

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



**Application No. 18296 of Daniel T. Merlis and Deany Laliotis**, pursuant to 11 DCMR § 3104.1, for a special exception under § 223 to allow a rear deck addition with below grade parking and storage at a one-family detached dwelling, not meeting the rear yard requirements of §§ 404 and 2503.1 in the R-2 District, at premises 3825 Morrison Street, N.W. (Square 1859, Lot 62).

**HEARING DATE:** January 17, 2012  
**DECISION DATE:** February 7, 2012

**DECISION AND ORDER**

Daniel T. Merlis and Deany Laliotis<sup>1</sup>, the property owners of the subject premises (the “Owner” or the “Applicant”), filed an application with the Board of Zoning Adjustment (the “Board”) on August 29, 2011, for a special exception under § 223 of the Zoning Regulations (Title 11 DCMR) to allow the completion of a concrete deck with below grade parking and storage, located within the rear yard of a one-family detached dwelling, wherein the completed project will not conform to the rear yard requirements of §§ 404 and 2503.2 of the Zoning Regulations.

For the reasons to be explained below, the Board voted to approve the application at its public meeting held February 7, 2012.

**PRELIMINARY MATTERS**

**The Application**

The application was self-certified pursuant to 11 DCMR § 3113.2 and the Applicant was represented by Jackson & Campbell, PC, Lisa A. Bell, Esq.

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<sup>1</sup> The original caption named only Mr. Merlis, as the application was filed in his name. However, Mr. Merlis’s wife, Ms. Laliotis, was also listed on later case filings as an additional “Home Owner”. Therefore, the caption has been amended to include Ms. Laliotis as well as Mr. Merlis.

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**BOARD OF ZONING ADJUSTMENT**  
District of Columbia

CASE NO. 18296

EXHIBIT NO. 58

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**Notice of Public Hearing**

Pursuant to 11 DCMR § 3113.13, notice of the hearing was sent to the Applicant, all owners of property within 200 feet of the subject site, the Advisory Neighborhood Commission (“ANC”) 3/4G, and the District of Columbia Office of Planning (“OP”). The Applicant posted placards at the property regarding the application and public hearing and submitted an affidavit to the Board to this effect. (Exhibit 28.)

**ANC Report**

In its report dated December 21, 2011, ANC 3G indicated that, at a regularly scheduled monthly meeting with a quorum present, the ANC voted to oppose the special exception application unless approval was conditioned upon a landscaping plan that was satisfactory to the Party in Opposition. (Exhibit 49.) The ANC reviewed and endorsed a proposed landscaping plan that depicted, among other things, a narrowing of the proposed driveway, and which screened the view of the deck from the street using various plantings and a trellis.

**Request for Party Status**

The Board received and granted two requests for party status from:

(1) Stuart Miles-McLean and Robin Miles-McLean, property owners at 5525 39<sup>th</sup> Street, N.W., abutting the Applicant’s rear yard. (Exhibit 29.) The Miles-McLeans asserted that the addition was within inches of their property line and that the deck “loomed over” their property, negatively affecting their privacy and the enjoyment of their yard. They also maintained that the materials used were an “overly bright” concrete that was visually glaring. (Exhibit 30.)

(2) Peter R. Kolker and Ann F. Kolker, property owners at 5524 39<sup>th</sup> Street, N.W., across the street from the Applicant. (Exhibit 31.) The Kolkers asserted that the project was inconsistent with the character, scale and pattern of other residences on 39<sup>th</sup> Street. They maintained that the new storage structure and concrete deck was a “significantly intrusive structure”, in comparison to the previous wood deck at the property that was not even visible from the street. (Exhibit 32.)

The two parties will hereinafter be referred to collectively as “the Opposition Party.”

**OP Report**

OP prepared a written report supporting the application on the condition that the Applicant file a landscape plan that addressed the concerns of the neighboring property owners, and that this plan become a condition of the special exception approval. (Exhibit 35.) Arthur Jackson, the OP representative who prepared the report, also testified at the hearing. Mr. Jackson noted that, although the deck was “different”, it was not “out of character” with the street or the general area. (Hearing Transcript of January 17, 2011, “Tr.”, p. 452).

**Post-Hearing Submissions**

The Board completed the public testimony on January 17, 2011. However, the record was left completely open until February 1, 2012, and a decision meeting was scheduled for February 7, 2012. (Tr. p. 514.) The Chair urged the parties to discuss specific landscaping options which would mitigate concerns raised by the Opposition Party.

