

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**  
**Board of Zoning Adjustment**



**Application No. 18232 of Herbert J. Sanborn, Jr.**, pursuant to 11 DCMR § 3104.1, for a special exception under § 202.10 to allow an accessory apartment in an existing one-family semi-detached dwelling in the R-3 District at premises 1679 35<sup>th</sup> Street, N.W. (Square 1294, Lot 805).

**HEARING DATE:** July 12, 2011

**DECISION DATE:** July 12, 2011

**DECISION AND ORDER**

This application was submitted April 12, 2011 by Herbert J. Sanborn, Jr. (“Applicant”), the owner of the property that is the subject of the application. In accordance with a letter to the Applicant from the Office of the Zoning Administrator, the application was filed pursuant to 11 DCMR § 3104.1 for a special exception under § 202.10 to allow an accessory apartment in an existing one-family semi-detached dwelling located in the R-3 District at 1679 35<sup>th</sup> Street, N.W. (Square 1294, Lot 805).<sup>1</sup> Following a public hearing, the Board of Zoning Adjustment (“Board”) voted 5-0-0 on July 12, 2011 to grant the application.

**PRELIMINARY MATTERS**

Notice of Application and Notice of Public Hearing. By memoranda dated April 18, 2011, the Office of Zoning (“OZ”) sent notice of the application to the Office of Planning (“OP”); the District Department of Transportation; the Councilmember for Ward 2; Advisory Neighborhood Commission (“ANC”) 2E, the ANC for the area within which the subject property is located; and the single-member district ANC 2E01.

A public hearing was scheduled for July 12, 2011. Pursuant to 11 DCMR § 3113.13, OZ, on

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<sup>1</sup> The referral letter from the Zoning Administrator, dated March 23, 2011, states that the Applicant’s request for a certificate of occupancy “to use the subject premises as an ‘Accessory Apartment’ has been denied due to the need for Board of Zoning Adjustment approval.” The letter instructed the Applicant “to obtain a special exception under the provisions of DCMR Title 11, § 202.10, (a), (3) to establish your use in the R-3 zone.” (Exhibit 6.)

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April 27, 2011 mailed notice of the hearing to the Applicant, the owners of property within 200 feet of the subject property, and ANC 2E. Notice was published in the *D.C. Register* on April 29, 2011 (58 DCR 3756) and on May 20, 2011 (58 DCR 4307).

Requests for Party Status. In addition to the Applicant, ANC 2E was automatically a party in this proceeding. There were no additional requests for party status.

Applicant's Case. The Applicant provided testimony and evidence describing his plan to establish an accessory apartment in his dwelling. According to the Applicant, the property was "already divided up and was formerly rented to students" when he purchased it 13 years ago. (Exhibit 4.) The Applicant stated that creation of an accessory apartment in the dwelling would provide needed income for the continued owner occupancy and care of the residence and would help reinforce the residential character of the neighborhood.

Government Reports. By report dated July 1, 2011 and through testimony at the public hearing, OP recommended approval of the requested special exception subject to the condition that the Applicant must secure a building permit for the accessory use in accordance with all applicable requirements. (Exhibit 25.)

ANC Report. By letter dated June 9, 2011, ANC 2E indicated that, at a regular, duly noticed monthly public meeting held May 31, 2011 with a quorum present, the ANC voted unanimously to adopt a resolution in opposition to the application. (Exhibit 23.)

Persons in support. The Applicant presented letters in support of the application from several neighbors living in the 1600 block of 35<sup>th</sup> Street. (Exhibit 26.)

Person in opposition. The Board received a letter and heard testimony from one person in opposition to the application. The witness, who owns but does not live in a two-family dwelling near the subject property, testified that conditions on the block have deteriorated in recent years due to overcrowding, and asserted that the creation of an additional apartment would cause "the block [to] sink further into noise, litter and rats." (Exhibit 24.)

