

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 15988 of the Irving Street Condominium Association, pursuant to 11 DCMR 3107.2, for a variance to allow an addition to an existing nonconforming structure that now exceeds the allowable lot occupancy and floor area ratio requirements [Paragraph 2001.3 (a) and (c)] and a variance from the floor area ratio requirement (Subsection 402.4) for alterations, repairs and an addition to a four unit condominium building in a DCOD/R-5-B District at premises 1813 19th Street, N.W. (Square 132, Lot 210).

HEARING DATE: October 12, 1994
DECISION DATE: October 12, 1994 (Bench Decision)

ORDER

SUMMARY OF EVIDENCE:

1. The subject site, located on Lot 210 in Square 132, is in the Dupont Circle Historic District in Ward 2. It is bounded on the north by Swann Street, N.W., on the east by 18th Street, N.W., on the south by S Street, N.W., and on the west by 19th Street, N.W.

2. The Dupont Circle Historic District and neighborhood contain a variety of uses, including single-family rowhouses, flats, apartment units, offices, retail stores, hotels, embassies, chanceries, churches and schools. The Dupont Circle Redline Metrorail station and several Metrobus routes provide public transportation to the area. The development pattern of the area, easy accessibility to public transportation, and the area's proximity to downtown, provide a vibrant mixed-use community and an attractive neighborhood setting.

3. The site is level and rectangularly-shaped. The property is 20-feet wide and 96.04 feet deep, and has a total land area of 1,920.8 square feet. The building occupies about 77 percent of the site. The remaining portion of the site accommodates two parking spaces and a walkway. A 10-foot wide public alley abuts the site at the rear.

4. The site is zoned DCOD/R-5-B. The R-5-B District permits matter of right development of general residential use including single-family dwellings, flats, and apartments to a maximum lot occupancy of 60 percent, a maximum floor area ratio (FAR) of 1.8, and a maximum height of 50 feet. The Dupont Circle Overlay District (DCOD) does not affect the instant application.

5. The applicant is requesting area variance relief under Subsections 3107.2 and 402.4 and Paragraph 2001.3(a) and (c) of 11 DCMR for alterations, repairs, and an addition to a four-unit condominium building.

6. This property is also the subject of BZA Appeal No. 15754 of Paul Reneau, challenging the issuance of a certificate of occupancy No. B-162715 on April 27, 1992, by Edgar T. Nunley, Chief, Zoning Review Branch, to the effect that the certificate was approved as to zoning despite the fact that illegal building additions were made beyond the scope of Building Permit No. B-352782 for a four-unit apartment building in a DCOD/R-5-B District at premises 1813 19th Street, N.W. (Square 132). It was the appellant's contention that an addition had been made to the fourth floor of the structure and that before a valid occupancy permit could be issued on the property, the owners of the property at that time, Steven and Lori Esrig, would need to seek relief from the Zoning Regulations. The appellant contended that the Zoning Administrator erred in failing to require the owners to seek variance relief from the Board of Zoning Adjustment.

7. The appellant made note of other documents related to the case, that should have affected the Zoning Administrator's decision.

8. By order dated September 8, 1993, in Appeal No. 15754, the Board granted the applicant's appeal and therefore reversed the decision of the Zoning Administrator.

9. The Board, in granting the appellant's appeal, believed that whatever the accurate characterization of the alleged addition and alterations made to the subject building which went beyond what was approved as specified under building permit No. B352782, the Zoning Administrator had an obligation to require compliance with the Zoning Regulations and to refer the owners to the Board if the rules were not met. The Board concluded that failure to do so was an error and therefore, Certificate of Occupancy No. 162715 should not have been issued on April 27, 1992.

10. The Board noted that the revocation was a "very difficult, a very emotional case" and strongly suggested to and advised the owners that a variance application be filed hence the submission of the subject application.

