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DONOHUE & STARNES, P.C.

November 18, 2013

D.C. Board of Zoning Adjustment
441 4th Street, NW Room 200 South
Washington, D.C. 20001

Re Statement by Opposition – Case No. 18659

Chairman Jordan and Members of the Board:

The Applicant's Pre-Hearing Statement ("Statement") essentially attempts to avoid responsibility for the subject violations by placing blame on every party except the one that had the duty, information and experience to prevent the problem – the Applicant himself. The Applicant's Pre-Hearing Statement tries to divert the focus in this case from the fact that:

1. He ignored the mandates of the D.C. Zoning Regulations which required compliance with the front and side yard setback requirements of §§ 1543 and 405.9
2. Illegally encroached on front and side yard setbacks
3. Demolished walls previously represented to DCRA to be retained without notifying DCRA of the significant change in plans, and
4. Continued work on the noncompliant portion of the new structure in violation of the Stop Work Order

Raze of Original Structure Removed Protection of Existing Front and Side Yard Setback Encroachments

Throughout the Statement, the Applicant refers to the fact that the new structure does not expand the footprint of the historical structure when, in fact, the Applicant was not entitled to build the new structure out to the bounds of the historical structure (Statement at 2, 7, 11 and 13). By razing the original structure, the Applicant forfeited the right to encroach into the front and side yards as had the original structure due to its construction prior to 1958. The fact that the porch had existed in its previous footprint since 1930 as noted by the Applicant on page 1 of his Statement is irrelevant except as to illustrate that the original noncomplying structure's encroachments into the front and side yard setbacks were protected given their pre-1958 construction date. The Applicant seems to believe that his argument is strengthened by noting throughout his Statement, that the original protected encroachments have been reduced by the new structure. He notes that the protected encroachment on the side yard has been reduced by seven (7) feet or 39% (overall reduction is only 20%) (Statement at 9). What is required by the Zoning Regulations is that the encroachments be reduced by 100%/eliminated.

The Applicant claims that "the construction of the Enclosed Porch was at all times undertaken in accordance with duly-issued (and rightfully issued) building permits" and that "It was not until the

remaining original wall was removed – in an area of the house completely removed from the Enclosed Porch – that the already completed work was determined by the Zoning Administrator to have changed characterizations from ‘addition’ to ‘new.’” (Statement at 3) The “rightfully issued” building permits to which the Applicant refers (1) ceased to be such when he removed walls that were to remain without notifying DCRA and (2) were based on plans that were not followed nor corrected by subsequent submissions. The Applicant cannot avoid responsibility here by relying on permits he knew were secured by misrepresentations made to DCRA.

Planning Staff & Zoning Administrator Have Determined that Two Variances are Required

Planning staff and the Zoning Administrator have determined that the Applicant is seeking inappropriate relief under §223. Despite admitting that two (2) variances are, indeed, required – “For the purposes of this Application, the Applicant stipulates that the Project was a raze and that Covered Porch was no longer a legally nonconforming structure” (Statement at 4)– the Applicant still argues under §223 and alternatively, that the Enclosed Porch and new house are two (2) separate projects the porch being an addition to the house. The new structure, in its entirety, has been deemed by DCRA and the Zoning Administrator to constitute a raze and new construction. The Applicant so admits in the very first paragraph of his Statement when he notes that the new construction was to “enlarge or reconstruct.” Unfortunately for the Applicant, these two words have two different meanings and per the determination of a raze, only reconstruct is an accurate description of the project. The Applicant represented to ANC 3D on November 6, 2013 that he had or would be revising the application to seek two (2) variances.

In his Statement, however, he continues to try and argue in the alternative that the main portion of the new structure and the Powder Room/ Enclosed Porch should be bifurcated. The Applicant’s reasoning simply does not hold. It was the unpermitted demolition of walls within the main portion of the new structure that categorized the project as a raze. The new structure was erected to include the Enclosed Porch. The Applicant should not be allowed to circumvent staff and the Zoning Administrator’s determination by separating portions of the new structure completed as part of one construction project.

Burden is on the Applicant to Follow Zoning Regulations and Notify DCRA of Changed Plans

The Applicant argues that he should not be required to incur the expense associated with the removal of the noncompliant construction due to the fact that the Zoning Administrator re-characterized the project as “a raze and new construction, based apparently on the demolition of a small area of original wall that was originally meant to be retained.” (Statement at 1) According to the Applicant, “Zoning Administrator’s recharacterization was made way too late.” (Statement at 13) What the Applicant fails to address is the fact that he removed the walls in violation of the permits previously obtained and failed to notify DCRA of the changes either before demolition or after. The portion of wall removed was not insignificant or “small,” but rather so substantial as to change the classification of the project from an addition to a raze. The plans that the Applicant submitted to DCRA showed the retention of 30 feet (30’) of exterior wall to be retained – that is 30%, none of which was actually retained. To date, the Applicant still has not submitted revised plans showing the demolition of the walls that resulted in the project’s classification as a raze. When the Bakers notified DCRA of the unapproved demolition, a Stop Work Order was issued (not on July 3rd as alleged by the Applicant on page 3 of his Statement) but on June 26, 2013. What followed was a Notice of Revocation of Building Permits on July 3, 2013 and a

