

2009 OCT 13 PM 3: 24

BEFORE THE
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

APPEAL OF GEORGINA AND OUTERBRIDGE HORSEY
Appeal No. 17971

APPELLANTS' PRE-HEARING SUBMISSION

Appellants have previously presented information outlining the three errors that they believe were committed by the Zoning Administrator in approving permits for work at 3046 N Street, NW, a single-family residence that is immediately adjacent to the rear yard of Appellants' house at 1249 31st Street, NW.

The permits at issue here authorized two elements. The first was the addition of a rear deck on the main floor of the house, as well as a flight of stairs leading down to the rear yard. Because 31st Street slopes to the south, the rear yard is at the same grade as Appellants' house.

The second new construction was the creation of an outdoor deck on the second floor of the property, one story above the deck and stairs just cited.

This supplemental filing will expand upon these points and summarize the testimony that Appellants intend to present at the hearing.

There are two salient questions in this Appeal:

1. With respect to the first floor deck: Is a landing part of a stair, or is it a separate element?

If a separate element, then it may not occupy a required rear yard as matter of right and can only occupy a required rear yard with either a Special Exception or with a Variance if the property is Non- Conforming due to Lot Occupancy

This is in reference to 11 DCMR section 2503.4 which reads:

"2503.4 Stairs leading to the ground from a door located on the story in which the principal entrance of a building is located may occupy any yard required under provisions of this title. The stairs shall include any railing required by the provisions of the D.C. Construction Code."

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17971

EXHIBIT NO. 16

Board of Zoning Adjustment
District of Columbia
CASE NO. 17971
EXHIBIT NO. 16

The following prior BZA cases all have reference to "a landing" in the Findings of Fact, and it appears from the context that the Board viewed the "landing" as a separate element and not part of the stairs:

BZA Case No. 17321 (2005): Findings of Fact:

"8. The property would have side yards 7.5 feet wide on both sides of the house. One side would contain a landing (4 by 8 feet) providing access to a side entrance to the dwelling. The R-2 zone requires side yards with a minimum width of 8 feet. 11 DCMR 8 405."

BZA Case No. 16921 (2002): Findings of Fact:

"3. The proposed addition would include a landing, three feet wide and approximately three feet above the ground, at the rear exit door and three steps exiting into the east side of the rear yard."

BZA Case No. 13486 (1981): Findings of Fact:

"4. The applicant testified that the subject deck was a replacement for a wooden landing and stairway leading to the backyard. The old stairway had rotted and had to be replaced. The original wooden landing extended approximately four feet into the rear yard."

BZA Case No. 13060 (1979): Findings of Fact:

"4. The applicant proposes to add a bay approximately 59.11 square feet in area, to the middle story of the building and to add an exit consisting of a door, landing, a set of steps and railing from the same story to the back yard."

ZC Case No. 06-03A (2007) Findings of Fact

"Applicant indicated that the areas in which landings, stairways, and systems of ramps or devices to enable those with mobility limitations to reach the level of the retail area within that area would be in conflict with the definition of "clear ceiling, height of" in the Zoning Regulations and, accordingly, requested approval for these portions of the respective areas to be exempt from the measurements involved."

Despite these authorities, the Zoning Administrator's recent filing relies exclusively on a bench decision that contained no Findings of Fact or Conclusions of Law, but merely a "determination" by the Board that was specific to that case:

BZA Case No. 17476

"However, the Board determined that the landing area is a portion of a building that does "not extend above the level of the main floor of the main building. . .", as "building area" is defined in Sect. 199 of the Zoning Regulations. In addition, the landing area, which connects the access door and the exterior stairs leading to grade level, is a component of a stairway, pursuant to Sect. 2503.4."

Curiously, however, in this case the Office of Planning, in its 7-page memorandum (attached), reached a different conclusion, which was that the proposed deck/landing would normally require a Special Exception but since the subject property was Non-Conforming due to Lot Occupancy, a Variance from the BZA was required.

Case No. 17476 is at odds not only with the cases cited above, but also with the Board's decision in Appeal No. 14093 (1990), where the facts are closer to what we have here.