11. Based on the Zoning Administrator's calculations, the building contains 4,093.7 square feet of which 4,017.5 square feet existed prior to the renovation. The discrepancy at issue in this application concerns the difference of 76.2 square feet, most if not all of this "excess" FAR is attributed to an "attic mezzanine located in the third floor unit of the property, which provides access to the building's roof top. The report of the Office of

Planning notes that because of the present nonconformity, the building's other excess FAR of approximately 560 square feet which was grandfathered must now be accounted for. Therefore, in order for the building to come within FAR compliance, 636.2 square feet of habitable space would have to be eliminated.

12. This project does not meet the lot occupancy requirement of the Zoning Regulations. The building is allowed to occupy 60 percent of the 1,920.8 square-foot lot, or 1,152.4 square feet. The existing building is 1,344.5 square feet, exceeding the allowable lot occupancy by 192 square feet. Thus, the applicant is also requesting variance relief from this condition.

13. The project architect testified that the renovations affecting the attic and the roof were as a result of a large fire which caused extensive damage to the building in 1982. After the fire, and long before the developers purchased the property, the roof was constructed over the party wall on each side of 1813 19th Street, which eliminated all rated separations and exacerbated the original fire hazard in violation of applicable building codes. The project architect testified that as part of the renovation, the roof was brought into fire code compliance which required the rebuilding of part of the roof as well as the addition of parapet wall extensions on the north and south property lines. It is with respect to these additions and modifications that this variance relates to.

The project architect testified that it would not be possible to reconfigure the building to reduce the living area by 76.2 square feet much less, 636.2 square feet. Additionally, the project architect testified that the only area subject to any reconfiguration to reduce the FAR, would be the removal of the attic mezzanine on the third floor apartment which would also necessitate the removal of the roof.

14. The project architect testified that such demolition work would cost on the order of \$50,000 and would necessitate the evacuation of the building for three to four months.

15. The applicant unit owners of the Irving Street Condominium Association testified that they relied on the original Certificate of Occupancy posted prominently on the premises when they purchased the condominium units.

16. The applicant unit owners testified that the purchase of the condominium was a major investment for each of them; and that each of the owners had placed a substantial amount of their life savings into the purchase of the units.

17. The applicant unit owners testified that in the event of demolition and evacuation, they would be forced to sell their

apartment units, and move, resulting in a tremendous loss. One of the unit owners, further testified that he had severe heart disease, and any evacuation could be life threatening.

18. The applicant unit owners further testified that their financing was imperiled because of the zoning status, as such status constituted a violation under their loan documents.

19. Testimony was also presented that the uncertain status of zoning presented a potential title problem, such that any sale of the property would produce significant economic losses not covered by title insurance.

20. The owners of the third floor unit, testified that in the event the attic mezzanine was demolished, the reconfigured apartment would no longer serve their needs, and they would be forced to sell their home. Testimony was also presented that in the event that the attic mezzanine was removed, the apartment would lose approximately \$100,000 in value. This figure was arrived at as the reconfigured apartment would be comparable to another unit in the building, which was sold at \$100,000 less than the third floor unit.

21. The Office of Planning (OP), by its memorandum dated October 5, 1994, and by testimony at the public hearing, recommended approval of the application, if the Board determined at the public hearing that there was a practical difficulty in this case. At testimony at the public hearing, the Office of Planning stated that based on the facts before it, on a review of the record in BZA No. 15754, and in conversations with the Zoning Administrator, it could not make a determination as to the existence of a practical difficulty.

22. On cross examination, the OP admitted that it had not considered the practical difficulty to the unit owners of the condominium -- the applicants in the present case -- but was under the mistaken assumption that the applicant was the developer of the property.

23. The Metropolitan Police Department (MPD), by its memorandum of August 25, 1994, stated that the department did not oppose the subject application. The MPD further stated that the change proposed by the applicants did not appear to affect the public safety negatively in the immediate area or generate an increase in the level of public services provided in the area.

24. The Department of Fire and Emergency Services (DFES), by its memorandum dated August 26, 1994, had no objection to the application.

25. The Advisory Neighborhood Commission (ANC) 2B, by its letter of September 15, 1994, unanimously supported the application.

