

**BZA Application , Eppolito-Slakey Addition
Case # 18938**

Motion for Reconsideration by Parties in Opposition Robert A. Shelton and Mark Flynn

We begin by expressing our appreciation for efforts to reconcile the competing interests of the parties to this proceeding. In particular, we are grateful for the elimination of the two proposed windows on the party wall, which would have been extremely intrusive, as well as the Applicants' suggestion to substitute a guardrail for the masonry on the second floor.

One additional thought to put the issue of light and air in context. Rear additions may not be unusual on Capitol Hill as Mr. Cochran testified. As recognized by the Board the facts of this instance, however, are atypical in that the light and air from the rear of our home are already significantly compromised by the 12 feet, 2 stories high building already existing along the rear party wall. The house is only 16.5' wide in an area of extremely dense construction. Our house is 1,500 square feet. The neighbors' is approximately 3,000.

APPLICATION

This proceeding commenced by Applicants' filing for a Special Exception noted as filed on December 17. We received notice a couple of days thereafter. Applicants knew we had long established plans to leave town on December 25 and agreed to stay the proceedings until our return in March. We note in passing that the consent letter signed by Mrs. Sloane references plans and is dated October 9.

There are 4 inaccuracies in the Applicants' filing.

1. The existing extension of two-story masonry along the party wall is 11 feet 10 inches and not 7 feet. {Corrected by filing on April 14}
2. The total footprint will result in coverage of 66.2 % coverage rather than 63.6% (see attached Exhibit A).
3. The current porch does not follow the party wall as represented in the filing and drawings. It is indeed 9 1/4 inches inside the property line (see attached a photo previously filed, Exhibit B).
4. The Sun Study is not for 10 feet. It is 4.

The following discussion demonstrates how these errors led to an incorrect decision by the Board of Zoning Adjustment.

I. THE APPLICANT FAILS TO MEET ITS BURDEN OF PROOF

A. THE LIGHT AND AIR AND ENJOYMENT OF OUR PROPERTY ARE ALREADY IMPAIRED BY THE ADJACENT HOUSE. THIS MUST BE CONSIDERED AS A MATTER OF LAW AND POLICY.

The property at 325 already extends 12 feet beyond our house with a two-story wall along the party line. Hence light and air are already significantly impaired. This fact is exacerbated by the dense construction in the environment together with the fact that our house is only 16.5 wide. It is clear that an additional restriction will be more intrusive where there is already impairment.

Applicants accord this significant issue scant importance. For starters: the application shows the extension to be 7 feet rather than 12. While this error was noted at the March 29 meeting with Applicants' architect, revisions were not filed until April 14. This was one week after the meeting of the Planning and Zoning Committee and simultaneously with the report of the Department of Planning. Hence this significant factor was not properly considered or weighed.

B. THE SUN STUDY IS INAPPLICABLE AS IT IS FOR THE LAST 4 FEET AND THE PROPOSED ADDITION IS FOR 10.

On April 14 one week prior to the BZA hearing and subsequent to the meeting of the Planning and Zoning Committee on April 17 Applicants filed a Supplemental filing to correct the error in the depth of the existing brick wall adjacent to the two properties. Applicants' architect also filed a Sun Study.

The Sun Study should be disregarded. There is no foundation as to who did it, and a clear statement of the premises. Only a close examination, read in conjunction with the Applicants' text, reveals that only the last 4 feet are included in the study.

As a predicate the filing (#41, "Supplemental Filing") stated:

"2. It should be noted that per DCMR 11, Section 2001.2, the existing porch may be enclosed as a matter of right. The two level porch existed prior to 1958 and thus the footprint is grandfathered in. The relief we are requesting is merely for an additional 3'10".

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.

3. A sun study was created in order to assess the impact on the light and air of 323 5th Street. The existing conditions are shown as the potential matter of right build out. The sun study indicates that there will be very little change in the shadows cast on 323 5th Street SE."

An examination of the sun study (Exhibit #42) clearly shows that the existing conditions are as given as noted by Applicants above. The study is “merely for an additional 3’10””.

This is an application for a single addition pursuant to 11 DCMR §§ 223 and 3104.1. The sun study must be for the entire 10-foot addition.

C. APPLICANTS ERRONEOUSLY ASSUME THEIR APPLICATION IS FOR 4 FEET.

Applicants conclude and assert that the proposed structure “may minimally impact the light and air available to a portion of the proposed addition.” However, they similarly consider only the extra 4 feet at the end of the proposed structure. Paragraph II (a) states: “However, the increase in length of the proposed addition beyond the existing rear porch is minimal and therefore the impact will be minor.”

This application is for a single addition, not for two. Section 2002.2 is irrelevant for any number of reasons including the facts that the porch is not on the footprint of the proposed addition and it is to be demolished. This was an application for a single addition pursuant §§ 223.