In No. 14093, the owners built a non-conforming deck that extended from the back of the house into the rear yard. Immediately next to that new deck, they built a set of stairs and a landing platform that connected the deck to an entrance to the house. Finding 3.d stated: "Had the deck not been built, this stairway would not lead to the ground from a door.

The Board concluded that just because the stairs and landing platform connected to the house in some fashion (*i.e.*, through a newly constructed deck), that did not make them legal. The Board concluded that stairs and platform violated sections 2001.3(b) and (c) of the Zoning Regulations because they did not conform to the rear yard requirements and extended to the north the previous encroachment into the rear yard. "Because the nonconforming deck is the only connection between the stairway and a door, the stairway is not rendered conforming by 11 DCMR 2503.4." Conclusion 6.

That decision supports our position here. Just because a structure of some sort may connect a set of stairs and a door, that does not make the entire structure a "landing" that is part of the stairs and may thus be omitted purposes of computing lot occupancy or rear yard compliance. If such an interpretation were allowed, then it would be very easy for an owner to do away with rear yard and lot occupancy requirements by building a full-sized deck in one's rear yard, adding a set of stairs at the end of the lot and call that deck a "landing" or "platform" that is not to be counted in determining building area.

Appellants' position is supported by these prior BZA cases as well as the DC Construction Code (which is referenced in the Zoning Regulations, 11 DCMR, Section 2503.4), which also establishes that a landing is a distinct and separate component of a stair in the same way that a railing is a separate component of a stair. The 2008 DC Construction Code requires the following with respect to landings:

R311.5.4 Landings for Stairways.

There shall be a floor or landing at the top and bottom of each stairway

Exception: A floor or landing is not required at the top of an interior flight of stairs, including stairs in an enclosed garage, provided a door does not swing over the stairs. A flight of stairs shall not have vertical rise of 12 feet (3658 mm) between floor levels or landings.

The width of each landing shall not be less than the width of the stairway served. Every landing shall have a minimum dimension of 36 inches (914 mm) measured in the direction of travel.

Thus, it is clear that a stair does not always require a landing, as in the case where a stair leads to a deck or floor outside the entry door.

11 DCMR, Section 2503.4 specifically includes two of these three components that can comprise a stairway: the "stairs" themselves and the "railing". It does not include the "landing."

Appellants further maintains that a landing is not only not included as part of the exception granted in Sect. 2403.4 but that, by its conspicuous absence, it is specifically excluded from this exception. The reason that it is specifically excluded is that such a landing or deck can vary greatly in size and can be interpreted to extend from the top of the stair to the door and thus be of any desired size and occupy any amount of the rear yard desired by the home owner. Allowing such a result would undermine if not subvert the intent of the Zoning Regulation which is to maintain the rear Yard as open as possible.

CONCLUSION to Question 1:

Thus Appellants submit that only the stair and railing but not the landing may be constructed in the rear yard as a matter of right. Any landing that is required must either be located outside the rear yard, or a special exception must be granted to allow it to be located in the rear yard. And if the subject property is non-conforming due to lot occupancy, then a variance must be granted to allow it to be located in the rear yard.

2. With respect to the second floor deck, the key question is: Is this deck an "addition"?

If so, since the existing structure is a non-conforming structure due to lot occupancy (69.8% where 60% is allowed), the deck addition may not be made to the structure (without a Variance relief) per 11 DCMR, Section 2001.3, which reads:

This is in reference to 11 DCMR section 2001.3, which reads:

"2001.3 Enlargements or additions may be made to the structure; provided:

(a) The structure shall conform to percentage of lot occupancy requirements, except as provided in § 2001.13;

(b) The addition or enlargement itself shall:

(1) Conform to use and structure requirements; and

(2) Neither increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined."

Importantly, the word addition is not defined in 11 DCMR Zoning Regulations. Thus, per § 199.2 (g), which reads:

"199.2 (g) Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary."

