

[PARTY OPPONENT'S DRAFT]

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Application No. 18886 (the “Application”) of Niloufar Hoorazor under 11 DCMR § 3104.1 for special exception under §223 for an already constructed non-conforming addition (the “Addition and Renovation”), which violates the side yard requirement under § 405.8, and the lot occupancy requirements of § 403. That Addition and Renovation were made to a single-family home in an R-1-B District at 2709 36th Street NW, Lot 811 in Square 1938 (the "Property").

HEARING DATE: March 31, 2015

DECISION DATE: May 5, 2015

Decision and Order

The Application was submitted September 23, 2014 by Niloufar Hoorazor (the “Applicant”), the owner of the Property. Following a postponement requested by the Applicant, a public hearing was held by the Board of Zoning Adjustment (the "Board") on March 31, 2015. At that hearing, the Board heard testimony and received exhibits, but did not vote. The Board asked the parties to submit further evidence including shadow studies concerning the impact of the Addition and Renovation to the Property.

PRELIMINARY MATTERS

Notice of Application and Notice of Public Hearing. By memoranda dated September 29, 2014, the Office of Zoning sent notice of the application to the Office of Planning (“OP”); the District Department of Transportation; the Councilmember for Ward 3; Advisory Neighborhood Commission (“ANC”) 3C, the ANC for the area within which the Property is located; and the single-member district ANC 3C-08. Under 11 DCMR § 3112.14, on October 3, 2014 the Office of Zoning mailed notice of the hearing to the Applicant, the owners of property within 200 feet of the Property, and ANC 3C. Notice was published in the *D.C. Register* on

(____ DCR ____).

Party Status. The Applicant and ANC 3C were automatically parties in this proceeding. The Massachusetts Avenue Heights Citizens Association (“MAHCA”) requested status as a party in opposition. At least one immediate neighbor also submitted a statement in opposition, and other neighbors were present at the Hearing to voice opposition to the Application. The Board granted

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party status to consolidated parties in opposition including those neighbors immediately surrounding the Property.

Government Reports.

Office of Planning (OP) Report. By report dated March 20, 2015, and through testimony at the public hearing, OP recommended approval of the requested relief. The OP report fails to address critical issues and makes erroneous assertions of fact.

The OP Report sets out a finding regarding light and air on the properties South, East, and West of the Property, but fails to address in any way the impact on the McKee Property to the North.

Regarding privacy, the OP report does not address the Applicant's large windows looking over McKee's patio and first floor. OP's analysis of streetscape ignores the view from the rear, which is a relevant factor under the governing standards.

OP's characterization of the structure erected in the southern side yard of the Property is also incorrect as to the facts and the governing law (which is addressed below). OP states

The Applicant has also filled in a portion of the southern side yard to meet the grade at the basement level. The filled area is below grade and does not result in any occupied area. The Applicant states that the filled area, which also accommodates a driveway, would be topped with pavers which would facilitate infiltration of water into the soil and would meet the 50% pervious surface requirement.

In fact, the Applicant has filled and leveled in the entire side yard to form a driveway/patio that meets a side door entering into the first floor. The side door itself, and thus the patio is significantly above the natural grade of the Property adjacent to the house on the South side, exceeding it by over 8 feet at its highest point. The grade adjacent to the house, which dropped from the street to the current at the basement level, was, prior to being filled in by the Applicant's structure, the natural grade. Accordingly, this structure itself requires a special exception and it also increases the degree to which the lot occupancy is exceeded by the Applicant, beyond the 50% permitted by a special exception under § 223.3, and beyond 40% even when the northern side yard is not taken into account.

ANC Report. By report dated December 16, 2014, at a regular, duly noticed monthly public meeting held on December 15, 2014, with a quorum present, the ANC voted 5-0-1 to recommend denial of the Application. Included in the ANC's reasons for opposing the Application is that "the neighbors have presented photographs which represent the relationship between the Addition and Renovation and neighboring properties and the public view from the alley, and these photographs show that the [Addition and Renovation] does have a substantial adverse affect on the light and air available to neighboring properties and on the privacy of those neighboring properties, and also show that the [Addition and Renovation] substantially visually intrudes upon

the character, scale and pattern of houses along the street frontage, as viewed from the public alley."