D. THE BOARD, THE ANC AND THE PLANNING DEPARTMENT RELIED ON THE SUN STUDY AND DID NOT UNDERSTAND THAT THE STUDY WAS FOR 4 FEET WHEN THE APPLICATION IS FOR 10 FEET.

The factual predicate for the Board’s decision is stated in paragraph 20.

“The Applicant’s sun study demonstrated that that there would only be slight increases to the shadow cast on the rear of the property to the north that would be of limited duration on both a daily and annual basis. (Exhibit 45.)”

However, Mr. Cochran testified (p. 50) the entire 10 feet was included in the sun study:

“MR. COCHRAN: The sun study measures an entire proposed addition. It doesn't measure just four feet, so I was looking at -- I assumed the results of the sun study of the entire proposed addition. I did not see a gap in the shadows that indicated that they had -- that they had simply taken the existing house, then done a gap, then done another four feet. No. The sun study showed the entirety of the proposed wall.”

II. PARTIES IN OPPOSITION WERE NOT ACCORDED DUE PROCESS OF LAW.

A. THE VINYL WALL

At the close of the Board’s hearing a motion to approve the Application was passed with two conditions:

- the deletion of the windows
- an addition of a trellis

The Application both in the exhibits and texts is based on a masonry wall. Applicants represent “that the proposed addition will be constructed with high quality, historically appropriate materials”.

Subsequent to the Hearing and Decision Applicants filed a drawing and filing indicating the substitution of a vinyl wall. We did not see them, perhaps because it was on a new page in the electronic filing system. In any event we did not and do not approve of it. Certainly the condition of a trellis does not include changing the composition of the wall from masonry to vinyl.

Vinyl on a house of this vintage in this neighborhood is totally inappropriate irrespective of whether it is covered in green. Actually, although the Board does not note this in its decision, it appears that Applicants have changed the entire addition—back and sides— to vinyl in the drawing.

B. THERE HAS BEEN INADEQUATE TIME TO PREPARE AND SECURE PROFESSIONAL ASSISTANCE AND THE PARTIES IN OPPOSITION HAVE BEEN THEREBY SIGNIFICANTLY PREJUDICED.

The Application was filed as noted on our copy, December 17, shortly before our departure. We had been requesting copies of the Application drawings for some time. However, the exhibit by Mrs. Sloane (# 33) indicates that drawings had been available since October 9 and Applicants knew of our scheduled departure. Applicants agreed to stay the proceeding until our return.

Immediately upon our return on March 19 we began to seek professional help. We attempted to retain local architects for assistance and talked to two architects with Capitol Hill experience. Neither wished to be involved in critiquing a colleague. We obtained counsel shortly before the meeting of the Planning and Zoning Committee.

Schedule

- We returned to Washington March 19, 2015, and requested a meeting with the Applicants’ architect to review the drawings and the application. This occurred on March 29 where it was confirmed that a key measurement in the Application was incorrect.
- After our meeting on March 29, we requested Applicant to defer the meeting of the Planning and Zoning Committee of the ANC but Applicants set it for April 7. This despite the fact that the correction of a material measurement had not yet been filed.

- On April 7 we requested a deferral at the meeting of the Planning and Zoning Committee for the purpose of obtaining professional assistance. The request was made orally and in a written form (Exhibit C) and distributed to all members of the Committee. The correction has not yet been filed. A deferral was not permitted.
- The Sun Study and Supplementary material were filed on April 14. This material corrected the measurement error.
- The Recommendation of the Department of Planning was filed on April 14, obviously not based upon the corrected measurement.
- The meeting of the ANC was held on April 20.
- The meeting of the BZA was held April 21. The BZA's own rules require the ANC report to be in hand a week prior thereto. Counsel had been retained for only a short while. At the BZA meeting our counsel requested both before and after additional time to prepare.

In sum, on this matter, complex in both law and facts- all requisite hearings were completed one month after our return to Washington. To call this process a rush to judgment would be an understatement. We did not have adequate professional assistance which in this highly specialized area is not easy to come by.

III. THE BOARD IMPROPERLY CONSIDERED THE RECOMMENDATION OF THE ADVISORY NEIGHBORHOOD COMMISSION

A. THIS WAS NOT A PLANNING MATTER. MOREOVER, THERE WAS NOT A WRITTEN REPORT OF THE ISSUES AND CONCERNS AS REQUIRED BY STATUTE AND REGULATION.

The D.C. Code § 1-309.10 provides for the duties and responsibilities of Advisory Neighborhood Commissions. It specifies:

(a) "Each Advisory Neighborhood Commission may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to all proposed matters of District government policy including, but not limited to, decisions regarding planning, streets, recreation, social services programs, education, health, safety, budget and sanitation which affect that Commission area."