The Appellants have provided in their initial statement filed with the Appeal, the Webster's Unabridged Dictionary definition of addition, which is as follows:

addition:

1a: The result of adding: anything added; b: something added that improves or increases value

2: the act or process of adding: the joining or uniting of one thing to another

3 *obsolete*: designation of (rank or place of residence) added to a person's name

4a: the process noted by the sign + of combining two or more numbers so as to obtain their sum **b:** the part of mathematics that treat of addition

5a: a part added to or joined with a building to increase available space...

On the Applicant's submission for the Building Permit, this deck was carefully described with architectural drawings, connection details and structural framing plans. It is clearly a structure under the definition in the Zoning Regulations¹ and by the definitions supplied above. It is also as "addition." It is "the result of adding." It is "something that improves or increases value." It is "a part added to or joined with a building to increase available space." Thus it is and can only be an "addition."

The fact that the deck addition is located above the existing structure and does not increase the lot occupancy non-conformance is irrelevant for purposes of determining whether or not it is allowed. The only purpose of this deck addition is to increase available usable exterior space in an extremely dense urban area.

§ 2001.3 does not distinguish whether "an enlargement or addition" refers to partially enclosed (i.e., with a railing), enclosed, or covered space or whether also includes open air structures such as decks. The intention of § 2001.3 (a) is to limit further intensity of use in a structure that is already non-conforming. And for structures that are non-conforming with respect to lot occupancy further additions that will increase the intensity of use are simply not allowed except when granted a variance by the BZA.

The following prior BZA cases all have reference to "a deck addition" or a "roof deck addition" In each of these cases, the Board assumed that zoning relief was needed permit the addition of a deck or roof deck and that the decks could not be built as a matter of right:

BZA Case No. 17739 (2008)

Application No. 17739 of Keith Cross, pursuant to 11 DCMR § 3103.2, as amended, for a variance from the lot occupancy requirements under section 403, a variance from the court requirements under section 406, a variance from the limitation on accessory buildings in rear yards under subsection 2500.3 and a variance from the nonconforming structure provisions under subsection 2001.3, to allow a roof deck above an existing garage serving a one-family row dwelling in the R-4 District at premises 663 K Street, N.E. (Square 857, Lot 846).

BZA Case No. 16906 (2002)

¹ A "structure" is "anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground. . . ."

Application No. 16906 of Gerald Schultz, pursuant to 11 DCMR § 3104.1, for a special exception to allow a roof deck addition to a single-family dwelling under section 223, not meeting the lot occupancy requirements (section 403), minimum lot dimension requirements (section 401), and nonconforming structure provisions (subsection 2001.3), in the R-3 District at premises 1213 34th Street, N.W. (Square 1205, Lot 51).

BZA Case No. 16741 (2001)

Application No. 16741 of Greg and Holly Porter, pursuant to 11 DCMR § 3103.2 for a variance to allow a roof deck addition to an existing nonconforming apartment building under subsection 2001.3 in an R-5-B District at premises 1523 Vermont Avenue, N.W. (Square 278, Lot 818).

BZA Case No. 16731 (2001)

Application No. 16731 (2001) of Barry W. Johnson, Jr., pursuant to 11 DCMR § 3103.2 for a variance under subsection 2001.3 to allow a roof deck addition to an existing nonconforming structure in an R-4 District at premises 647 Massachusetts Avenue, N.E. (Square 866, Lot 52).

BZA Case No. 16423 (1999)

Application No. 16423 of Lance Benson and Leslie Anderson, pursuant to 11 DCMR § 3107.2 for a variance to allow an addition to an existing non-conforming structure (Subsection 2001.3(a) and (c)), a variance from the maximum allowable percentage of the lot occupancy provisions (Subsection 1203.3) for the proposed construction of a second-story rear porch deck addition, roof deck and elevator penthouse at an existing flat in the CAP/R-4 District at premises 18 Third Street, S.E. (Square 787, Lot 807).

BZA Case No. 15955 (1994):

"Application No. 15955 of Susan Elizabeth Spence, pursuant to 11 DCMR § 3107.2, for a variance from the lot occupancy requirements (Subsection 403.2) for a deck addition to a single-family row house in an R-3 District at premises 4421 17th Street, N.W. (Square 2650, Lot 25)."