Persons in opposition. The Board heard testimony or statements in opposition to the Application from ANC 3C-08 Commissioner Catherine May, Paul Cunningham, a neighbor to the immediate south of the Property, Malia N. Brink, on behalf of MAHCA, and Tony Glowacki, a neighbor to the rear of the Property. The Board also received letters in opposition from over 20 community members, including the neighbor to the immediate north of the Property, Gail McKee, which it considered in its deliberation.

This Board has also taken notice of the voluntary comments submitted by a real estate developer, John Wood Bolton, Jr., which contend that the Addition and Renovation meets none of the criteria for a special exception.

FINDINGS OF FACT

The Subject Property and Surrounding Area

1. The Property is at 2709 36th Street NW, Lot 811 in Square 1938.
2. The Property is rectangular and contains approximately 6,450 square feet of land area.
3. The Property is in the R-1-B District.
4. The Property is improved with a renovated single family home.
5. The Property fronts on 36th Street, NW, and borders a fifteen-foot wide alley at the rear of the Property.
6. The Applicant knew, or should have known, that the northern side yard was non-conforming, because the official plat, which would have been provided at time of sale, was required by DCRA to be submitted in the permitting process, and which is in DCRA files relating to Applicant's permitting process, shows a northern side yard measurement of 4 feet 7 inches.
7. Because of the non-conforming northern side yard, the existing dwelling is a "nonconforming property" as defined in DCMR § 199.1 and therefore requires a special exception for the Addition and Renovation sought by the Applicant. In addition, because the northern side yard is less than five (5) feet in width, the northern side yard is counted in building area for purposes of calculating lot occupancy.
8. The Applicant initially obtained a building permit for her Addition and Renovation without seeking or obtaining Board approval of a special exception on the basis of diagrams and a survey (which states it should not be used to show accuracy of distances) that Applicant submitted and which shows a 5 foot northern side yard.

9. The structure on the southern side yard of the Property fills 100% of the side yard and is at its greatest depth more than 8 feet above the natural grade adjacent to the house on the that side of the Property. From the Applicant's drawings and opponent's photos, the structure may reach a height over 9 feet above the natural grade adjacent to the rear of the house.
10. Despite receiving notice in the permitting process from DCRA, as early as August 29, 2013, that BZA approval would be required for the proposed work due to noncompliance with lot occupancy requirements, Applicant knowingly and willfully proceeded at her own risk for at least one year to construct the Addition and Renovation before seeking a special exception.
11. Despite the warning on the Application form (Form 120) applicable to this proceeding, Applicant misrepresented the facts known to the Applicant regarding when the Applicant learned that she would require a special exception for the construction of the Addition.
12. The Application misrepresented the actual lot occupancy of the Property by excluding the space added to lot occupancy by the unpermitted structure constructed in the southern side yard that occupies 100% of that side yard. It appears that, even with the special exception sought here, the Property may continue to exceed the lot occupancy limits.
13. The structure in the southern side yard of the Property constitutes the introduction of non-conforming structure prohibited by section 2001.3, which can only be remedied, if at all, by a Special Exception. Applicant, however, notwithstanding the comments in the OP report, has not sought a special exception from section 2001.3 for any purpose, nor has the Applicant otherwise requested a Special Exception for that structure.

The Addition and Renovation Unduly Affects the Light and Air Available to Neighbors

14. The adverse effects on light and air are less substantial than the adverse effects on privacy. However, as shown by the opponents' photos and shadow study, the adverse effects on the neighbor to the South – in terms of blocked natural light - are substantial, and the effects on the neighbor to the North are very substantial.

The Addition and Renovation Unduly Compromises the Privacy, Use, and Enjoyment of Neighboring Properties

15. The Addition and Renovation included the following changes impacting Privacy, Use and Enjoyment of the Neighbors:
 - a) The Addition and Renovation expanded the size of existing windows facing north into the McKee property (the direction of the nonconforming narrow side yard) by 12-24 inches and added another oversized window (compared to other windows in the neighborhood) facing the McKee property.

- b) The Addition and Renovation also added an elevated patio structure encompassing the entirety of the southern side yard, the elevation of which is roughly parallel to and allows visibility over the southern neighbors' wall, which had previously been several feet above grade and blocked all visibility from the natural grade of the Property.
- c) The Addition and Renovation included the installation of at least six very wide and nearly floor-to-ceiling windows facing east, as well as a roof deck, which overlooks the yards and homes to the rear, and similar windows facing North and South overlooking the homes and patios of the two immediately adjacent neighbors.

