unit apartment house pursuant to this Board's approval. The subject property has continued to be used as a five unit apartment house until the present.

This Board does not condone the illegal use of the premises for nearly the past twenty years and cautions the applicant about such occurances. The Board concludes that the applicant, at the time he purchased the subject property, had a legitimate certificate of occupancy for a five unit apartment house which, for reasons he had no knowledge of and which were beyond his control, was changed to a flat. The Board concludes that the overriding factor in this application is that the District of Columbia should not have issued the flat certificate of occupancy in 1964 to a person who no longer owned the property. That certificate of occupancy deprived the applicant of the right to use the property as it had historically been used. While the applicant's explanation for his actions are somewhat ambiguous, the Board must accept it as the most creditable answer on the record.

The Board concludes that the proposed five unit apartment house is consistent and compatible with other uses in the immediate area. Immediately north of the site is a strip along Pennsylvania Avenue. The attached row dwellings to the south range from a flat to a six unit apartment house.

The Board further concludes that the subject property cannot physically provide a normal size parking space on-site. The structure occupies the entire site except the rear yard. The rear yard is less than the required depth for a parking space and the yard's configuration is irregular. The ten foot alley at the rear yard is too narrow to allow adequate manuevering space for vehicles and it is used primarily for service and delivery activity of the commercial businesses fronting on Pennsylvania Avenue. The Board concludes that it has accorded to the Advisory Neighborhood Commission the "great weight" to which it is entitled.

The Board is further of the opinion that the relief sought can be granted without substantially impairing the intent, purpose and integrity of the Zone Plan. Accordingly, it is ORDERED that the application is hereby granted.

VOTE: 5-0 (William F. McIntosh, Carrie L. Thornhill, Douglas J. Patton, Walter B. Lewis and Charles R. Norris to GRANT).

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

ATTESTED BY: Steven E. Sher

STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: SEP 27 1983

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 CONSUMER AND REGULATORY AFFAIRS.

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