Furthermore, the roof deck addition extends to within 18.98 ft. of the rear property line and thus extends the non-conforming lot occupancy.

The cases cited in Appellee's statement in opposition dated September 28, 2009 do not undercut these points. In Application No. 13207 (1980), the Board concluded that a variance was necessary to permit construction of a roof deck "addition" on top of an apartment building. The Board's discussion of the character of the roof deck came in the context of explaining why a variance was warranted under the criteria for variance relief, not to suggest that the deck could be built as a matter of right. Similarly, in Application No. 13021 (1979) the Board assumed that two new rental units would constitute an "addition" that required a variance. Appellee's memorandum relies on language in the order about how the new units would not increase lot occupancy or gross floor area ratio, but the Board's discussion was a response to neighbors' objections as to the *use* of the property, not the need for an area variance.

CONCLUSION to Question 2:

The Appellants maintain that according to these prior BZA cases, as well by according to the definition of "addition" in Webster's Unabridged Dictionary, the second-story roof deck constitutes an addition to the non-conforming structure at 3046 N Street and as such, without BZA relief that it currently does not have, is not permitted per Section 2001.3 or any other section of 11 DCMR.

This roof deck addition has a major impact on the privacy of the Appellants neighboring property. The right to "privacy and enjoyment" is central to the Zoning Regulations' guidelines for relief in dense urban areas as per Section 223 (b), which reads:

(b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised;

Respectfully submitted,

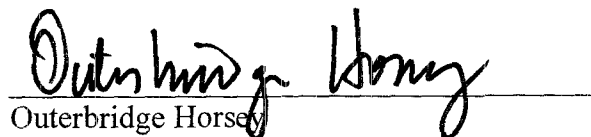

Outerbridge Horsey


Georgina Owen Horsey

1249 31st Street, NW
Washington, DC 20007
(202) 965-0605

CERTIFICATE OF SERVICE

I hereby certify that copies of this pre-hearing submission were served by first-class mail, postage prepaid, this 13th day of October, 2009 upon Robert A. Renjel, Assistant Attorney General, 941 North Capitol Street, NE, Suite 9400, Washington, DC 20001.


Outerbridge Horsey

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF PLANNING



Office of the Director

MEMORANDUM

TO: Board of Zoning Adjustment

FROM: *for*
Ellen McCarthy
Director

DATE: May 9, 2006

SUBJECT: BZA Application 17476

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17476

EXHIBIT NO. 23

2006 MAY -9 PM 4:14

D.C. OFFICE OF PLANNING

RECEIVED

APPLICATION

Amy and Peter Pastan, the applicants, request a special exception to allow structural alteration of a landing and a deck addition to an existing two-story semi-detached dwelling on property located at 3727 Jocelyn Street, S.E. (Square 1873 Lot 52) in a Residential (R-2) zone district pursuant to §§ 223 and 3104.1 under Title 11 of the District of Columbia Municipal Regulations (DCMR), Zoning.

SUMMARY RECOMMENDATION

The Office of Planning recommends approval of a variance to § 2001.3 (a) to allow the requested structural alteration and proposed deck construction to the subject dwelling that exceeds the allowable lot occupancy of 40%.

SITE AND AREA DESCRIPTION

According to D.C. Land Records, lot 52 is 2,000 square feet (0.05 acre) in area and developed with a 2.5 story semi-detached masonry dwelling originally constructed in 1913. An open porch is attached to the front building façade. Previously a 2-story enclosed porch on the rear façade was replaced with a landing that abuts the common wall (eastern side yard) boundary. It is 5 feet 4 inches above grade and has a stairway to rear yard. Concrete steps beneath the landing extend from the rear yard to the basement doorway. The property is landscaped with trees and bushes in the front yard. In the rear yard is a brick patio. A fence composed of metal cable and posts extends along the western property while the northern (rear) yard is surrounded by a gated wooden fence 6-7 feet tall. The gate allows access to the 15-foot wide alley that extends along the northern property boundary. No parking area is provided onsite.