**Submissions from the Applicant**

The Applicant submitted a copy of the final landscaping plan, known as the Balman Plan on February 1, 2012. (Exhibit 54.) The Balman Plan was dated January 26, 2012, and revised on January 28, 2012. The Applicant also submitted an accompanying narrative on February 2, 2012. (Exhibit 55.) The Board waived its rules to allow this filing, which was only one day late, into the record. (See, 11 DCMR § 3100.5.)

**Submissions from the Opposition Party**

On January 17, 2012, the Opposition Party submitted a drawing that was shown on the exhibit boards at the public hearing. (Exhibit 53.) On February 6, 2012, the Opposition Party also filed a submission indicating that they were willing to withdraw their opposition to the application provided the Balman Plan was made a condition to the approval of the application. The submission was late-filed but was accepted by the Board into the record.

**FINDINGS OF FACT**

**The Site and Surrounding Area**

1. The subject property is located at 3825 Morrison Street, N.W., Square 1859, Lot 62, a corner lot in the R-2 Zone District.
2. The lot is improved with a two-story one-family detached dwelling that was built in 1914.
3. Properties in the surrounding area include one and two-story one-family detached dwellings with a variety of designs.
4. The existing lot occupancy is no more than 30%.<sup>2</sup>

**The Addition**

5. In 2010, before seeking zoning relief, the Applicant built a concrete rear deck, with a parking garage and storage below it

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<sup>2</sup> Although the Applicant states that the lot occupancy is 28% (Exhibit 5), OP states that the lot occupancy is 30% (Exhibit 35). The Board accepts OP's calculation.

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6. The parking is accessed from a driveway that extends from an existing curb cut along 39th Street. The driveway was also widened to nearly 20 feet wide to service the garage doors on the addition.
7. The addition was constructed pursuant to a building permit issued by the Department of Consumer and Regulatory Affairs ("DCRA") and was designed to replace an existing larger wooden deck in the same location at the property.
8. Later, a second building permit was issued for construction of a smaller version of the original addition and the Applicant began construction.
9. The addition reduced the rear yard setback between the dwelling and the northern property boundary from 21.8 feet to 0.91 feet.
10. Later, however, DCRA revoked the building permit, having determined that the deck required zoning relief.

Zoning Relief

11. Subsection 404.1 of the Zoning Regulations requires that each structure in an R-2 Zone provide a minimum rear yard depth of 20 feet. The dwelling with addition will have a rear yard of approximately 0.91 feet.
12. The deck occupies a portion of the required rear yard. Subsection 2503.1 of the Zoning Regulations provides that a required yard must be open and unobstructed to the sky. Although there are three exceptions set forth in §§ 2503.2 through 2503.4, none of these apply.

The Impact of the Addition

13. The elevation plans, photographs, and site plan show the relationship of the addition to adjacent buildings, and also show views from the public rights-of-ways.
14. The property owned by Opposition Party members Stuart Miles-McLean and Robin Miles-McLean, located at 5525 39<sup>th</sup> Street, which abuts the property to the north, is at least 27 feet away from the Applicant's addition.
15. The property owned by Opposition Party members Peter R. Kolker and Ann F. Kolker, located at 5524 39<sup>th</sup> Street, across the street, is more than 40 feet away from the Applicant's addition.
16. There is a seven-foot tall wooden fence along the shared boundary with the 5525 39th Street neighbor, as well as tall flowering cannas lilies, both of which provide screening of the new construction.

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17. Pursuant to the Balman Plan, the Applicant will add shrubbery, trees and a new fence on the property line to provide additional screening for the neighboring property owner at 5525 39<sup>th</sup> Street.
18. Pursuant to the Balman Plan, the Applicant will provide further screening of the addition by narrowing the concrete driveway, providing planting areas on either side, edging it with cobblestone and planting two trees on both of those corners, adding plantings along the driveway perimeter, and erecting a pergola at the top of the public space area.
19. The addition is not visible from Morrison Street, but it is visible from 39<sup>th</sup> Street, N.W.
20. The concrete finish and muted colors of the addition are not out of character with the stucco exterior finish of the existing dwelling and the other dwellings along 39<sup>th</sup> Street.
21. Many corner properties in the neighborhood without alley access have garages and parking areas that face the street.
22. While the addition is higher above grade than the previous deck, there is no evidence of negative impacts to the light and air that is available to neighboring properties.

**CONCLUSIONS OF LAW**

The Applicant is seeking a special exception pursuant to 11 DCMR §§ 223 and 3104.1 to construct an addition to a one-family dwelling in an R-2 District, where the proposal will not comply with the rear yard requirements of § 404 and § 2503.1. As stated in § 3104.1 of the Zoning Regulations (Title 11 DCMR), the Board “is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) ... to grant special exceptions, as provided in this title, where, in the judgment of the Board, the special exceptions 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 Maps, subject in each case to the special conditions specified in this title.” In this case, the “special conditions” are those specified in §§ 223.2 through 223.5.