Zoning Compliance Decision Letter on August 1, 2013 confirming the Applicant's violations and the raze determination

As the Zoning Administrator has stated, the Applicant bears the burden of notifying DCRA of any revisions to previously approved plans. He cannot escape liability for illegal construction by arguing that DCRA should have caught his demolition. Without being informed of the removal and reconstruction of original walls, inspectors had no reason or way to know that the Applicant had deviated from the plans on file with DCRA. As a self-proclaimed "architect and construction manager," Applicant was familiar with the established rule that the Zoning Administrator and DCRA has followed for the past three (3) years in deciding what constitutes a raze (Statement at 10) If he had any questions, he could and should have asked prior to acting. Clearly, removing all of the exterior walls would qualify as a raze

Applicant Fails to Meet Any of the Three Prongs of the Area Variance Test

Prong One – Extraordinary or Exception Situation or Condition

In support for this prong, the Applicant offers that permanent structures on the land itself may be considered. The case that the Applicant cites to support his contention that structures on the property could be considered in meeting this prong is *Clerics of St. Viator v. D.C. Bd. Of Zoning Adjustment*, 320 A.2d 291 (D.C. 1974). This case is distinguishable from the present situation. In that case the seminary had been used for its intended purpose for several years before registration numbers declined to such an extent as to render the use no longer viable. This decline promulgated the seminarians' request for the variance which would allow for the facility's use as a nursing home. It was this change in circumstance over time that removed the case from the realm of *Taylor v. D.C. Bd. Of Zoning Adjustment*, 308 A.2d 230 (D.C. 1973), which makes clear that this prong of the variance test may not be satisfied by conditions that are self-imposed. There, a developer sought rezoning of property that would allow the construction of more homes. The Court of Appeals in *Taylor*, stated "[p]etitioner failed to demonstrate that the 'hardship' could not be alleviated by redrawing his subdivision" and "it is undisputed that petitioner bought the property with a knowledge of the zoning restrictions and the general condition of the neighborhood." *Id.* at 235-36. Like the developer, the Applicant here has created his own hardship. As the Court of Appeals in *Clerics* noted, "In *Taylor* the direct result of the petitioner's actions was the creation of the hardship complained of, and the court quite correctly deemed it to be 'self-imposed'." In *Clerics*, it was not the building of the structure in 1961 which gave rise to the complained of hardship as the building was utilized for its intended purpose as a seminary for a number of years. The hardship was caused by an extraordinary drop in enrollment of seminarians, found by the Board to be 'due solely to the historical circumstances of decline in religious vocations and departure from the traditional seminary concept of theological education' and 'beyond the control of the seminary administration.' *Clerics of St. Viator v. D.C. Bd. Of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974). The hardship was wholly created by the Applicant and it was completely within his control to avoid.

The Applicant also alleges that the discovery of the structurally unsound walls constitutes an exceptional situation. Again, upon this discovery the Applicant was obligated to disclose new plans to DCRA and obtain revised permits. He failed to do so and as such imposed upon himself the hardship of having to remove the portion of the new structure that is noncompliant.

Finally, the Applicant cites *Monaco v. D.C. Bd. of Zoning Adjustment*, 407 A.2d 1091 in an attempt to use DCRA as a scapegoat for his own violations. The Petitioner in *Monaco* was able to demonstrate good

faith reliance on the zoning authorities' representations. Here, the Applicant withheld materially significant information from the DCRA – specifically, the plans illustrating the demolition of walls to such a degree as to render the project a raze. The Applicant is therefore estopped from claiming that DCRA should have prevented him completing his illegal actions as he was obligated to provide them with the information that would have made them aware of his violations. The Applicant, unlike the Petitioner in *Monaco*, did not act in good faith, rather, he did what he wanted, did not wait for the requisite approvals and hoped not to get caught.

Prong Two – Practical Difficulties

The Applicant cites the expense and time delay inherent in correcting his violations. The Applicant has admitted in his October 29, 2013 correspondence with ANC 3D as well as in his Statement that he could have easily located the Powder Room/ Enclosed Porch at another location on the first floor, specifically at the rear of the property. The practical difficulty he claims then would only result from his own violations of the Zoning Regulations. The case cited by Applicant, *Palmer v Board of Zoning Adjustment*, 287 A 2d 535, requires that “it must be shown that compliance with the area restriction would be unnecessarily burdensome.” *Id.* at 542. Given the admitted ease with which the Powder Room/ Enclosed Porch could have been located elsewhere and still can be (by the Applicant's own admission in the October 29, 2013 letter to ANC 3D & Statement at 9), the Applicant fails to satisfy this second prong of the area variance test. Any practical difficulty such as expense in tearing down and relocating has been self-imposed.