The subject properties and other properties from the alley south are in an R-2 zone district. Properties north of the ally are in an R-1-B zone district.

APPLICANT'S PROPOSAL

According to the submitted plans and The Statement of Use dated December 21, 2005, this proposal would repair the existing 6 x 9-foot landing (as scaled from the plans), replace the stairs to the rear yard, and construct a new 11 x 11-foot deck area 4 feet above grade with steps to connecting the landing and deck. The deck area would also provide steps to the rear yard below. Concrete steps to the basement door would remain unchanged. Resulting setbacks would be 5 feet 7 inches from the western (side) property boundary and just over 15 feet from the rear boundary. The existing landing would continue to abut the eastern (side) boundary.

EXISTING ZONING AND RELIEF REQUESTED

The one-family semi-detached dwelling is allowed as a matter of right in the R-2 zone district under § 300.3 (c). However, the lot does not have the minimum dimensions required under § 401.3. According to The Statement of Use the dwelling exceeds the R-2 zone district's allowable percentage of lot occupancy of 40% by 9%, and the side yard setback along the western boundary is less than the 5 feet required under § 400.9. As a result the subject property and building are not in conformance with current Zoning Regulations.

The Statement correctly indicates "The lower (deck addition) is allowed to project into the 20' required backyard because it is 4' or less above grade as provided by Section 2503 (Structures in Required Open Spaces)." The Office of Planning notes this is true of the required side yard, and that § 2503.4 also allows stairs leading from a door located on same story as the principal entrance to the building to locate in any required yard.

Thus the proposed (lower) deck addition and attached stairways do not have the meet required side and rear yard setbacks. The deck would not increase the current lot occupancy percentage because it would not be over 4 feet above grade. However, Zoning Regulations include the following provisions pertaining to nonconforming structures devoted to conforming uses:

"2001.3 Enlargements or additions may be made to the structure; provided:

- (a) *The structure shall conform to percentage of lot occupancy requirements;* and
- (b) The additional or enlargement itself shall:
 - (1) Conform to use and structure requirements; and
 - (2) Neither increase or extend any existing, nonconforming aspect of the structure; nor
 - (3) Nor create any new nonconformity of structure and addition combined."

Although this proposal would not extend, increase or create a nonconforming aspect, it would not bring the existing dwelling into conformance with the maximum allowable percentage of lot occupancy. As a result the applicant submitted this request for special exception approval under § 223.

Compliance with § 223

223.2 The addition shall not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular;

- (a) **The light and air available to neighboring properties shall not be unduly affected;** *The proposed deck and stair additions would not affect air and light to neighboring properties.*
- (b) **The privacy of use and enjoyment of neighboring properties shall not be unduly compromised;** *This addition would not compromise the privacy and enjoyment of neighboring rear yards.*
- (c) **The addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the street frontage;** ... *The addition would not be readily visible from the adjacent alley or the street on the opposite side of the dwelling.*
- (d) **In demonstrating compliance with (a), (b), and (c) of this subsection, the applicant shall use graphical representations such as plans, photographs or elevation and section drawings sufficient to represent the relationship of the proposed addition to adjacent buildings and view from public ways.** *Sufficient documentation was provided for this analysis.*

223.3 The lot occupancy of the dwelling or flat, together with the addition, shall not exceed **fifty percent (50%)** in the R-1 and R-2 districts or **seventy percent (70%)** in the R-3, R-4 and R-5 Districts. *This proposal would not change the existing lot occupancy percentage.* However, OP determined the following while confirming the percentage of lot occupancy calculation from submitted plans:

Area of covered front porch	137.9 sq. ft.
Dwelling footprint	688.2 sq. ft.
Area of nonconforming side yard setback (< 5 ft. wide)	162.7 sq. ft.
Area of existing landing (> 4 ft. above grade)	<u>54.0 sq. ft.¹</u>
Total Building Area	1,042.8 sq. ft.

