

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

**Application of Daniel Merlis & Deany Laliotis
 3825 Morrison Street, N.W. (Square 1859, Lot 62)**

PRELIMINARY STATEMENT OF COMPLIANCE WITH BURDEN OF PROOF

Daniel T. Merlis and Deany Laliotis (the "Homeowners"), owners of the property and improvements at 3825 Morrison Street, N.W., Square 1859, Lot 62 ("Property"), hereby request special exception approval pursuant to Section 223 of the District of Columbia Zoning Regulations ("Zoning Regulations") to allow the completion of concrete deck with below grade parking and storage space in replacement of a pre-existing wood deck at the rear of an existing one-family dwelling ("Home") on the Property.

I. Background.

The Home, which was built in 1914, is located in an R-2 Zoning District, and occupies a corner lot, bounded on the side by Morrison Street and on the side by 39th Street.

In 2009, the Homeowners embarked on the alteration and repair of the existing building including the reconfiguration and improvement of the structural integrity of an existing kitchen, and replacement of an existing wood deck located within the required rear yard, with a concrete deck. The proposed and permitted work also included excavation to create below grade space devoted to the dual function of parking and storage space.

On December 15, 2009, the Homeowners received Building Permit No. B1001551. The permit approved construction of the replacement rear addition and deck. On June 30, 2010, the Homeowners received Build Permit No. B1007414; which authorized construction of a smaller version of the replacement rear addition and deck—*i.e.*, 10' x 18', 8" instead of 12' x 20'. On August 9, 2010, Department of Consumer and Regulatory Affairs ("DCRA") issued a Notice to Revoke Building Permit No. B1007414; specifying the new addition encroached into the minimum rear yard requirement in violation of 11 DCMR § 2503.1. The Homeowners worked in good faith with DCRA and the Zoning Administrator to resolve the issues, and on October 27, 2010, obtained Building Permit No. B1100395,

"to complete construction on the replacement kitchen addition".

To the extent that the Zoning Administrator (ZA) issued Building Permit No. B1100395 to allow the completion of the kitchen portion of the project, he concedes that the kitchen reconstruction is in compliance with all pertinent provisions of the zoning regulations. Therefore the instant application is limited to the concrete deck within the "rear yard" only; representing that portion of enforcement action held in abeyance pending the outcome of the ZA's investigation as to the legitimate pre-existence of the wood deck in the location (rear yard) presently occupied by the concrete deck.

On December 1, 2010, the Zoning Administrator determined that the concrete deck replacement addition violated the minimum rear yard requirement because part of the structure is more than 4 feet above grade in violation of 11 DCMR § 2503.2 . The ZA noted that “there is a lack of evidence¹ for me to conclude either that the deck existed on May 12, 1958 or that it was more than 4 feet above grade.” *Id.*, Letter of M. LeGrant, Zoning Administrator.

The ZA does not dispute that a wood deck existed and occupied a larger portion of the rear yard than now occupied by the concrete deck, in light of the physical evidence provided by the homeowners. However, he found no *conclusive* evidence that the wood deck’s existence predated May 12, 1958, and further that even if it did, that such deck was more than four feet (4 ft.) above adjacent finished grade at any point. The Applicant notes the wood deck existed when they purchased the property and extended to the property line. A parking space and storage area existed below.

Pursuant to D.C. Code § 6-641.07(g)(2) (2001), the Board of Zoning Adjustment is authorized to grant special exceptions as provided in the Zoning Regulations. The Homeowners are seeking a special exception pursuant to 11 DCMR §§ 3104.1 and 223 to allow the completion of the concrete deck with below grading parking and storage space, located within the rear yard of the one-family detached dwelling in an R-2 zone, wherein a portion of the structure projects into the required rear in excess of the limit prescribed under Section 2503.2 The Homeowners meet the standards for special exception relief as described below.

II. The Application Satisfies the Special Exception Requirements of Sections 3014.1 and 223.

A. Overview.

Pursuant to Section 3104.1 of Zoning Regulations, the Board is authorized to grant special exception relief "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 will not tend to affect adversely the use of neighboring property," subject also, in this case, to the specific requirements of Section 224 of the Zoning Regulations. Special exceptions, unlike variances, are expressly provided for in the Zoning Regulations. *First Baptist Church v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (D.C. 1981). In reviewing applications for a special exception under the Zoning Regulations, the Board's discretion is limited to determining whether the proposed exception satisfies the relevant zoning requirements. If the prerequisites are satisfied, the Board ordinarily must grant the application. *Nat'l Cathedral Neighborhood Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984, 986 & n.1 (D.C. 2000). This Application provides evidence sufficient to show that the Homeowners have satisfied the relevant zoning requirements of Sections 3104.1 and 223, as described herein, and, therefore, supports a decision granting approval of the Application.

¹ There is no additional reference to the type or amount of evidence Mr. LeGrant considered in his determination and there is no other information describing the inaccuracy of the evidence which he reviewed and considered.

B. Requirements of Section 3104.1.

The granting of a special exception in this case "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 the neighboring property" 11 DCMR § 3104.1.

The Property is located in an R-2 Zoning District, which "consists of those areas that have been developed with one-family, semi-detached dwellings, and is designed to protect them from invasion by denser types of residential development." 11 DCMR § 300.1. The Home on the Property is currently used, just as it has been for decades, as a one-family dwelling, and it will continue to be used as a one-family dwelling consistent with the Zoning Regulations. Additionally, the Home, including the replacement rear addition and concrete deck, does not exceed 40 percent of the lot occupancy in accordance with the Zoning Regulations. 11 DCMR § 403.2.