## **FINDINGS OF FACT**

### **The Subject Property and Surrounding Area**

1. The subject property is a rectangular parcel located on the east side of 35<sup>th</sup> Street, N.W., midblock between Reservoir Road and R Street (Square 1294, Lot 805). The lot is approximately 30 feet wide and 155 feet deep, and has an area of 4,635 square feet.
2. The subject property is improved with a two-story frame dwelling located along the northern property line, approximately 20 feet wide and 46.5 feet deep. The Board credits the

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testimony of the Office of Planning that, according to “D.C. land records, the gross dwelling floor area is 2,688 square feet....” (Exhibit 25.) The one-family dwelling is set back approximately 9.5 feet from the street frontage along 35<sup>th</sup> Street, and has a side yard approximately 10 feet wide along the southern property line. The property also contains a one-story accessory garage, currently used as an artist studio, but within which no commercial activity occurs.<sup>2</sup> The accessory building is approximately 18 feet wide and 60 feet deep, and abuts a public alley along the northern and eastern (rear) property lines. The accessory building has a side yard approximately 12 feet wide along the southern property line, and its western edge is located approximately 48.5 feet from the rear of the dwelling. A parking pad with space for one vehicle is located at the rear of the subject property.

3. Properties in the vicinity of the subject property are improved primarily with two- and three-story row, semi-detached, and detached dwellings, and the surrounding neighborhood character is predominately moderate-density residential. A large two-story detached dwelling is located on a large lot across the alley to the east, and a public high school, the Duke Ellington School of the Arts, is located to the west across 35<sup>th</sup> Street.

#### The Applicant’s Project

4. The Applicant proposes to establish an accessory apartment of 450 square feet (i.e. approximately 18% of the gross floor area of the house) on the second floor of the existing dwelling.<sup>3</sup> The Applicant will continue to reside in the dwelling, using the entire first floor and a portion of the second floor as the principal dwelling. The one-bedroom accessory apartment will be created in the rear portion of the second floor, with access to the apartment provided through an existing side door. No external changes to the dwelling are planned.

#### Harmony with Zoning

5. The subject property is zoned R-3. The R-3 District is “designed essentially for row dwellings,” with areas where “row dwellings are mingled with one-family detached dwelling, one-family semi-detached dwellings, and groups of three (3) or more row dwellings. To maintain a family-life environment, permitted related uses are the same” in the R-3 District as in the most restrictive zone, R-1. (11 DCMR § 320.1.)

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<sup>2</sup> The Board previously granted an application for a variance from §§ 2300.3 and 2001.2 for the replacement of an existing accessory garage with an artist studio at the subject property. See Application No. 16391, order issued December 1, 1998.

<sup>3</sup> The Applicant testified that the accessory apartment would occupy 25% of the gross floor area of the house, but did not indicate the building’s total gross floor area. The OP report states that the proposed accessory apartment “would occupy approximately 18% of the dwelling gross floor area” but also that “[a]ccording [to] the DC land records, the gross dwelling floor area is 2,688 square feet....” (Exhibit 25.) In that case, the projected size of the accessory apartment would comprise 16.74% of the gross floor area of the house (450 divided by 2,688). In any event, the Board finds that the planned accessory apartment will not exceed 25% of the gross floor area of the dwelling.

## **CONCLUSIONS OF LAW AND OPINION**

The Applicant seeks a special exception under § 202.10 to allow an accessory apartment in an existing one-family semi-detached dwelling located in the R-3 District at 1679 35<sup>th</sup> Street, N.W. (Square 1294, Lot 805). The Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2001) to grant special exceptions, as provided in the Zoning Regulations, where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map, subject to specific conditions. (See 11 DCMR § 3104.1.)

Pursuant to § 202.10, an accessory apartment may be added within an existing one-family detached dwelling if approved by the Board as a special exception under § 3104, subject to certain requirements. As set forth in paragraphs (a) through (h), the requirements for approval in the R-3 Zone include that the lot must have an area of at least 4,000 square feet; the house must have at least 2,000 square feet of gross floor area, exclusive of garage space; the accessory apartment may not occupy more than 25% of the gross floor area of the house; the accessory apartment may be created only through internal conversion of the house, without any additional lot occupancy or gross floor area, and garage space may not be converted; any additional entrance created to the house must not be located on a wall of the house that faces a street; either the principal dwelling or the accessory apartment must be owner-occupied; the aggregate number of persons who may occupy the house – both the principal dwelling and the accessory apartment – must not exceed six; and an accessory apartment may not be added where a home occupation is already located on the premises.