Dividing this building area by the lot area results in a 52 % lot occupancy percentage which exceeds the 50% allowed under this section. The situation could be rectified by reducing the landing height to 4 feet above grade proposed for the deck, or by reducing its size to reduce the building area and lot occupancy percentage to 49%. *However, the architect recalled the basement door below the landing is 6 foot 8 inches tall. Reducing the landing elevation from 5 feet 4 inches to 4 feet would require:*

- *a corresponding reduction of 1 foot 4 inches in the height of the basement door to 5 feet 4 inches; and*
- *new concrete steps at ground level that would extend further into the rear yard in order to maintain head clearance to the basement.*

OP asked about reducing the landing area to reach the 50% lot occupancy allowed under this section. The architect found that reducing the landing area by

¹ Based on width scaled on submitted plans

43 square feet to make the total building area 1,000 square feet would result in an 11 square-foot landing. Generally a minimum stair landing is 4 x 4 feet or 16 square feet.

223.4 The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials or other features for the protection of adjacent and nearby properties. No special treatment is recommended.

Compliance with § 3104.1

Based on the above analysis this proposal would continue to exceed the maximum lot occupancy percentage allowed under referenced § 223.2. As a result, OP believes this proposed addition cannot be allowed by special exception. It can only be allowed with approval of a variance from § 2001.3 (a) to allow the requested addition while retaining the nonconforming lot occupancy percentage in the R-2 zone district.

Compliance with Section 3103.2

The zoning relief needed is an "area" variance that requires circumstances surrounding this request are "unique" and that the usual application of the particular regulation would result in "practical difficulty."

- Unique situation: The proposed modernization and structural alteration of the rear landing on this nonconforming building is allowed under § 2001.2 while proposed additional construction would not increase any nonconforming aspect of the building or create any new nonconformity.
- Practical difficulty: Options proposed by OP to bring the building into conformance by either reducing area of the rear landing and lowering the landing to a height of 4 feet would result in a less and a 4 x 4-foot landing or significantly impact access to the basement.

Based this information, the applicant has established how adhering to the Zoning Regulations presents a practical difficulty. OP already determined in the above special exception analysis the proposed structural alteration and addition would have no discernable impact on neighboring properties.

Therefore, granting a variance to § 2001.3 (a) to allow the requested structural alteration and additional construction would be in harmony with the general purpose and intent of the Zoning Regulations, and Zoning Map.

COMPREHENSIVE PLAN

The Comprehensive Plan Generalized Land Use Map designates the general area for Low Density residential development characterized by detached and semi-detached dwellings as predominant uses. The existing semi-detached dwelling is not inconsistent with this designation.