16. Prior to the Addition and Renovation, there was no significant intrusion from the Property on the Privacy, Use and Enjoyment of the Neighboring properties. Instead,

- a) The neighbor to the North had enjoyment of a private rear yard and first floor den, now subject to constant view from the Addition and Renovation, which also blocks the light to the neighbor's rear yard for a greater period of time and to a greater degree than had the prior structure on the Property.
- b) The neighbors to the East were exposed to a well landscaped, deeper rear yard on the Property and much smaller windows, similarly scaled to all others in the neighborhood, overlooking their homes. Now the neighbors to the East are in constant view of floor to ceiling windows that are several feet closer than the much smaller windows of the prior structure and offer no relief from intrusive observation from the house and the roof top deck added by Applicant three stories above the natural rear yard grade (which is above the grade of the housing to the East). This roof top deck also looks down on all other neighboring properties.
- c) The neighbors to the South, which had designed a now ten-year old addition and landscape renovation to shield their property from the prior structure on the Property and also to shield from observation the prior structure, which previously had a very deep and wide southern side yard, are now deprived of that privacy by virtue of Applicant's conversion of the entire southern side yard to an elevated driveway and patio that reaches over nine feet above the natural grade and runs from the street to the rear of the Applicant's house. The result is the frequent presence of persons and vehicles on the elevated structure Applicant has built into the side yard, all of which can be seen and heard from the inside of the home of the neighbors to the South, the windows of which were not previously visible from the natural grade of the prior side yard. The neighbors to the South also no longer have any privacy in their rear yard which had previously been entirely shielded from view from the previous structure on the Property but is now loomed over by a deck three stories above the natural grade and nearly floor-to-ceiling windows overlooking the neighboring properties from the Addition and Renovation below the deck. The Addition and Renovation also blocks the sky view previously open to the North from the South neighbors' rear patio.

17. Applicant has not mitigated these intrusions into their neighbors' enjoyment in any meaningful manner. Applicant did offer after construction to plant vegetation that would increase privacy but decrease light and air for the McKee property. Applicant rejected options such as lessening the size of the intrusive windows, using opaque or frosted glass, or forgoing or substantially limiting use of the roof top deck.

The Addition And Renovation, Together With The Original Building, As Viewed From The Street, Alley, And Other Public Way, Substantially Visually Intrudes Upon The Character, Scale And Pattern Of Houses Along The Subject Street Frontage

18. Reasonable people might view the front of Applicant's house - aside from the elevated driveway/patio- as being consistent with the character, scale and pattern of houses of the neighborhood. There can be no question however, that the front-access elevated driveway/patio, the size and style of windows facing North, East and South, and the scale and style of the posterior façade of the house are starkly out of place when viewed from the alley, street or from any perspective other than a straight-on, 90-degree angle to the house, from the West or Northwest.

CONCLUSIONS OF LAW

The Governing law.

Section 3104.1 provides:

the Board is authorized under § 8 of the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (formerly codified at D.C. Code § 5-424(g)(2) (1994 Repl.)), 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. The special conditions governing special exceptions for the construction of the Applicants' Addition to a one-family dwelling in an R District are governed by § 223.

Section 223 provides:

223 ZONING RELIEF FOR ADDITIONS TO ONE-FAMILY DWELLINGS OR FLATS (R-1) AND FOR NEW OR ENLARGED ACCESSORY STRUCTURES

223.1 An addition to a one-family dwelling or flat, in those Residence Districts where a flat is permitted, or a new or enlarged accessory structure on the same lot as a one-family

dwelling or flat, shall be permitted even though the addition or accessory structure does not comply with all of the requirements of §§ 401, 403, 404, 405, 406, and 2001.3 shall be permitted as a special exception if approved by the Board of Zoning Adjustment under § 3104, subject to the provisions of this section.

223.2 The addition or accessory structure shall not have a substantially adverse effect 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 Applicant 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.

223.3 The lot occupancy of all new and existing structures on the lot shall not exceed fifty percent (50%) in the R-1 and R-2 Districts or seventy percent (70%) in the R-3, R-4, and R-5 Districts.

223.4 The Board may require special treatment in the way of design, screening, exterior or interior lighting, building materials, or other features for the protection of adjacent or nearby properties.