Prong Three- Substantial Detriment

On page 12 of his Statement, the Applicant claims that granting the relief requested will only approve that which was originally approved by the Zoning Administrator in the original building permits. The Applicant fails to point out that those original building permits were revoked based upon his exceeding their scope (per the July 3, 2013 Notice of Revocation) and therefore, the encroachments into the front and side yards are in violation of the Zoning Ordinance and not approved by any building permits.

The Applicant completely disregards the significant negative impact to the Bakers' property, the decrease in light and air to their dining room, bay window and front stoop as well as the elimination of any possible landscaping options by the side yard encroachments. The ANC recognized the specific intent of the Wesley Heights Overlay District language in §1541 to protect the light and air to adjacent properties and the Applicant's noncompliant construction infringes on that protection. As further evidence of the lack of substantial detriment, the Applicant mentions the weeping cherry tree in the front yard of the property. This tree offers no screening to the Bakers whose home is to the west of the new structure and who now are subject to a reduced side yard that severely restricts their landscaping options and access to light and air. The tree will also offer no screening from the street when it loses its leaves in the winter months.

Finally, the Applicant closes this section of his argument by reiterating that the historical footprint was not expanded. Again, by razing the original structure, the Applicant forfeited the right to build out to the original footprint.

Applicant's Measurement Have Yet to be Confirmed

The Staff Report notes on page 5 that the Project replaces a larger structure with a more conforming one. We would contend that this is not an accurate statement. The original structure conformed to the Zoning Regulations and, due to its construction prior to 1958, enjoyed front and side yard setback encroachment protections. The new structure is substantially taller and extends into front and side yard setbacks that it is now subject to by virtue of the Applicant's razing of the original structure.

Moreover, the measurements provided by the Applicant are disputed and the ANC has requested that an additional wall check be performed to confirm the numbers provided in the Applicant's Form 135. The Applicant's own submissions call into question the validity and accuracy of the measurements cited in his October 29, 2013 letter to ANC 3D; the Applicant noted that the side yard encroachment had been improved by 30% when compared to the original structure. On page 9 of his Statement, he now alleges the violations have been reduced by 39%. Similarly, at the first ANC meeting on October 2, 2013, counsel for the Applicant stated that only the chimney had been retained, while the Statement now claims that only a small portion of one of the walls in question was removed. The discrepancies in the Applicant's own representations to the ANC and to this Board underscore the need for confirmation.

Support

Finally, the Applicant notes the 13 letters in support from surrounding property owners (Statement at 13). Several neighbors have submitted originally-drafted letters noting the importance of careful consideration by the BZA of the effect of Applicant's encroachments on the adjoining property owners closest in proximity. It is important to note that the letters of support were drafted by the Applicant himself and the language contained therein that "[i]t is not likely to have a negative impact on us or any other property owner" is clearly inappropriate as no property owner can speak to the impact of the Applicant's construction on another property owner. Mr. Florentin Butaru states this in his November 3, 2013 letter to the BZA. Mr. Butaru's letter and four (4) others are attached.

For the above-noted reasons, we ask that the Board find in accordance with the recommendations of ANC 3D and the Office of Planning and deny Application No. 18659.

Respectfully submitted,



Edward L. Donohue
Counsel for Peter and Sally Baker – Movants for Party Status/ Neighbors in Opposition

117 Oronoco Street
Alexandria, Virginia 22314
703 549 1123
edonohue@donohuestearns.com

Attached:

- 1 Letter in Opposition from Robert L. Green

- 2 Letter in Opposition from Michael Sheehan
- 3 Letter from Florentin Butaru
- 4 Letter from Zeyneb Lange
- 5 Letter from Eli Joseph
6. Letter from Martin Sullivan to ANC 3D dated October 29, 2013

3115 Foxhall Road NW
Washington, DC 20016
November 12, 2013

District of Columbia
Board of Zoning Adjustment
441 4th Street NW
Suite 200/210-S
Washington, DC 20001

Re Application No. 18659

Dear Sir or Madam:

I am writing concerning the above referenced application for a special exception and/or variance for a premises located at 4540 Lowell Street, N W (Square 1608, Lot 68).

My wife and I have lived at 3115 Foxhall Road NW (Square 1608, Lot 64) since 1987. Our rear property line is contiguous to 75 feet of the western property line of Lot 68.

As an initial matter, we were not asked for our consent or approval of the pending application for a special exception/ variance at the subject property. We believe that Application No. 18659 should be denied.

