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Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W.
Suite 210 S
Washington, D.C. 20001

**Re: Dissenting ANC Opinion re BZA Application No. 18296 for 3825
Morrison St. N.W. (Square 1859, lot 62)**

This is a brief dissent, by Commissioners Thompson and Engel, to the report of ANC 3/4G regarding BZA Application 18296, an Application of Daniel T. Merlis and Deany Laliotis for a Special Exception to the Zoning Regulations pursuant to 11 DCMR 3104.1 (2011) to "construct a concrete deck in place of an existing wood deck in the rear yard of 3825 Morrison Street, N.W. (Square 1859, Lot 62) with an additional underground parking space."

The ANC 3 / 4 G, at its regularly scheduled public meeting, December 12, 2011, by a vote of 5 to 2 (a quorum being four) opposed the granting of the Special Exception, "unless" the landscaping and other changes described in certain drawings by Barbara Balman, Landscape Design, dated September 6, 2011, are required as conditions of approval. In effect, the ANC approved the Special Exception on the condition that the Owners complete the landscaping depicted in the drawing, which is more of a conceptual sketch than an actual landscaping plan. The burden on the Owners in this regard seems slight, as the landscaping changes are fairly minor. It appears that the ANC's intent in stating an objection "unless" the changes are accomplished is to ensure that BZA takes notice of the ANC's condition.

The outcome represents a fair and sensible compromise under the circumstances. The Owners were asked to agree to the condition and it is regrettable that they did not voluntarily accept it, so that the outcome could have been more amicable. Having not accepted the condition, however, the legal issue becomes whether the condition can be *enforced* against the Owners. That matter must be assessed under the relevant standard.

The ANC report adequately reviews the relevant facts. Without repeating them all, in short: (a) the Zoning Administrator issued a permit to the Owners to replace an existing rear wood deck with a concrete terrace with a maximum height of 3'7 5/8"; (b) construction commenced in accordance with the permit; (c) the permit was revoked and then a second permit was re-issued; (d) construction was completed in accordance with the permit (there was no evidence to support the objectors' speculation that the construction was not in compliance with the permit);

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(e) after construction was completed, the Zoning Administrator reversed his prior determination and decided that a Special Exception is necessary after all, and that without one, the construction would have to be demolished, at great expense to the Owners.

The context for consideration of this Special Exception is unique. Usually, an owner has not yet commenced construction, and receives a front-end determination from the Zoning Administrator that a Special Exception is required. Before investing in the work, the Owners then proceed to apply for the Special Exception. Here, the Zoning Administrator reversed the situation on the Owners. Under these unique circumstances, there should be an equitable presumption in *favor* of granting the Special Exception to the Owners.

The Zoning Administrator's ultimate decision was based on a determination that the replacement deck was a "non-conforming" structure in the "rear yard" that therefore intruded on the 20-foot setback required in an R-2 district under 11 DCMR 404.1. Without purporting to understand the technical difference between a "rear yard" and a "side yard," this area appears to a layperson to be a side yard, which would make it exempt from the 20-foot rear yard setback requirement. Moreover, the structure underneath does not appear to be a "garage," but rather, a storage area, which would also make it exempt from the requirement. The Zoning Administrator may have been mistaken on one or both of these fronts, thus mooted the need for the application for a Special Exception.

But assuming that the Special Exception is indeed required, the standard warrants granting it. The majority of the neighbors signed a petition in favor of the Owners, stating approval of their addition. A few neighbors complained – one across the street, and one immediately adjacent to the Owners on the side yard with the deck. The immediately adjacent neighbors were concerned with the scale of the construction and its impact on their particular property.

The relevant question in considering the Special Exception is whether the new deck has a "substantially adverse effect" on the neighboring properties, specifically: (a) the light and air available to neighboring properties shall not be "unduly affected"; (b) the privacy of use and enjoyment of neighboring properties shall not be "unduly compromised"; and (c) the addition or accessory structure, 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 subject street frontage.

Taking these in turn, first, as all agree, there is no issue with regard to subsection (a): the deck structure does not block light or interfere with air flow to any adjacent structure.

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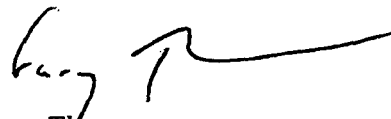
Second, considering subsection (b), there was no evidence that “the privacy of use and enjoyment” of the adjacent property would be “unduly compromised.” The complaint essentially can be reduced to a subjective dislike of the new deck by the adjacent neighbor. But there is no indication of any *physical* compromise to the adjacent property. Indeed, there is ample space between the side yard and the adjacent house, separated by a large tree. To the extent the adjacent property is compromised, the word “unduly” must still be given meaning, and moreover, there must be a “substantial adverse effect.” Such evidence is lacking. It is not enough for one neighbor simply to dislike what another neighbor is doing with his or her private property.

Third, considering subsection (c), there was no evidence that the addition or accessory structure, together with the original building, as viewed from the street, alley, and other public way “substantially visually intrudes” upon the character, scale and pattern of houses along the subject street frontage. The Owner’s renovated home is in keeping with the character, scale, and pattern of houses along the street and in the neighborhood generally. Their new driveway is of a common design in the neighborhood.

In short, when the matter is put to the relevant three-part review, the Special Exception should be recognized. We appreciate the “compromise” that the ANC tried to forge between the Owners and the complaining neighbors. But it is a different issue whether, under the above three-part test, the Owners can be *legally deprived* of a Special Exception unless the condition is fulfilled. Moreover, the condition might also prove difficult to apply, as the objecting neighbors may never be personally satisfied with the landscaping. This dissent is also made out of concern regarding the notion that neighbors can object to what each other does with their private property out of what is essentially an aesthetic dislike. Good taste in architecture and renovation are in the eye of the beholder (indeed, the renovation is, in our view, of good taste and not unduly intrusive).

For the above reasons, Commissioners Gary Thompson and David Engel would have granted the Special Exception, and therefore, respectfully dissent.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gary Thompson', with a long horizontal flourish extending to the right.

Gary Thompson
ANC 3/4G - 02