223.5 This section may not be used to permit the introduction or expansion of a nonconforming use [Emphasis added].

Section 2001 provides in relevant part:

2001.1 The restrictions set forth in this section shall apply to a nonconforming structure devoted to a conforming use.

2001.2 Except as provided in §§ 2001.11 and 2001.12, ordinary repairs, alterations, and modernizations to the structure, including structural alterations, shall be permitted.

2001.3 Enlargements or additions may be made to the structure; provided

- (a) The structure shall conform to percentage of lot occupancy requirements, except as provided in § 2001.13 [which is not relevant here]; and
- (b) The addition or enlargement itself shall:
 - (1) Conform to use and structure requirements; and
 - (2) **Neither increase or extend any existing, nonconforming aspect of the structure; nor create any new nonconformity of structure and addition combined** [Emphasis added].

Finally, this is the law governing structures in a side yard.

The definitions of “Yard” and “Side Yard” are found at section 199.1:

Yard - an exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title. No building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title. [Emphases added] *[We note this 50% rule is interpreted to be an exception to the exception below in section 2503.2 – meaning that Applicant cannot put any structure - even a ‘less than 4 foot’ structure - in a required yard if it takes up more than 50% of that required yard. While neither OP nor the Applicant has provided the full dimensions of the structure (which the Applicant was required to provide to DCRA in the permitting process but did not) to this Board, we can only note from the pictures submitted by the parties that the structure appears to occupy the entire side yard between Applicant’s building and the adjacent property].*

Yard, side - a yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure.

Section 2503 provides additional guidance regarding structures in required open spaces:

2503.1 Except for the structures and exceptions specified in this section, every part of a yard required under this title shall be open and unobstructed to the sky from the ground up.

2503.2 A structure, not including a building no part of which is more than four feet (4 ft.) above the grade *at any point*, may occupy any yard required under the provisions of this title. Any railing required by the D.C. Construction Code, Title 12 DCMR, shall not be calculated in the measurement of this height.

2503.3 A fence or retaining wall constructed in accordance with the D.C. Construction Code may occupy any yard required under the provisions of *this title*.

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2503.4 Stairs leading to the ground from a door located on the story in which the principal entrance of a building is located may occupy any yard required under provisions of this title. The stairs shall include any railing required by the provisions of the D.C. Construction Code.

The Burden is on the Applicant to prove that the special exception sought complies with the general requirements of section 3104 and the particular requirements of section 223 and 2001.

It does not bear on the BZA review that Applicant proceeded at her own risk to construct the Addition and Renovation before seeking a special exception, especially after Applicant was put on notice that the Addition and Renovation would require a special exception before it could be permitted. The review is to be conducted as if the Addition and Renovation had not been constructed. The question before the Board is whether Applicant would have qualified for a special exception had it been requested before construction of the Addition and Renovation.

The question before the Board embraces the overall incremental impact of the structure occupying the lot after the Addition and Renovation of the prior residence. The Board may, therefore, take into account the adverse impact on neighbors and the neighborhood of the structure, whether permitted or not, that occupies 100% of the southern side yard of the Property, a substantial portion of which, as demonstrated photographically, is greater than 4 feet above the natural grade.

The Board takes notice of the fact that the structure in the southern side yard of the Property occupies enough space to render the Special Exception sought in this proceeding by the Applicant a nullity because, even if the northern side yard is not taken into account in measuring lot occupancy, the structures on the Property would still exceed the allowed 40% lot occupancy. Applicant has not sought a special exception from section 2001.3 to remedy this problem or otherwise requested a special exception for that structure.

The Office of Planning (OP) recommended approval of the Application. The OP report is generally entitled to great weight. However, as noted above in our discussion of Preliminary Matters, the OP report was deficient in several respects and, and to that extent, is not entitled to any weight. In addition, the OP report is merely conclusory on those matters which it did address. OP presented no testimony explaining **why** the Property followed the character of the neighborhood, **why** it concluded the Addition and Renovation did not intrude on the privacy, light and air of its neighbors, and the OP witness could not say at hearing **whether** any other properties in the neighborhood included windows of such a size in such proximity to immediate neighbors. OP's Report also did not indicate that OP reviewed the property from any perspective **but that of the Applicant**, or even sought to view the Addition and Renovation from the neighboring properties. OP also did not consider the impact on the neighbors and neighborhood of the structure in the southern side yard of the Property that occupies 100% of that side yard. In short, OP presented an unsubstantiated and conclusory view with no support relevant to the issues before us.