26. A resident of 1836 Swann Street, N.W., a neighbor of the subject property for over 30 years, testified that it would be unjust not to grant the variance. He stated further that prior to the renovations, the building was in a dilapidated condition and was used as a rooming house. The developers had spent a considerable amount of money in improving the building, and in replacing the temporary roof placed on the building after a fire destroyed the building in the early 1980s. He further testified that the variance at issue did not concern alterations visible from the street.

27. Part-owner of the building at 1819 19th Street, N.W. in the neighborhood opposed the application. His argument was that any additional floor area ratio (FAR) to the application was technically illegal.

FINDINGS OF FACT:

Based upon the Court's rulings in de Azcarate vs. D.C. Board of Zoning Adjustment, and Beins v. District of Columbia Board of Zoning Adjustment, the Board of Zoning Adjustment finds the following facts in the record to be relevant to the issue of "an extraordinary or exceptional situation or condition":

(a) The developer of the property received both preliminary and final approvals for the Property from zoning officials of the District of Columbia Government. These included investigations by zoning officials prior to the issuance of the certificate of occupancy, the stamping of the construction documents as approved for zoning, and the issuance of all building permits on October 2, 1991, and a certificate of occupancy on April 27, 1992. Additionally, the Historic Preservation Review Board recommended approval of the project on June 19, 1991.

(b) Upon receipt of the certificate of occupancy, the developer marketed the property for sale as condominium units. The purchasers of these units relied on the certificate of occupancy in purchasing and obtaining financing for these units.

(c) The applicant unit owners were not aware of any circumstances warranting the invalidity of the certificate of occupancy when they purchased the units.

(d) The applicant unit owners acted in good faith, justifiably relied on the actions of the D.C. officials as acting

on the issuance of Certificate of Occupancy No. B162715, made expensive and permanent improvements to their property.

(e) The revocation of Certificate of Occupancy No. B162715 on September 8, 1993, in Appeal No. 15754, stayed for a reasonable time, however, to allow the applicant owners to apply for area variances.

(f) On October 5, 1992, a Board of Zoning Adjustment (BZA) appeal was filed by Paul Reneau with the city alleging that a certificate-of-occupancy (C of O) was issued in error for the subject property. The appeal, Application No. 15754, was heard by the Board on January 27, 1993.

The appellant alleged that additions and alterations were made to the subject building which went beyond what was approved under the project's building permit. Specifically, variance relief from the floor area ratio (FAR) requirements of the Zoning Regulations should have been sought prior to the city's issuance of a building permit and certificate of occupancy for the subject building.

On September 8, 1993, the Board decided the case and concluded that the project's originally submitted plans did not accurately delineate all of the modifications that were to be made to the project. The Board, thereafter, revoked the Certificate of Occupancy.

2. Based upon the evidence and testimony, the Board finds that the strict application of the Zoning Regulations would impose a practical difficulty since it would require at least one of the applicant unit owners -- who purchased the unit in good faith reliance on the existing Certificate of Occupancy -- to demolish or lose a portion if not all of a unit's habitable space.

3. The Board finds that the applicant unit owners purchased their homes with a valid certificate of Occupancy in place. If the variance is not granted, each unit owner faces an extended evacuation, as well as an economical loss in the inability to sell at market rate a unit in a building not in compliance with the zoning regulations. Additionally, one unit owner suffers from heart-disease, the street attendant any evacuation or economic loss could be life-threatening.

4. With respect to the Office of Planning's report and recommendation, the Board notes that the Office of Planning, by its own admission at testimony at the hearing, did not consider the practical difficulty from the perspective of the applicant unit owners, but only from the perspective of the developer. Accordingly, the Board disagrees with the Office of Planning's decision not to reach a determination with respect to practical difficulty.

5. The Board agrees with the recommendation of Advisory Neighborhood Commission 2B.

6. Based upon the evidence and testimony, the Board finds that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan. The renovation of the building is an improvement over the prior existing condition of the property; and the excessive FAR is not noticeable from the street.

7. The Board also finds that great harm to the public good will occur from a policy standpoint if the applicant unit owners are forced to demolish any portion of the building to come into compliance with the FAR.