The Applicant asserted that all requirements of § 202.10 would be satisfied by the planned accessory apartment, and that no waiver from any requirement was needed. The Board notes, however, that § 202.10 states that an accessory apartment may be added “within a one-family *detached* dwelling” (emphasis added), while the Applicant’s property contains a one-family semi-detached dwelling. Pursuant to § 202.10(i), the Board may modify or waive up to two of the requirements “specified in paragraphs (a) through (h) of this subsection” (except for the owner-occupancy requirement), subject to certain limitations. The reference to “one-family detached dwelling” occurs in the introductory provision of § 202.10, not as a requirement listed in paragraphs (a) through (h). However, § 202.10(i)(3) specifies that “[a]ny request to modify more than two (2) of the requirements *of this subsection* shall be deemed a request for a use variance” (emphasis added), which implies that the Board may consider, as a special exception, a request for a waiver of any requirement of § 202.10, not only those requirements listed in paragraphs (a) through (h).<sup>4</sup> This interpretation is consistent with the limit on the Board’s

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<sup>4</sup> Subsection 201.10 (i) reads as follows, with the relevant references to the “paragraphs” and the “subsection” italicized:

- (i) The Board may modify or waive not more than two (2) of the requirements specified in *paragraphs (a) through (h)* of this subsection; provided, that the following occurs:

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authority stated in § 202.10(i)(2): the Board cannot approve any modification or waiver that would conflict with the intent of § 202 to permit accessory uses while maintaining a one-family residential appearance and character in the R-1, R-2, and R-3 Districts. The R-3 District is intended to have a one-family residential character and a family-life environment, whether a given area within an R-3 Zone is characterized by detached dwellings, one-family semi-detached dwellings, or row dwellings. The type of dwelling – whether detached, semi-detached, or row – does not determine its use; each type may be devoted to the same one-family residential use.<sup>5</sup> The Board concludes that a request to waive the “detached dwelling” requirement may be approved as a special exception and does not require a use variance so long as an application requests a waiver or modification of no more than two requirements of § 202.10 in total.

In this case, the proposed accessory apartment will comply with the requirements of § 202.10 without needing any waiver except for the requirement of a “detached dwelling.” As described in the findings of fact, the subject property has a lot area of 4,635 square feet, in excess of the minimum requirement of 4,000 square feet in the R-3 Zone. The gross floor area of the house, exclusive of garage space, is at 2,688 square feet, which exceeds the minimum requirement of 2,000 square feet. The proposed accessory apartment, at 450 square feet, will occupy less than the permitted maximum of 25% of the gross floor area of the house. The accessory apartment will be created only through internal conversion of the existing dwelling, without any additional lot occupancy or gross floor area; garage space will not be converted, and no additional entrance will be created to the house. (The accessory apartment will be accessed through an existing door on the south side of the dwelling, not facing the street.) The Applicant, *i.e.* the owner of the subject property, will continue to reside in the principal dwelling, and no more than six persons will occupy the house in total. No home occupation is currently located on the premises.<sup>6</sup>

The Board concludes that the requested special exception can be granted consistent with the requirements of § 202.10, and that a waiver of the detached dwelling requirement can be

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- (1) The owner-occupancy requirement of paragraph (f) shall not be waived;
  - (2) Any modification(s) approved shall not conflict with the intent of this section to maintain a single-family residential appearance and character in the R-1, R-2, and R-3 Districts; and
  - (3) Any request to modify more than two (2) of the requirements *of this subsection* shall be deemed a request for a use variance.

<sup>5</sup> Approval of a waiver of the “detached dwelling” requirement allows an applicant to establish an accessory apartment that will comply with all other requirements of § 202.10; the accessory apartment does not alter the principal use of the property, which remains one-family residential. The approval does not allow the conversion of the applicant’s property into a two-family flat, a different principal use from one-family residential.

<sup>6</sup> The Board notes the testimony of the Office of Planning that, if the Board “considers the applicant’s use of the artist studio on the property to be a ‘home occupation,’ the proposed apartment use would require waiver” of that requirement. In light of the Board’s finding that there is no commercial activity occurring in the artist studio (finding of fact no. 2), the Board concludes that the Applicant’s use of the accessory building does not constitute a home occupation.