As residents of Wesley Heights since 1987, we observed first-hand the teardowns and redevelopment of an alarming number of homes that led to the adoption of the Wesley Heights overlay. We are strong supporters of enforcement of the overlay and believe that its requirements should be strictly adhered to. Without strict enforcement, the overlay has no real value and the unique character of the Wesley Heights neighborhood will be destroyed by piecemeal exceptions and/or variances being granted.

In this particular case, it is my understanding that the submitted plans sought to take advantage of grandfathered side yard and front yard setbacks that do not meet the current setback requirements applicable in Wesley Heights. It is also my understanding that to take advantage of the grandfathered non-conforming setbacks, a property owner must maintain the existing walls.

That did not occur here. Instead, the applicants demolished the walls under which they claimed entitlement to grandfathered setbacks. This was a departure from the submitted plans that were the basis for the building permit.

It is also my understanding that the applicants proceeded with construction without approval of the departure from the approved plans.

From our perspective, it appears that the applicants acted at their peril. Applicants are seeking to have it both ways. They relied on the grandfathering provisions to obtain their building permit. Once the permit was obtained, they destroyed the walls that were the basis for their ability to claim the grandfathering exception. Now, having moved forward with construction that current regulations would not permit, they seek be excused from their non-compliance with existing regulations. This appears to be an instance where it is easier to ask forgiveness than it is to ask permission.

As stated above, the applicants acted at their own risk. To the extent that denial of the special exception/variance creates a hardship, it is a hardship they created for themselves

The Board of Zoning Adjustment should deny Application No 18659.

My wife and I are unable to attend the November 19 hearing in this matter because of long scheduled travel plans. In our absence, please make this letter part of the record.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert L. Green", with a long, sweeping horizontal line extending to the right.

Robert L. Green

November 11, 2013

Board of Zoning Adjustment
441 4th Street, Suite 210S
Washington, DC 20001

Re BZA Variance/Special Exception Application No. 18659, 4540 Lowell Street NW,
Square 1608, Lot 68

Dear Mr. Chairman and Members of the Board,

I live at 4529 Lowell Street, NW, which is within 200 feet East from 4540 Lowell, the property that is seeking relief in this Application. I strongly oppose Ms. Goirand's and Mr. Xenophontos's plans despite his representing that neighbors support his current illegal project. The area of the new construction needing variance relief was previously a covered porch which was demolished and re-built in a much larger footprint, and encroaching upon the neighbor's property.

The property of 4520 Lowell tore down a house of two stories and has built a much higher structure of three stories of about 40 feet, much higher than any of the other properties in the neighborhood, it "dwarfs" the houses to its right, left and across the street. The garage and so-called "carriage house" in the backyard are not in conformity with the current zoning given the 30% coverage allowed in the R1B zone. It is not a "carriage house" but simply an illegal, additional rental dwelling in the backyard of a neighborhood which does not allow rental properties to be built in the back yard. It sets a terrible precedent for the neighborhood, and should be torn down. Mr. Xenophontos's stated intention to live in the carriage house and rent out the new property under construction clearly violates the zoning restrictions which don't allow properties to be rented to unrelated families on one property. Based on his previous track record of illegal structures and other by-passing of zoning regulations, we have no trust in his stated plans – and insist that these illegal dwellings in the back yard be torn down immediately.

Finally, there has been a continual noise and construction level beyond normal working hours
(including before 7 am on some weekends)

Mr. Xenophontos visited our house in person and represented that "every other neighbor" has signed off on his petition requesting the Board to approve his Application for development. He misrepresented this information and has continued these strongarm tactics by going door to door and pressing neighbors to endorse his Application by giving them false and incomplete information about the project. Given his illegal building, rental of property to two unrelated families, violation of local zoning restrictions and illicit behavior, we therefore urge the Board reject his BZA Application No 18659 and insist he come into compliance with the rest of the property by removing all of the illegal structures – and preventing him from building a virtual condo unit in this neighborhood. I urge you to come and look at these structures – they are completely out of line with this neighborhood.

Sincerely,



Michael Sheehan

4529 Lowell Street NW

Washington, DC 20016

202-758-0326

November 03, 2013

Board of Zoning Adjustment
441 4th Street, Suite 210S
Washington, DC 20001

Re. BZA Variance/Special Exception Application No. 18659; 450 Lowell Street NW,
Square 1608, Lot 68

Dear Mr Chairman and Members of the Board,

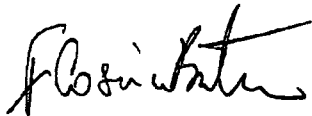
I have been informed about existing concerns related to the ambivalence of certain phrasing in the letter sent on September 25, 2013, in regard to Ms. Goirand's and Mr Xenophontos's BZA Variance/Special Exemption Application No 18659

In order to avoid any confusion that may arise, I would like to clarify the following.