As noted by the Court of Appeals:

In evaluating requests for special exceptions, the BZA is limited to a determination of whether the applicant meets the requirements of the exception sought. “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 grant the application.” *National Cathedral Neighborhood Assn. v. District of Columbia Bd. of Zoning Adjustment*, 753 A.2d 984, 986 n. 1 (D.C.2000) (quoting *French v. District of Columbia Bd. of Zoning Adjustment*, 658 A.2d 1023, 1032-33 (D.C.1995)).

*Georgetown Residents Alliance v. District of Columbia Bd. of Zoning Adjustment*, 802 A.2d 359,

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363 (D.C. 2002).

In this case, the Board concludes that the Applicant has satisfied the two general tests stated in § 3104.1 and the specific conditions contained in § 223.

As to the general test, the Board concludes that the requested special exception will “be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps.” (11 DCMR § 3104.1.) The proposed addition will not change the residential use of the dwelling and will be in harmony with the existing residential neighborhood. With respect to whether the special exception will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps, the Board concludes that this standard is satisfied if the specific conditions of § 223 are met. These will be discussed in the section below entitled “The ‘special conditions’ for an addition under § 223.1”.

The “special conditions” for an addition under § 223.1

Under § 223.1 of the Zoning Regulations, an addition to a one-family dwelling shall be permitted even though it does not comply with applicable area requirements if approved by the Board as a special exception, subject to its not having a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular:

223.2(a). The light and air available to neighboring properties shall not be unduly affected. As OP found, the Board concludes that the light and air at neighboring properties will not be unduly affected. (Exhibit 35.) (Finding of Fact 22.)

223.2(b). The privacy of use and enjoyment of neighboring properties shall not be unduly compromised. Nor, with adequate screening, will the privacy of use and enjoyment of neighboring properties be significantly affected. The properties owned by the Opposition Party are more than 25 feet away from the addition. (Findings of Fact 13 and 14.) Further, as provided in the Balman Plan, neighboring property owners will be effectively screened from the addition. (Findings of Fact 17 and 18.)

223.2(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 subject street frontage. As OP also found, the addition will not substantially visually intrude upon the character, scale or pattern of homes along the street frontage of 39<sup>th</sup> Street (Exhibit 35.) (Findings of Fact 19, 20, and 21.)

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

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(70%) in the R-3, R-4, and R-5 Districts. The subject property is in the R-2 Zone. (Finding of Fact 1.) With the proposed addition, the lot occupancy will be no more than 30%. (Finding of Fact 4.) Therefore, this condition will be met.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. As noted, the ANC voted to oppose the special exception application unless approval was conditioned upon a landscaping plan that was satisfactory to the Party in Opposition. The Board found that the ANC's advice to be persuasive in this regard and has imposed the requested condition. Having acknowledged the ANC's issues and concerns and explained why it found the ANC's advice to be persuasive, the Commission met the great weight requirement.

In reviewing a special exception application, the Board is also required under D.C. Official Code § 6-623.04(2001) to give "great weight" to OP recommendations. The OP requested that the Applicant file a landscaping plan that addressed the neighbor's concerns and the Applicant did so.

For the reasons stated above, the Board concludes that the applicant has satisfied the burden of proof with respect to the application for a special exception under § 223 to allow the issuance of a building permit authorizing the construction of a concrete deck with below grade storage and parking, in the R-2 Zone.

Therefore, for the reasons stated above, the application for a special exception is **GRANTED**, **SUBJECT to the following CONDITION:**

1. The Applicant will implement the landscaping plan prepared by landscape architect Barbara Balman, dated January 26, 2012, and revised on January 28, 2012. (Exhibit 54 in the record.)

**VOTE:**        **4-0-1**    (Meridith H. Moldenhauer, Jeffrey L. Hinkle, Nicole L. Sorg, Lloyd J. Jordan, and Marcie I. Cohen, to Approve.)

Vote taken on February 7, 2012.

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

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

**ATTESTED BY:**

  
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**SARA A. BARDIN**  
Director, Office of Zoning

**FINAL DATE OF ORDER:** October 2, 2012

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.

PURSUANT TO 11 DCMR § 3205, THE PERSON WHO OWNS, CONTROLS, OCCUPIES, MAINTAINS, OR USES THE SUBJECT PROPERTY, OR ANY PART THERETO, SHALL COMPLY WITH THE CONDITIONS IN THIS ORDER, AS THE SAME MAY BE AMENDED AND/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT. FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

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

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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.