8. As to Mr. Reneau's argument that the excessive FAR is technically illegal, the Board finds that the building was provided with a certificate of occupancy, and that the applicant unit owners are before the Board having fully relied on that certificate of occupancy seeking variance relief relating to the impermissible FAR. Given the statutory and legal standard for an area variance, the issue of whether or not the excessive FAR is technically "illegal" is immaterial to this application.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicants are seeking area variances, the granting of which requires a showing that the site is affected by extraordinary or exceptional situations or conditions, that the strict application of the Zoning Regulations will result in practical difficulties to the applicants and that relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zone plan.

Based on the foregoing findings of fact and evidence of record, the Board concludes that the applicant has satisfied these tests for an area variance. The property is affected by extraordinary or exceptional conditions relating to its history. The D.C. Court of Appeals held in de Azacarte v. D.C. Board of Zoning Adjustment, 388 A.2d 1233 (D.C. 1978), that the extraordinary or exceptional condition which is the basis for a variance need not be inherent in the land, but can be caused by subsequent events extraneous to the land itself. As applied to this application, the Board concludes that these events include the city officials' issuance of the building permits and the Certificate of Occupancy, the reliance of the applicant unit owners on that Certificate of Occupancy in purchasing their units, the economic prejudice to applicant unit owners would suffer in the event this

variance is denied, and that to at least the one unit owner with heart disease, the denial of the variance and the attendant consequences could be life threatening. Further, on this basis, the applicant unit owners reasonably proceeded in good faith in purchasing their units.

The Board concludes that there are practical difficulties as a result of the exceptional conditions. Strict application of the Zoning Regulations would require demolition of some or substantial portion of the building, all at substantial cost. The practical difficulty also involves the applicant unit owners' good faith and detrimental reliance on assurances and actions of the officials at the Zoning Administrator's office and the economic prejudice to the applicant unit owners if the regulations are strictly applied.

The Board further concludes that the building is consistent with the purpose and intent of the DCOD/R-5-B District and can be granted without substantial detriment to the public good. The Board believes greater harm will result if the applicant unit owners are required to demolish any part of the building to conform to the applicable floor area ratio (FAR).

The Board finally concludes that the unit owners acted in good faith relying on actions of the officials at the Zoning Administrator's office in purchasing their units, and seeking necessary renovations, and that the equities strongly favor the applicant unit owners of the Irving Street Condominium Association.

The Board afforded ANC-2B the "great weight" to which it is entitled. Accordingly, it is hereby **ORDERED** that the application be **GRANTED**.

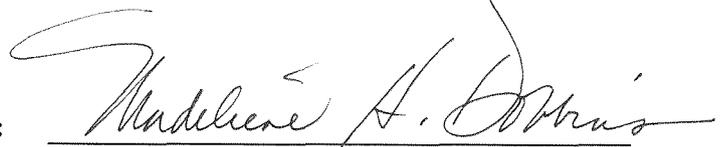
VOTE: 3-0 (Craig Ellis, Susan Morgan Hinton and Angel F. Clarens to grant; Maybelle Taylor Bennett and Laura M. Richards not present, not voting, not having heard the case).

This order was issued as a proposed order pursuant to the provisions of D.C. Code Section 1-1509(d). The proposed order was sent to all parties on October 11, 1996. The filing deadline for exceptions and arguments was November 1, 1996, and responses were due by November 15, 1996. No party to this application filed exceptions or arguments relating to the proposed order, therefore, the Board of Zoning Adjustment adopts and issues this order as its final order in this case.

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

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ATTESTED BY:



MADALIENE H. DOBBINS
Director

FINAL DATE OF ORDER: NOV 27 1996

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

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, 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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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15988

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on NOV 27 1996 a copy of the order entered on that date in this matter was mailed postage prepaid to each person who appeared and participated in the public hearing concerning this matter, and who is listed below:

Benny L. Kass, Esquire
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A handwritten signature in cursive script, reading "Madeliene H. Dobbins", written over a horizontal line.

MADELIENE H. DOBBINS
Director

Date: NOV 27 1996