I am in support of Ms Goirand's and Mr Xenophontos's plans, since their variance has no impact on my property, located at 4554 Lowell Street NW and own jointly by my wife, Kiara Rankin, and myself. Under no circumstances I would make such statement on behalf of anyone else, such as other neighbors, therefore, the reference "[] any other property owner [.]" used within the initial letter should only be associated to my wife

I am confident the Board will carefully weight negative impacts to other neighbors, if any, before approving this Application

Sincerely,

A handwritten signature in black ink, appearing to read 'Florentin Butaru', with a stylized, cursive script.

Florentin Butaru

**Zeyneb Lange
3207 Foxhall Road, NW
Washington DC 20016**

November 16, 2013

Board of Zoning Adjustment
441 4th Street NW
Suite 200/201-S
Washington DC 20001

Re. BZA Application No. 18659

Dear Sir or Madam,

I have become aware of concerns regarding certain phrasing in the letter on October 8, 2013 regarding Ms. Goirand's and Mr. Xenophontos above-mentioned BZA Variance/Special Exemption Application.

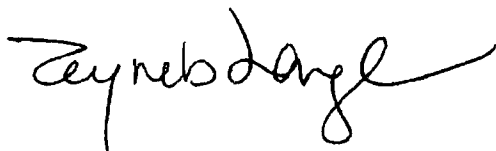
I would like to clarify my earlier letter to avoid any confusion and make the following statements:

I support Ms. Goirand's and Mr. Xenophontos's plans to the extent their variance has no impact on my property located at 3207 Foxhall Road NW and which is owned solely by me.

However, under no circumstances would I make such a statement on behalf of other neighbors. Therefore, the reference to "... any other property owner..." used within the letter of October 8 should be omitted.

It is my hope that the Board will carefully weigh negative impacts on other neighbors while considering this Application

Sincerely,



Zeyneb Lange

November 15, 2013

Board of Zoning Adjustment

441 4th Street, Suite 210S

Washington, DC 20001

RE BZA Variance Special Exception Application No 18659 4540 Lowell Street, NW Square 1608, Lot 68

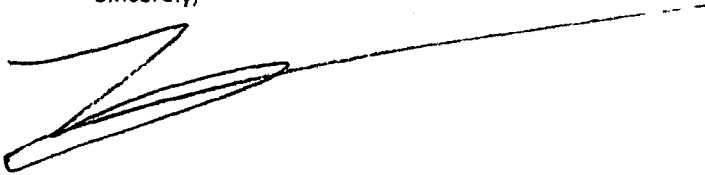
Dear Chair and Members of the Board

I am writing to clarify a previous letter transmitted on my behalf in September 2013 with regards to Ms Goirand's and Mr Xenophonotos' BZA Variance/Special Exemption Application No 18659

In order to avoid any confusion that may arise, the following is intended to clarify my point of view

I remain supportive of Ms Goirand's and Mr Xenophonotos' plans, since their variance has no impact on my property, located at 4547 Lowell Street, NW. However, I cannot speak for others on our street or in our neighborhood, and therefore, the reference "any other property owner" should only be associated with myself and my wife, Margaret Joseph. The project itself has no direct negative impact on my property, located across the street, but I have observed that it may directly impact others on the street. I hope that the Board will carefully weigh the views and impacts that project may have on others in the neighborhood—those who may support and/or oppose the project.

Sincerely,

A handwritten signature in black ink, appearing to be 'Eli Joseph', written over a horizontal line.

Eli Joseph

SULLIVAN & BARROS, LLP

Real Estate • Zoning • Land Use

Stephen P. Sullivan, Partner
Direct: (202) 503-1700
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Via e-mail and/or regular mail

October 29, 2013

Advisory Neighborhood Commission 3D
P.O. Box 40846 Palisades Station
Washington, DC 20016
3D@anc.dc.gov

Re: BZA Application No. 18659 Xenophontos Gouand Residence 4540 Lowell Street NW

Dear ANC 3D Commissioners:

I am writing on behalf of Andreas Xenophontos and Elodie Gouand, 18-year residents of 4540 Lowell Street NW (the "House") in response to the presentation by Sally Baker and her attorney Ed Donohue at the ANC meeting on October 2, 2013.

Before addressing that presentation, I note that the BZA application - the only item at issue before the ANC and the BZA - involves only the one-story structure which takes up a footprint of approximately 10.9 feet by 10.4 feet in the northwest corner of the House (hereinafter the "Powder Room"). The Powder Room has little or no effect on the Opponents' light and air and privacy; it is completely shielded from view in the front by a large Japanese Weeping Cherry tree, and it has existed in this exact same footprint as a covered porch for over eighty (80) years.