COMMUNITY COMMENTS

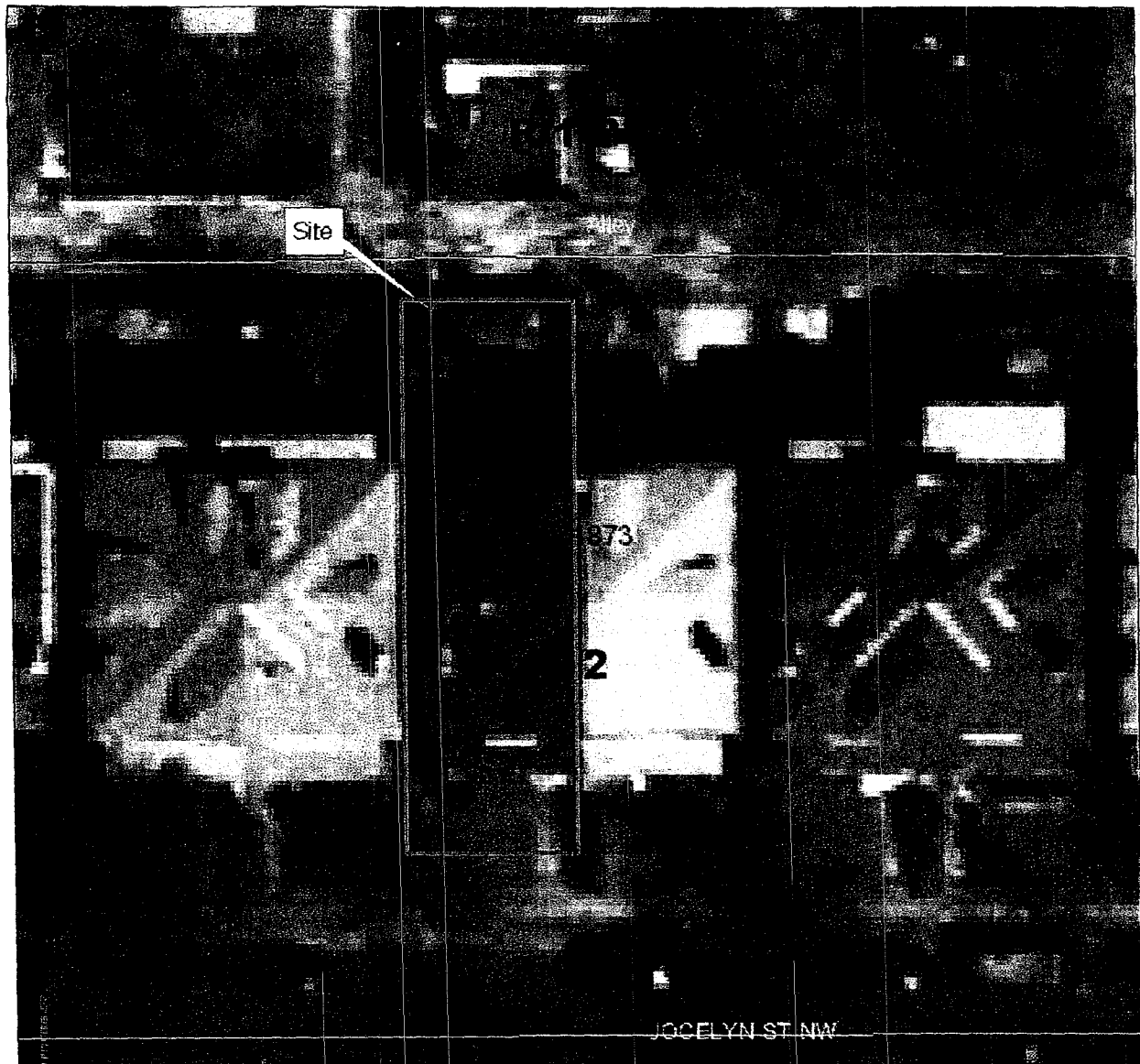
On March 13, 2006, Commissioners of Advisory Neighborhood Commission (ANC) 3/4G voted unanimously to support this request.

RECOMMENDATION

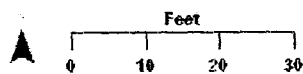
OP recommends approval of a variance to § 2001.3 to allow the requested structural alteration and proposed deck construction to the subject dwelling that currently exceeds the allowable lot occupancy of 40%.