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ANC 3C recommended denial of the Application. The ANC report is entitled to great weight. That recommendation was based on photographs noting the relationship of the Addition and Renovation to the neighboring properties, the testimony of the Applicant and opposing neighbors, including the recommendation of the SMD Commissioner who resides in the neighborhood, and the recommendation of the Massachusetts Heights Citizens Association, the decades-old association of residents in the neighborhood where the Property is located.

The Applicants only showing related to the issues before us consisted of a power point presentation which does not refute the contentions of the neighbors and the ANC that there is an impact on the neighborhood and the neighboring properties but merely asserts that those impacts are not in the Applicant's view sufficient to warrant denial of the Application. For example, Applicant submitted no demonstration that the intrusions on privacy, light and air demonstrated by the opponents were not real, that the photographic evidence submitted by opponents did not accurately portray the impacts cited by the opponents, or that, by common-sense standards, the impacts presented by opponents were not substantial. The same was true regarding the Applicant's response to the opponents' showing with respect to the visual impact of the Addition and Renovation, especially from the rear of the property. And the Applicant made no showing that the special exception would "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". In short the Applicant has not met its burden of proof.

Prior to the Addition and Renovation, none of the neighbors to the Property had been subject to significant intrusion on their light, air and privacy from the Property, and the residence on the Property was wholly consistent with the character of the neighborhood. Applicant made no showing that, while designing and constructing the Addition and Renovation, she had considered the radical imposition of the Addition and Renovation on the character of the neighborhood, especially when viewed from the rear, or of the intrusion of the Addition and Renovation into the privacy of the immediate neighbors to the North, South, or East of the Property, or that she had given any thought to mitigating those intrusions, or made any good faith effort to consult with neighbors to mitigate those intrusions prior to substantially completing the Addition and Renovation. She took no account of the neighbor's right under the governing law to be free of substantial adverse impacts on the use of their property.

The Applicant's suggestion that what she might have built as a matter of right governs what she may build with a Special Exception has no bearing here. Applicant did not chose to build as a matter of right and therefore must meet the governing standards for Special Exceptions even if she would not have been required to do so for a matter of right structure. Moreover, Applicant's side yard violations and lot occupancy violation would not have been permitted for a matter of right structure.

The Applicant's suggestion that her privacy had been intruded upon by the fact her Addition and Renovation could be viewed from the neighboring houses is irrelevant because the issue before this Board is the effect of the Addition and Renovation on the neighborhood and not the conditions for which the Applicant volunteered by purchasing the Property.

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The Applicant's *ad hominem* remarks regarding neighboring property owners are unproven and irrelevant.

The Board finds, after consideration of the neighbors' submissions and testimony and the reports by the Office of Planning and ANC 3C, that the Applicant has not met its burden of proof. The privacy, use and enjoyment of the adjacent properties have been substantially adversely affected by the Renovation and Addition. The change in character of existing windows and the installation of two other oversized windows on the north side of the house enable a person to look directly into the first floor den of the northern neighbor's property, as well as her backyard. The installation of several oversized windows to the east of the property, as well as a roof deck, permits persons in Applicant's house to view directly into the backyards and back windows of several homes to the rear of the property. Moreover, the size of the windows installed is inconsistent with the character of the surrounding neighborhood. The change in character of existing windows and the installation of oversized windows on the South side of the house enables a person to look directly into the first floor first floor of the South neighbor's property, as well as their backyard. The patio structure in the southern side yard sits well above the allowable four feet above grade for otherwise legal side yard structures and permits a person to look over an existing wall and into the South neighbors' property and home. Further, the Addition and Renovation substantially adversely affects the light and air available to the property to the North, substantially restricting the view from the back patio and yard and casting a significant shadow over the same.

The Board concludes that the Applicant has not met her burden of proof entitling her to a Special Exception. It is **ORDERED** that a) the Application is **DENIED** and b) upon the request of the Applicant and response by the opponents, the Board will entertain the question of whether to receive further pleadings and to schedule further hearings to consider whether mitigating conditions may be adopted which are sufficient to permit granting a Special Exception for the Addition and Renovation.

VOTE: 4-0 (Marnique Heath, Jeffrey Hinkle, Anthony J. Hood, and Lloyd Jordan) to DENY.

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

The majority of the Board members approved the issuance of this order.

ATTESTED BY: _____

FINAL DATE OF ORDER: _____