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November 6, 2006

Chairman Geoffrey Griffis
Board of Zoning Adjustment
441 Fourth Street, N.W.
Suite 200
Washington, D.C. 20001

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17519

EXHIBIT NO. _____

RE: BZA Appeal No. 17519 - Appeal of Advisory Neighborhood Commission 2E
(Subject Property: 1812 35th Street, N.W. (Square 1296, Lot 802))

Dear Chairman Griffis:

We write with regard to BZA Appeal No. 17519, in which ANC 2E appeals from the issuance by DCRA of Building Permit No. 89770 to allow the Owner of 1812 35th Street, N.W. to convert the existing single family semi-detached dwelling into a row dwelling. The existing dwelling has been renovated previously in violation of the applicable Zoning Regulations and prior orders of the BZA. Rather than comply with the law, the Owner has continued to try and manipulate the process to manufacture an after-the-fact rationale to allow the unlawful structure to remain.

Our clients, Richard E. Schmidt and Margaret R. Schmidt, own and reside at 1810 35th Street, N.W., next door to the Subject Property. Mr. Schmidt made a specific request for party status on this appeal, which was rejected by the Board. Respectfully, this decision was incorrect and Mr. Schmidt reserves his right to appeal from that determination. *See, e.g., York Apartments Tenants Ass'n v. District of Columbia Zoning Comm'n*, 856 A.2d 1079, 1083-1085 (D.C. 2004). As a party owning and residing property *next door to* the Subject Property, Mr. Schmidt can assert, and did assert, issues personal to him with respect to this appeal, he meets all of the requirements to have standing to protect his interests, and he was entitled to party status to permit him appropriate procedural and substantive means to protect his interests. *See id.*

Respectfully, the BZA should take all of the relevant interests and issues into account in deciding this appeal on all of the arguments presented by those opposing the Owner's longstanding effort to avoid the application of the Zoning Regulations and prior BZA Orders. Similarly, the Owner's suggestion that certain issues were not appealed in a timely manner should be rejected summarily. This Board has never required the level of formality that the

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Owner suggests applies to this appeal. Although the Owner concedes that this appeal was timely filed on May 8, 2006, it argues for a limitation on the presentation of arguments and evidence going beyond those expressly and completely set forth in the initial filing. The rules governing this Board do not impose such extensive requirements, nor do they validate the Draconian consequence of dismissal of the appeal under these circumstances. The Board decides these issues on the merits, not by applying overly formalistic pleading requirements and dismissing cases on technicalities.

In advancing the motion to dismiss, the Owner is essentially making an “estoppel” claim with respect to the basis for this appeal. A right of appeal encompasses all matters considered in the earlier proceedings. *See York Apartments Tenants Ass’n, supra*, 856 A.2d at 1085. The Owner does not and could not claim any unfairness in the fact that it is being called to account for *all* of its violations of the Zoning Regulations, and it does not deny that these provisions have been argued at length with respect to the Subject Property during this longstanding process. Where no unfair prejudice can be shown, the Board has not dismissed appeals – even where the issue ultimately decided on appeal was different from the grounds asserted initially. *See Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh* (February 28, 2005) (denying motion to dismiss, where original grounds for appeal had all been dismissed as moot and only the additional challenge raised after original appeal filing remained for resolution).

The issue involved in this case is simple. The Owner took the risk of completing a renovation without complying with the Zoning Regulations or obtaining approval for the noncompliance. Since then, the Owner has engaged in a series of efforts to thwart the applicable requirements to the detriment of Mr. Schmidt and others, and to avoid prior BZA rulings adverse to the Owner.

The latest iteration of this effort is the ruse that an almost totally – if not completely – nonfunctional extension of the upper portion of the dwelling, although not creating a common division wall, creates a “row dwelling” as a matter of right, negating the Owner’s violation of the applicable lot occupancy limitations. The Owner’s position flies in the face of reason as well as the plain language of the Zoning Regulations.

Conversion to a row dwelling under these circumstances requires *both* construction to the lot line *and* creation of a common division wall. Anything less leaves a nonconforming side yard or court, leaving unresolved the lot occupancy violation and creating a further violation by decreasing the existing nonconforming side yard or the creation of a nonconforming court.