Rule 11-3115 DCMR provides:

"The written report of the ANC prepared in response to a notice of application provided pursuant to §3115.5 shall be submitted to the Board at least (7) days in advance of the hearing and shall contain the following information:

(b) The issues and concerns of the ANC about the appeal or application as related to the standards of the Zoning Regulations against which the appeal or the application must be judged.

DC Code § 1-309.10 (d) (3) (A): “The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns.”

“Requirement that Board of Zoning Adjustment (BZA) give “great weight” ... implies explicit reference to each ANC issue and concern as such, as well as specific findings and conclusions with respect to each.” D.C. Code 1981, § 1-261 (d), D. C. Mun. Regs. Title 11, §3307.2. *Neighbors on Upton Street v. District of Columbia Board of Zoning Adjustment*, 697 A.2d 4, 1997 D. C. App. LEXIS 130 (D. C. 1997).

The ANC held its meeting on the evening of April 20, 2015. The report was hand delivered by the Chairman at the BZA hearing on April 21, 2015, although rules require delivery a week prior thereto. The vote was not free from dissension. There were 6 affirmative with 4 abstentions in the vote.

The Board notes in its decision and Order “In this instance, the ANC 6 B’s report stated its support for the Application without identifying any issues or concerns.”

Moreover, ANC understood the sun study as described by Applicants to be for 10 feet rather than the last 4 feet.

B. This is an adjudicatory proceeding. It is clear from the statute that the ANC is to be consulted in terms of “planning issues.” This is an “adjudicatory” proceeding. Indeed, the statute would not even require action by the ANC. Applicants having participated in the ANC process can represent it is clearly a political process, appropriate for planning issues, but totally inappropriate for an adjudicatory matter.

IV. IT IS ERROR TO GIVE “GREAT WEIGHT” TO THE RECOMMENDATION OF THE PLANNING DEPARTMENT

Planning Department’s recommendation was based on an erroneous conclusion that the Sun Study was for the entire 10 feet of the proposed addition. Moreover, the recommendations of the Planning Department are based on a significant error in the plans, as corrections were not made until the date its recommendations were filed. It is essential as a matter of law and planning that the existing effect of the wall on our property be considered. The Department of Planning filed its report on April 14. The revisions to the plans showing the 12 feet existing impairment were filed the same day.

Recommendation of the Planning Department is a statutory requirement for planning issues and concerns. It is far less clear that this is intended for an adjudicatory hearing.

V. CONCLUSIONS AND RELIEF REQUESTED

A. Applicants have failed to meet the burden of proof required under § 223.1 of the zoning regulations all as described above.

B. The constitutional rights of the Parties in Opposition to Due Process have been infringed. It is clear that this has resulted in substantial prejudice.

C. At the hearing a motion was made and seconded to approve the Application with the deletion of the windows and construction of a trellis. There was no request or action to substitute vinyl for masonry. In their application Applicants represented that “the proposed addition will be constructed with high quality, historically appropriate materials.” The requirement of a masonry construction should be reinstated.

D. We much appreciate the suggestion of a trellis with a planting. We would prefer, however, to attend to this ourselves if it seems appropriate over the course of time.

E. There are limited options as to what can be done. One possibility is to indent the addition, even a little, as is the situation with the porch (see Exhibit B). We are advised however that this would constitute a “court” and not possible under the zoning regulations.

F. We have lived in this house for 40 years. We have been friendly and continue to be friendly with all of our neighbors. Perhaps two years ago, Applicants asked for our approval to drill out the concrete in the basement under the party wall and lower the floor in order to secure an additional 1,000 feet of living space. We readily gave it- although concerned about the effect on the foundation of soft brick walls over 100 years old.