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approved consistent with the requirements of § 202.10(i). The waiver will not cause any conflict with the intent of § 202 to maintain a single-family residential appearance or character, especially since the external appearance of the residence will not change, the principal dwelling will remain owner-occupied, and the number of persons living in the residence will be limited to six.

For the same reasons, the Board concludes that, consistent with § 3104.1, the requested special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Zoning Map. Creation of the accessory apartment will not alter the appearance or character of the Applicant's dwelling, but will maintain its principal use as a one-family dwelling in accordance with the requirements of the R-3 Zone District. The Board was not persuaded by the person in opposition to the application that the proposed accessory apartment would have any deleterious effect on overcrowding, noise, litter, or rats, in part because the Applicant's dwelling will not be enlarged for purpose of creating the apartment, the principal dwelling will remain owner-occupied, the total number of persons occupying the house will not exceed six, and no home occupation is located on the premises. The Board concludes that approval of the requested special exception will not tend to adversely affect the use of neighboring property. The Board is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163, D.C. Official Code §6-623.04) to give great weight to OP's recommendations. The Board concurs with OP's recommendation that the requested zoning relief should be granted, but declines to adopt OP's proposed condition, which would require the Applicant to "secure a building permit for the accessory use in accordance with all applicable requirements," as outside the purview of the Zoning Regulations.

Section 13(b) (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)(A)) requires that the Board's written orders give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, ANC 2E's opposition to the application cited "[t]wo exhaustive zoning reviews ... under way currently that affect" the requested special exception: (i) "the zoning rewrite, which ... will include neighborhood zoning ... that will set out in detail rules tailored to fit the neighborhood for dealing with accessory apartments..." and (ii) a "review under way at the Zoning Commission, where the issue of students living off campus in our community is a major concern...." The ANC stated that, "[u]ntil those key issues are resolved, [ANC 2E] cannot recommend an exception in the current case that would risk exacerbating a situation that is already very serious now, and in need of remedy, in our community." (Exhibit 23.) The Board does not find that the issues and concerns raised by ANC 2E warrant the denial of the requested special exception. The Board may not deny a request for zoning relief on the ground that the future results of proceedings undertaken by the Zoning Commission might affect an applicant's proposal. In evaluating a request for a special exception, "the Board is limited to a determination whether the exception sought meets the requirements of the particular regulation on which the application is based. The applicant has the burden of showing that the proposal complies with the regulation; but once that showing has been made, the Board ordinarily must

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grant the application.” See, e.g., *President and Directors of Georgetown College v. District of Columbia Bd. of Zoning Adjustment*, 837 A.2d 58, 68; *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C. 1995).

Based on the findings of fact, and having given great weight to the recommendations of the Office of Planning and to the issues and concerns of ANC 2E, the Board concludes that the requested zoning relief can be approved so that the Applicant’s project is not likely to become objectionable to adjoining and nearby property. For the reasons stated above, the Board concludes that the Applicant has satisfied the requirements for a special exception under § 202.10 to allow an accessory apartment in an existing one-family semi-detached dwelling located in the R-3 District at 1679 35<sup>th</sup> Street, N.W. (Square 1294, Lot 805). Accordingly, it is hereby **ORDERED** that the application, pursuant to Exhibit 9 (Plans), is **GRANTED**.

**VOTE: 5-0-0** (Meridith H. Moldenhauer, Nicole C. Sorg, Lloyd J. Jordan, Jeffrey L. Hinkle, and Greg M. Selfridge to Approve)

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

A majority of the Board members approved the issuance of this Order.

**ATTESTED BY:**

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**RICHARD S. NERO, JR.**  
**Acting Director, Office of Zoning**

**FINAL DATE OF ORDER:** December 20, 2011

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 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.

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.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT**



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As Director of the Office of Zoning, I hereby certify and attest that on December 20, 2011, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail or delivered by electronic mail in the case of those ANCs and SMDs that have opted to receive notices thusly, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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**ATTESTED BY:** \_\_\_\_\_

**RICHARD S. NERO, JR.**  
**Acting Director, Office of Zoning**

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