Andreas and Elodie did not have to close in this covered porch. They could have easily installed a powder room somewhere else on the first floor. They could have easily located this density to the rear of the house, where they have over sixty (60) feet of rear yard setback available. By closing in the porch in its historical footprint (as has been done many times by Wesley Heights homeowners), Andreas and Elodie have gained no additional gross floor area or lot occupancy. In fact, they actually removed a significant portion of the original house which encroached into the side yard closest to the Opponents' house, giving up about thirty percent (30%) of the area of the historical side yard encroachment.¹

Other than the Powder Room, the House complies with all Zoning Regulations, as attested to by the numerous DCRA inspections prompted by the Opponents. If Andreas and Elodie had done no other work, they could have closed in this porch as a matter-of-right. In fact, if they had only removed a few feet less of wall than they did, they could have closed in this porch as a matter-of-right. Instead, DCRA determined, well after the House and Powder Room had been duly permitted and substantially constructed, that the work done was more correctly identified as "new construction" instead of an "addition." According to the Zoning Administrator, that meant that closing in the porch now required BZA relief, even though it was originally

As regards the encroachment into the side yard, it is considerably less than what it was five years ago. If Andreas and Elodie's purpose was to "hoodwink" DCRA to try to keep the front footprint, why would they remove the part of it closest to the Opponents' house?

October 29, 2013
ANC 3(D)

permitted. The critical work that led to this determination involved the removal of walls which were found to be structurally deficient as a result of deterioration (see Structural Engineer's letter attached as Exhibit A).

The BZA application has nothing to do with any part of the House other than the Powder Room which means that almost all of the presentation by the Opponents is irrelevant. Furthermore, the Stop Work Order had nothing to do with any part of the House other than the Powder Room. Andreas and Elodie are constructing, or rebuilding, or adding to (however the Zoning Administrator has arbitrarily labeled it) a matter-of-right house in the style and size of many other recent new and renovated homes on Lowell Street. They are not developers. They have lived here for 18 years and wish to remain here.

Closing in the front porch was an afterthought and was never imagined to be a potential source of so much contempt and consternation. If they had to do it over again, Andreas and Elodie would have eliminated the porch, and moved that density to the rear of the house. But the work was approved, and inspected many times, prior to its substantial completion. To remove it and install a powder room somewhere else on the first floor would now be a catastrophic expense (and almost impossible at this stage since the interior of the house is completely closed in). Furthermore, removing the Powder Room provides no material benefit at all to the Opponents, just as allowing the Powder Room to remain causes them no harm.

Response to The Opponents' Presentation

1) On page 2 of the Power Point, Opponents asserted that the Applicant is retroactively seeking approval for construction that has already been completed in violation of (i) the D.C. Zoning Regulations, (ii) a Stop Work Order, and (iii) a Notice of Revocation of Building Permits.

Response: Andreas and Elodie are indeed seeking retroactive approval, but such construction was at no point undertaken in violation of any law or regulation, Stop Work Order, or Notice of Revocation.

2) On Page 3, the Opponents rightly assert that the purpose of the Wesley Heights Overlay is to preserve and enhance the low density character of Wesley Heights and to preserve in general the neighborhood.

Response: Andreas and Elodie agree, and therefore undertook construction that not only complied 100% with the Zoning Regulations and the Wesley Heights Overlay (as evidenced by the permit and subsequent inspections), but also preserved the historical footprint of the original house in the area of the Powder Room.

3) On Page 3, the Opponents conclude that the existence of the Powder Room "significantly impacts the general appearance of the neighborhood, light and air." They also stated, without support and in fact incorrectly, that the height of the Powder Room is now higher than it was previously.

Compare this situation to BZA Case No. of Mary McGrath, where this ANC approved a significant expansion into the front yard setback because DCRA mistakenly approved what was obviously illegal construction. In this case, there was no such expansion of the existing legally nonconforming encroachment, and DCRA correctly approved closing in the porch. It was only later, after substantial completion, that DCRA reversed its determination based on a technicality having nothing to do with the nonconforming porch.

October 29, 2013

ANC 3D

Response The Powder Room was previously a covered porch with a sloped roof in the same footprint and height as it is now, except for a 3'7" x 7' section of the original house which was removed. Opponents fail to explain or produce any evidence to support why such a small, pre-existing structure causes their property such great harm.

4) On page 3, the Opponents state that the "non-compliant construction severely reduces the air and light to the adjacent parcel."

Response The BZA application involves the Powder Room. The portion of the Powder Room under consideration for side yard relief consists only of an area which is 10.9 feet long, one-story high, and which extends 4.3 feet into the required side yard. The sloped roof and porch and supporting columns have been in this same location for over eighty (80) years. Not only that, but Andreas and Elodie actually removed a 4'7" x 7'0" portion of legally nonconforming structure from the side yard adjacent to the Opponents' property. **In other words, the area of "nonconforming structure" is actually less than it has been historically, and what remains is merely closed in.** The existence of the Powder Room casts a miniscule shadow, if any, on the Opponent's property, and not on their house, and this in an area that is already well-shadowed by the many surrounding trees, particularly to the south.