A “row dwelling” cannot be created under these circumstances without a common division wall. Here, there is admittedly no such common division wall with the existing structure owned by Mr. and Mrs. Schmidt. The Owner admits that if there were any space at all between the wall and the lot line, the proposal would be prohibited. It says, however, that it plans to extend the upper portions of the existing structure to the lot line, leaving an unfinished

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“open pedestrian walkway” below. This so-called “open pedestrian walkway” is no different from the roof extension proposed and rejected by the BZA previously. The claim that it qualifies as a “dwelling” is incorrect on its face. It is an open area of separation between the two structures. The Owner proposes to create neither a common division wall nor a lot line wall, but instead some sort of extension of the upper part of the structure, leaving an unfinished area below constituting the “open pedestrian walkway.”

The absence of a common division wall means that there is space between the two dwellings – the Owner’s and the Schmidts. This space implicates the purposes of the side yard requirements: “The side yard regulations as a whole are designed to ensure the provision of an adequate amount of separation between structures.” *Appeal No. 16811 of David and Janet Pritchard* (October 15, 2002) at 9. Where, as here, the separation is insufficient, then matter of right construction is not permitted. Currently, it is undisputed that the space between 1810 35th Street, N.W. and 1812 35th Street, N.W. is a side yard. Boxing it in with an extension of the upper portions of the dwelling reduces the side yard or converts it to a nonconforming court, but does not eliminate it altogether. Whether the space is called an “open pedestrian walkway,” a “side yard,” or a “court,” it is noncompliant. The existing nonconforming use may be changed, but it is not eliminated. Matter of right construction is prohibited: “a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.” *See id.* at 8. The situation involved in *Appeal No. 16935 of Southeast Citizens for Smart Dev.* (September 26, 2003) is not involved here, because not even a lot line wall is being proposed by the Owner given the “open pedestrian walkway.”

Instead of attempting to proceed as a matter of right, the Owner has to seek special exception or variance approval: “A property owner seeking to construct an addition that will convert a semi-detached dwelling to a row dwelling under circumstances where it is not possible to construct a common division wall may apply to the Board for a special exception or variance, as appropriate.” *See Pritchard* at 10 (footnote omitted). The Owner in this instance did that – and the request was denied. The Owner should have respected the validity of the Board’s Order. Instead, it simply tried to find another way to ignore the BZA’s authority.

The Owner attempts to convert this issue into one involving the question of whether “a semi-detached dwelling can [n]ever be converted to a row dwelling.” This is not the question before the BZA. Rather, the question is whether the lack of a common division wall means that conversion to a row dwelling has not been accomplished. The Zoning Regulations do not authorize the creation of a “row dwelling” without a common division wall, and to read these provisions otherwise is to ignore their plain meaning. No amount of verbal prestidigitation from the Owner can avoid the clear import of the Zoning Regulations.

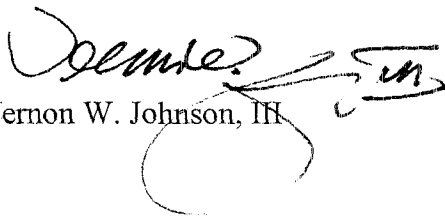
ANC 2E’s opposition to the Owner’s position is also notable. ANC 2E’s recommendation is entitled to great weight. The requirements of D.C. Code § 1-309.10 are quite explicit, and require that the Commission’s recommendation be given great weight, including a

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written explanation stating "with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances." See D.C. Code § 1-309.10(d)(3)(B) (which further requires a statement of "specific findings and conclusions with respect to each issue and concern raised by the Commission" and specific support for the position ultimately taken).

Mr. Schmidt respectfully requests that the BZA follow the recommendation of ANC 2E and sustain Appeal No. 17519.

Sincerely,



Vernon W. Johnson, III

cc: Laurie B. Horvitz, Esq.
Mary Carolyn Brown, Esq.
Bill Crews
Stephanie Ferguson, Esq.
Office of the Attorney General, Land Use, Public Works and Utilities Section
Ellen McCarthy