MASSACHUSETTS HEIGHTS CITIZENS ASSOCIATION

March 30, 2015

Mr. Lloyd Jordan, Chairman
District of Columbia Board of Zoning Adjustment
441 4th Street, NW
Room 220 South
Washington, D.C. 20001

Re: Case 18886 – Preliminary Prehearing Comments

Dear Mr. Chairman,

MAHCA and its affected members and ANC 3C had not planned to submit reply comments to the Applicant's initial Statement ("Statement") and her prehearing statement ("PHS"). However, as we prepare for the March 31 hearing, it is apparent we should address some of the legally irrelevant propositions asserted by the Applicant – especially those that seem ethically troubling – lest the hearing become mired in or beclouded by anything but the merits of Applicant's case.

The Applicant seeks a special exception for extension of a non-conforming side yard and for a lot occupancy violation. Both are sought for an addition Applicant has been building at her own risk (and continuing to be built) since the permit for that construction was granted on September 11, 2013. The addition extends a non-conforming side yard and exceeds the lot occupancy permitted by at least 40%.

The legal standards governing special exceptions are set forth in Section 223.2 of the Zoning Regulations. Section 223.2 provides that

> "[t]he addition…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."

We understand that the law is also clear that a) the burden is on the Applicant to show the addition, whether built or merely proposed, will meet those requirements and b) whether the addition has been built or was built by mistake is irrelevant – the addition is to be reviewed as if it had not been built.

As we will further develop at the hearing, Applicant makes no real showing to meet her burden other than assertions and therefore the Application cannot be granted legally. In addition, we will seek to show that the Applicant could not have met its burden of proof under any plain English reading of Section 223.2.

Applicant, whom we understand is an experienced developer, tries to divert attention from her burden of proof and failure to make any real case on the merits. Her explanation can be confusing but it amounts to the following: Applicant, by mistake, built a house with fewer adverse effects than the one she contends she could have built as a matter of right. All it would have taken was razing the prior structure and spending more money. Therefore, the law notwithstanding, she should get a special exception for the house she built instead.

This is a superficially fetching but legally irrelevant argument. Parts of it are also pernicious and an insult to the integrity of the zoning and permitting process.

APPLICANT'S IRRELEVANT "ESTOPPEL" ARGUMENT IS BASED ON A FALSE PREMISE

Most unsettling is Applicant's pseudo-"equitable estoppel" argument ("Estoppel Argument"). It goes like this: we built our addition before we knew we needed a special exception, therefore we should get a special exception. The problem with the Estoppel Argument is a) the premise is not true; and b) Applicant continues to assert it knowing full well that it's not true.

Applicant's Statement lists the permits received by Applicants at the time of the Application. It states:

> **C. Description of the Home Alteration**
>
> **As shown on the Architectural Plans, see Property Survey at Tabs 11and 13, the Applicant's objective was to construct an addition to the west and south sides of the dwelling. The project involved demolition and removal of the original rear exterior and interior load-bearing walls, constructing the new addition with new load-bearing walls, renovating the interior, and installing new mechanical, electrical and plumbing systems. This construction expanded the building envelope from approximately 2,451 to 3,509 square feet. During this time, the Applicant was issued the following relevant permits:**
>
> **May 24, 2013: Demolition permit issued for interior demolition of non-load bearing walls.**
> **October 25, 2013: Building permit issued for removal of load bearing walls.**
> **January 31, 2014: Building permit issued for new addition and interior renovations, including mechanical, electrical and plumbing systems.**
> **May 30, 2013: Building permit issued for replacing existing concrete slabs.**

June 6, 2013: Building permit issued for interior renovations.
[Section III. C. of Statement (pages are not numbered)].

That information is true as far as it goes but it is incomplete and therefore misleading. As we have learned from DCRA's files: by the date the Statement was filed in this proceeding, the Applicant had received, besides those listed above, the additional permits listed below.[1] That omission renders the asserted proposition - "here's the list" - false. It is also misleading; it disguises evidence revealing that the premise of the Estoppel Argument – the information that required the Applicant to seek a special exception was not available before she began constructing the addition – is entirely false.

1. On July 22, 2013, Applicant received a Fence Permit to Replace Existing Privacy Wood Fence in the Same Location.

- **Included in the permit file is a plat prepared by the DC Government's Office of Surveyor prepared June 17, 2013 and signed by the owner or her authorized agent July 11, 2013 - showing the side yard on the North side of the property at issue here to be plus or minus 4.8 feet. [MAHCA Exhibit 1]**
- **The plat directly contradicts Applicant's statements about when she had notice of the proper measurements of that side yard (See, e.g., last paragraph of Section III C of the Statement, which contains no page numbers) and Applicant's PHS (See, e.g., PHS at 5). It was provided to Applicant before the map she submitted in this proceeding to support the Estoppel Argument was prepared**

[1] Also, on November 25, 2013 Applicant received a Building Permit for Temporary Support, Shoring Detail For Existing Wall To Be Removed, Linked To Permit B1309068 [the September 11, 2013 permit]. While omitted from Applicant's list of permits, it has no bearing on the Applicant's Estoppel Argument.