5) On page 3, the Opponents state that the Powder Room significantly impacts the general appearance of the neighborhood.

Response The Powder Room, as stated, sits in its historical footprint. It was a covered porch that was closed in, as many such porches have been in Wesley Heights (See photos attached as Exhibit B). Furthermore, the Powder Room is almost completely shielded by a magnificent Japanese Weeping Cherry tree. If this tiny, pre-existing structure is so offensive to the neighborhood, it begs the question why almost every neighbor on this block has expressed support for Andreas and Elodie's BZA application. We also point out that the Opponents' structure *also* encroaches into the Wesley Height front yard setback, although their encroachment is well over twice the area of the encroachment at 4540 Lowell.

6) On page 4, the Opponents attempt to make a case for why the Applicant would want to have the construction categorized as an addition rather than a demolition, claiming that it was the Applicant's desire to preserve the footprint of the Powder Room.

Response On one hand, this is correct. Andreas and Elodie did indeed wish to retain the historical footprint of the Powder Room, as was their right until the Zoning Administrator retroactively labeled the project new construction. But from the beginning through substantial completion, Andreas and Elodie worked under duly issued building permits permitting this work. Also, if Andreas and Elodie were so intent on retaining every bit of the historical nonconforming footprint and harming the Opponents, they would not have removed the thirty square foot section of the original house that was closest to the Opponents' house.

7) The Opponents alleged and implied throughout their presentation that DCRA was something less than responsive to their near-constant stream of complaints.

And the Bikers have actually commenced a campaign to encourage others throughout Wesley Heights to contact DCRA inspectors with complaints of violations at 4540 Lowell. We ask the ANC, "at what point does voicing concerns with public officials cross the line and become unwarranted and unreasonable harassment?"

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Response: DCRA's illegal construction inspector has now made six unannounced visits (he came again last Thursday) to 4540 Lowell – at the behest of the Opponents - without issuing a single violation or stop work order notice. After each visit (including this latest visit) the inspector approved the on-going work and allowed it to continue. After this relentless effort by the Opponents, the Zoning Administrator eventually made the highly questionable determination that led to the Stop Work Order and prompted this BZA application.

8) The Opponents' presentation consisted almost exclusively of allegations about Stop Work Orders, OAH proceedings, and Notices to Revoke.

Response: Andreas and Elodie have at all times complied with every DCRA directive. The Stop Work Orders were lifted; the Opponents refuse to accept that, and at any rate none of this relates to the decision criteria for the BZA application.

9) On page 8, the Opponents claim that "[w]e are here because the Applicant chose to ignore and continues to ignore the SWO and Notice of Revocation issued by DCRA."

Response: This statement is false. We are here because the Zoning Administrator determined, well after the fact, that Andreas's and Elodie's attempt to close in the Powder Room was not allowed by right, even though it was originally approved and then substantially completed before any Stop Work Order was issued. Not only did Andreas and Elodie not ignore the Stop Work Order, they followed it to their detriment, since the entire home (all of which but the Powder Room is unquestionably matter-of-right) was left open to the elements while they begged DCRA for a response to their requests to weatherproof the structure.

10) On page 8, the Opponents state that the Applicant is hoping that the Office of Administrative Hearings (OAH) grants relief or the BZA retroactively approves setback violations.

Response: True! This is why Andreas and Elodie filed an appeal with the OAH and an application with the BZA. They hope very much not to have to spend \$75,000 or more demolishing construction on the existing footprint that was built at all times under approved building permits."

11) The photographs provided by the Opponents completely misrepresent the relevant situation. The House complies in all respects with all height, lot occupancies, and setback requirements other than in the area of the one-story Powder Room. On page 14, the photo caption states "Impact to adjoining parcel is significant reduction in light & air." But the photos relating to that caption only show the matter-of-right portion of the House, and not the Powder Room which is the only subject of the BZA application. The photo on page 16

Although not germane to the BZA application, the allegation of a violation has no actual basis in the Zoning Regulations or Building Code. Rather, the Zoning Administrator noted that his decision was "an interpretation" (unpublished) that he had been following for just the last three years. (See the e-mail from the Zoning Administrator attached as Exhibit C.)

During the two months that construction was stopped, the House experienced repeated flooding causing significant damage, some of which is demonstrated in the photos attached as Exhibit D). The only response issue from DCRA was the lack of response that allowed this damage despite Andrea imploring DCRA to allow him to close up the matter-of-right portion of the House.

The potential damage to Xenophon's Gonard is so great, and the "interpretation" that stopped construction of the Powder Room so vague and ambiguous, that a laches or estoppel defense is likely to succeed at OAH if the variance is not approved.