The already-constructed concrete deck addition to the Home replaces a preexisting wood deck that occupied a larger area of the rear yard. The final footprint of the replacement rear concrete deck addition is *smaller*, not larger, than the original addition, and, therefore, should not unduly affect the light and air and privacy of use and enjoyment of neighboring properties.

With respect to the already-constructed rear concrete deck, it replaces an existing old wood deck. The old deck extended out, on the side of the Property, from the Home to within inches of the rear property line. The new replacement deck similarly extends out from the Home to within 1 foot, 5 inches of the rear property line. As with the old deck, the replacement concrete deck is modest in size extending less than 10 feet from the Home, with a width of 18 feet, 8 inches. Like the old deck, the replacement deck is bounded on the property line with an 8-foot fence, which provides screening for and privacy to the adjacent property. Just like the old deck, the single-family dwelling to the immediate of the Property is approximately 27 feet from rear deck. A copy of the architect's plan it attached under Tab 5.

The replacement concrete deck features below grade parking and storage space. In effect the construction of the concrete deck and the associated excavation to create below grade parking and storage space represents no net change to pre-existing condition at and above the first floor level or main floor of the main building, including attendant proximity of structure to the adjoining property.

For those reasons, and as represented in photographs included with this Application, the existence of the replacement rear concrete deck will have limited or no substantial adverse impact on the privacy of use and enjoyment of the neighboring properties and will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Map.

C. Requirements of Section 223.

The rear addition and deck replacement described in this Application satisfies the requirements of Section 233 as follows:

1. § 223.2: *The addition or accessory structure 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; (b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; (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; and (d) In demonstrating compliance with paragraphs (a), (b) and (c) of this subsection, the application shall use graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the proposed addition or accessory structure to adjacent buildings and views from public ways.*

(a) As set forth above, and as represented in photographs included with this Application, the already-constructed rear concrete deck has a smaller footprint than the previous wood deck and is located at or below the level of the main floor of the main building itself and any other adjacent building therefore, it does not unduly affect the light, air, and privacy of use and enjoyment of neighboring properties. Consistent with the definition set forth in Section 199.1 for “Building, area” the concrete deck does not count in percentage of lot occupancy for the very reason that it constitutes a portion of a building not extending above the level of the main floor of the main building, if so placed, as in the instant case, not to obstruct the light and ventilation of the building itself or any other adjacent building.

(b) As aforementioned, the most proximal building to the concrete deck on 39th Street is approximately 27 feet removed. The privacy of use and enjoyment of neighboring properties are therefore not unduly compromised and can be mitigated by appropriate screening.

(c) The rear concrete deck is not visible from the Morrison Street frontage, and therefore will not visually intrude upon the character, scale and pattern of houses along the Morrison Street frontage. The rear concrete deck is visible from 39th Street, but only during the winter months. As before and after photographs attest, the proposed rehabilitation of the rear yard is esthetically superior to pre-existing condition and does not substantially visually change the character, scale and pattern of houses along 39th Street, where it is visible. The concrete deck is at or below the level of the main floor of the main building and is therefore not visible above the main or first floor of the building. It is instructive that the portion of the concrete deck which the ZA determined to be above four feet (4 ft) above adjacent finished grade, coincides with where

excavation was mandatory to achieve the minimum prescribed slope for a driveway leading to the below grade parking.

For these reasons, and as represented in photographs included with this Application, the addition does not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property. In addition, of the Homeowners' neighbors have expressed support for the project and noted the replacement addition.

2. § 223.3: *The lot occupancy of all new and existing structures on the lot shall not exceed 50 percent (50%) in the R-1 and R-2 Districts.*

As set forth more fully in the second page of the Self-Certification form, Form 135, attached hereto at Tab 4, the lot occupancy of the Property, is 28%.

D. The Deck-Addition is "Grandfathered"

The Homeowners purchased the property with the rear deck addition jettisoning off of the kitchen. Photographs of the pre-existing deck are provided at Tab 8. The deck extended within inches from the property line of the homeowner at 39th Street. All of the photos and evidence prove the existence and location of a deck structure. The elevation plans provided herein illustrate the four foot natural grade considerations are not applicable for the replacement.

E. Homeowners Has Acted in Good Faith

While it is not necessary to include an affirmative defense on benefit of the Homeowners, it is significant to review the history of the project and the Homeowners' attempts to satisfy the requirements of the Zoning Regulations. A chronology can be provided to describe the actions taken by the Homeowners in response to concerns raised by the DCRA and the Zoning Administrator. While the law does not encourage estoppel, the government should not be allowed to raise arguments resolved. The elements required to establish estoppel are: "a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine." *Wieck v. District of Columbia Board of Zoning Adjustment, supra*, 383 A.2d at 11 (citation omitted).

III. Conclusion

Pursuant to Sections 3104.1 and 223 of the Zoning Regulations, the Applicants will file their Statement of the Applicant with the Board no fewer than 14 days prior to the public hearing for the present Application. Through the Applicant's written statement, and through testimony and evidence presented at the public hearing, the Applicant will further demonstrate how it meets its burden of proof to obtain the Board's approval of the requested relief.