(prepared September 6, 2013 and warning that is it not to be used for the purposes to which Applicant seeks to put it here) [MAHCA Exhibit 2].

2. On September 11, 2013 Applicant received a Building Permit for New Addition and Interior Renovation, New Mechanical, Electrical and Plumbing Systems

- **Included in the permit file is a Plan Correction List [MAHCA Exhibit 3] dated August 29, 2013 stating "BZA approval is required for noncompliance with [Section] 403.2, maximum lot occupancy and [Section] 412.3 minimum pervious surface in R-1-B."**
- That Plan Correction List also proves Applicant had notice she required the special exception she is seeking here even before she received the permit that allowed her to commence construction on the addition.
- **Included in the file are also three site drawings submitted by Applicant.**
    - **The first, dated 7/11/13 and labeled "Site Plan" shows the side yard at issue here to be 4.8+/- feet wide. [MAHCA Exhibit 4]**
    - **The second, part of Applicant's erosion and sediment control plan and approved by the District 8/28/13, shows the side yard at issue here to be 4.8+/- feet wide. [MAHCA Exhibit 5]**
    - **The third, signed by the Applicant's Third Party Reviewer on 9/3/13 and approved by DCRA on 9/11/13, shows the side yard at issue here to be 5.2+/- feet wide. [MAHCA Exhibit 6]**

3. Finally, the Building Permit itself, dated September 11, 2013, which Applicant needed to construct the addition, contradicts Applicant's position [Section III. C. of Statement (pages are not numbered)] **that the earlier June 6, 2013 building permit for renovation of the interior of the previously existing structure led to**

the construction of the addition.[2]

Any estoppel argument should be irrelevant in this proceeding. Even if Applicant's Estoppel Argument were relevant, these permits and related documents from DCRA files show Applicant does not have a colorable estoppel argument. Instead, she had pre-construction notice she would need a special exception. She deliberately proceeded to construction without one. And she asserted after the fact to this Board a contrary story directly contradicted by the permitting documents in DCRA's files.

APPLICANT'S IRRELVANT "MATTER OF RIGHT" ARGUMENT FALLS WITH HER "ESTOPPEL" ARGUMENT

Applicant's PHS contends that the Board should grant a special exception because, had she known she couldn't build what she built as a matter of right, she would have built something even more offensive to her neighbors' enjoyment of their properties as a matter of right. The problem with that argument is threefold: First, she knew before construction she need a special exception. Second, she did not build something more grand and adverse to her neighbors. Third, "coulda, woulda, shoulda" arguments, even if plausible, are not a substitute for making the showing required by the law; they are irrelevant under Section 223.2.

It is hard to tell, but perhaps related to the irrelevant and implausible "matter of right" argument is the argument made in the PHS that Applicant somehow "reduced" the volume she could

[2] Also attached to that permit is a construction cost estimate for the addition of $50,000, which for a significant developer such as the Applicant, suggests either the permit was based on a misrepresentation, or that Applicant's claim here that modification of the addition to meet zoning requirements would be a substantial burden is itself misleading.

add to the prior structure as a matter of right. That argument fails for four reasons: a) it is also irrelevant (except that the addition would likely have had more adverse effect if it had been volumetrically larger), b) nothing was reduced on the upper floors of the prior building – Applicant only added volume, c) volume above ground does not affect whether lot occupancy is excessive; and d) Applicant had a choice and did not exercise the right she says she had.

We hope this will make it possible to avoid the extended discussion of irrelevant matter intended by Applicant's statement and allow the Board to focus on whether, after evidence is presented by Applicant, us, our ANC, and any other parties, Applicant has met her burden under Section 223.2.

APPLICANT'S IRRELEVANT AND FLAWED COMMUNICATIONS ARGUMENTS

Whether the Applicant and affected parties have been able to compromise their differences is irrelevant to the issue to be decided here. Nonetheless, the Board should be aware, as the attached email correspondence shows, since the filing of the application, there has been, at best, a "dance of the lawyers" over the issue of whether and when the applicant and the affected parties might reach a compromise. [MAHCA Exhibit 7]

The Board should also be aware that a) the Applicant and her agents contended throughout the construction process that she was acting as a matter of right and that she had no obligation to make any changes in the project to meet her neighbor's concerns and b) neighbor's attempts to work with applicant on certain matters were rebuffed or ignored. Because this issue is irrelevant, we are not planning to present evidence on this issue but would, at the Board's request, submit affidavits to this effect if the Board determined this sort of testimony to be relevant.

Very truly yours,

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