EMc/afj

Attachment:	Exhibit 1	Aerial with Zoning
	Exhibit 2	View from the South



BZA Application No. 17276
3727 Jocelyn Street. NW



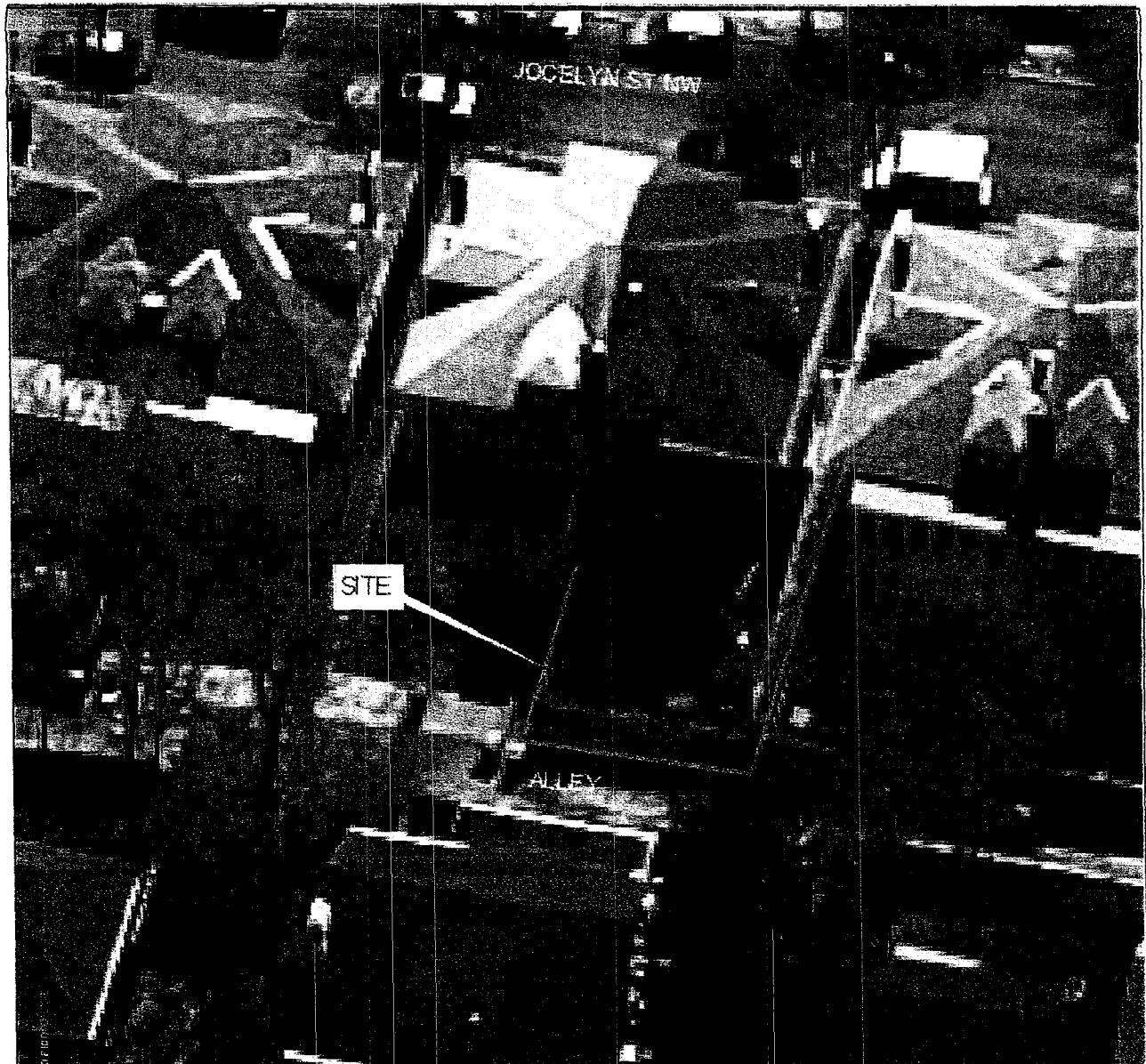
★ ★ ★ Government of the
 District of Columbia
 Anthony A. Williams, Mayor

Office of Planning - May 3, 2004

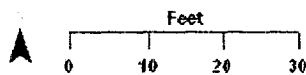
This map was created for planning
 purposes from a variety of sources.
 It is neither a survey nor a legal document.
 Information provided by other agencies
 should be verified with them where appropriate.
 Oblique imagery ©2003 Pictometry International

Legend

-  Property Squares
-  Water Features / Streams
-  Alleys
-  Street Centerlines



**BZA Application No. 17276 - 3727 Jocelyn Street. NW
(View to the South)**



★ ★ ★ Government of the
District of Columbia
Anthony A. Williams, Mayor

Office of Planning ~ May 3, 2004

This map was created for planning
purposes from a variety of sources.
It is neither a survey nor a legal document.
Information provided by other agencies
should be verified with them where appropriate.
Oblique imagery ©2003 Picometry International

Legend

-  Property Squares
-  Water Features / Streams
-  Alleys
-  Street Centerlines