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on the other hand, without caption, is actually a good representation of the minor nature of the pre-existing encroachment into the west side yard, and it also shows the area of the eliminated portion of the original House nearest the Opponents house.

12) As another diversion, the Opponents provided pictures of the port-a-john on the property, even though it has nothing to do with anything in this case.

Response: Andreas and Elodie cannot locate the port-a-john in the rear yard because the service truck cannot reach it. They cannot locate it on the front street because that would be illegal and unsafe. They located it on the east side of the house for six months, and then moved it to the west side of the house. It has sat longer on the west side, thanks to the Opponents' success at stalling the construction process. The neighbor to the east did not complain. Andreas and Elodie just thought it fair to split the time.

13) On page 18 of the power point are photos of Andreas and Elodie's contractors.

Response: As noted, the Stop Work Order was never violated. There was another construction project taking place at the house next door to the east of 4540 Lowell, which was managed by Andreas Xenophonos with the same contractors that had been working on Andreas and Elodie's house. Ms. Baker harassed and intimidated those contractors on a daily basis by taking pictures, and parking behind their cars and taking pictures of their license plates. Andreas had to intervene to dissuade some contractors from calling the police as they felt threatened and intimidated.

14) On page 19 of the power point, the Opponents finally address the actual B/Z argument.

Response: The Opponents conclude that Andreas and Elodie are applying for the wrong relief, despite the fact that the B/Z application was made in response to a suggestion from DCR. The Opponents also mention § 223.5, which applies to nonconforming uses, obviously not germane to this residential use. Then the Opponents simply conclude at the end, with no explanation or evidence of any kind, that the application does not meet any of the standards of § 223 relief.

There is little or no impact on the light and air to the Opponents' property from the Powder Room. It consists of a small 113 sq. ft., one-story area which existed as a covered porch in this same footprint for 80 years. Even if it was a completely new footprint, the Powder Room has no material impact on light and air to the Opponents' property. In fact, the area of this encroachment is about thirty percent smaller than it was a year ago. (See photos attached as Exhibit E, showing the relationship between the Powder Room and the Opponents' property.)

The privacy situation has vastly improved, as the open porch has become enclosed, with a single powder room window. Further, the Powder Room is in its historical footprint and almost 100% screened by the Weeping Cherry tree. As such, it no more intrudes upon the character of the street frontage than does the Opponents' much greater encroachment into the Overlay's front yard setback. We note the photos attached here as Exhibit E, showing the visibility of the Powder Room in relation to the front building line of the Opponents' house.

The irony of this case is that the encroachment into the side yard adjacent to the Opponents property for which we are seeking relief has actually been reduced by thirty percent (30%)!

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15) The Opponents made a comment at the ANC meeting that "all the neighbors" were in agreement with their opposition to this BZA application, without supporting documentation.

Response: To date, this BZA application enjoys the support of thirteen (13) neighbors surrounding the property and within the 200 foot radius. Several others have said they wish to remain neutral. Please see the attached letters of support and map attached as Exhibit G.

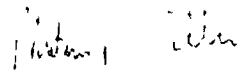
Andreas and Elodie are doing what several other neighbors on Lowell Street have done in recent years: building a house on their property (for their own use - not for resale) which is compliant with all Zoning Regulations and Wesley Heights Overlay requirements, save for closing in the previously existing porch, for which they are now before the ANC and BZA. The size and scale of their house is similar to many other recently renovated or reconstructed homes on Lowell Street. (See photos of other new houses attached as Exhibit H.)

But the House itself is not at issue before the BZA or this ANC. The only item before the BZA and the ANC is the Powder Room. The request to retain this Powder Room is a minor request, the granting of which will not have a substantially adverse affect on the use or enjoyment of any abutting or adjacent dwelling or property, and which, if not granted, would present an extreme practical difficulty to Andreas and Elodie.

Nor will the granting of relief substantially impair the integrity of the Zoning Regulations or the Wesley Heights Overlay. Unlike a recent case approved overwhelmingly by this ANC, the footprint of the structure encroaching in the front yard overlay has been in place since the house was originally constructed over eighty (80) years ago. But for the technical change in how the Zoning Administrator has labeled this project, this structure would have been permitted as a matter-of-right. Many such historical porches have been closed in in similar fashion in Wesley Heights, without detriment to the overlay or the neighborhood.

Andreas Xenophontos and Elodie Gorrard respectfully request that the ANC consider the information herein, the other relevant issues in this BZA application, and the overwhelming support of the neighbors on this block, and recommend that the BZA approve the application.

Sincerely,



Martin P. Sullivan

This ANC recommended approval of BZA Application No. 18586 of Mary McGrath. In that case, however, relief was granted across the entire width of the house in an area which had not previously contained a legally nonconforming structure. In contrast, granting the requested relief only leaves the encroachment as it has been historically.