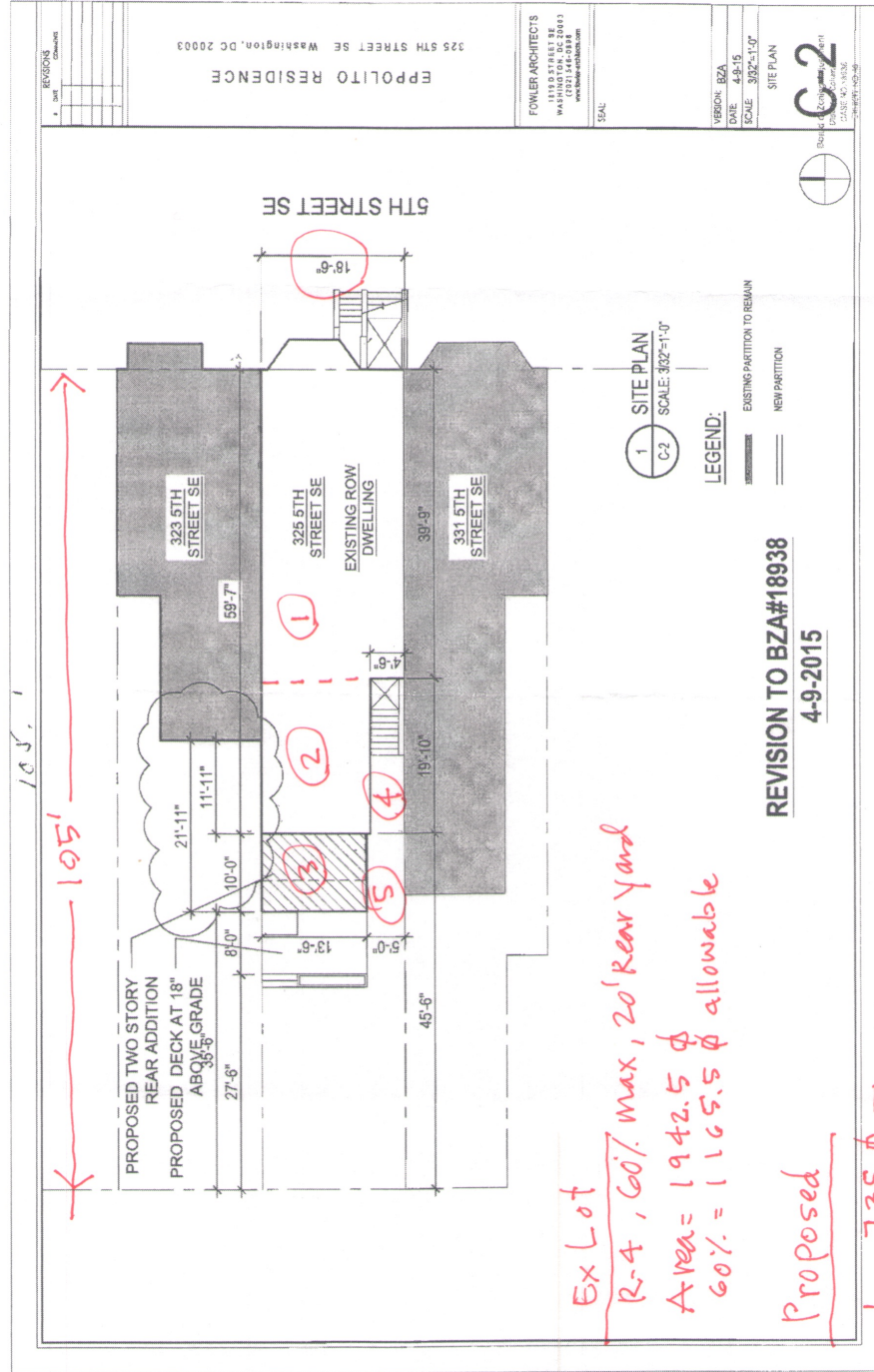
We will attempt to come to an accommodation with the Applicants.

Thank you very much for your consideration and efforts.

Robert A. Shelton and Mark Flynn

Exhibit A.

325 5th St SE



Ex Lot
R-4, 60% max, 20' Rear yard
Area = 1942.5 sq
60% = 1165.5 sq allowable

Proposed

1. 735 sq
 2. 277 sq
 3. 135 sq
 4. 89 sq
 5. 50 sq
- House new + exist'g
- Court Nm. conform. => 1286 sq total (66.2% coverage)

BZA claims 63.6%

Exhibit B.



Exhibit C

Before the ANC Planning and Zoning Committee

Request of Shelton and Flynn in Application of 325 5th St. for postponement of hearing

1. This project has been in a discussion phase since apparently some time in late October (See BZA consent of Glenda Sloane dated October 28, 2014 referencing drawings which she reviewed).
2. Although Flynn was asked for a “consent” on three separate occasions prior to December 25, Flynn and Shelton did not review or receive any plans on those occasions.
3. Although Shelton and Flynn first requested plans about Thanksgiving we were informed that the architect have been delayed in producing them. Shelton and Flynn had informed the Applicants they would be away for some time departing Christmas day
4. The only written material Shelton and Flynn received prior to departing Washington, D.C. was the Notice dated December 17th from the Board of Zoning Adjustment and received by mail.
5. Upon receipt of the Notice, we talked with Applicant Eppolito who agreed that all hearings would be deferred until after our return in mid March and we would have ample time for review.
6. Shelton and Flynn learned how to access the BZA files in early January. Based upon a review of the filed documents, they mailed a petition to Registered Mail to be included as parties to the case.

7. Shelton and Flynn returned to Washington on March 18th. In quick succession there was a meeting with applicant Eppolito and Ms Fowler on Saturday March 28th to review the plans. At this meeting a significant error was noted in the Burden of Proof. Ms. Fowler agreed to make the correction and submit to BZA. She has not done so and hence the Application is defective in a significant regard. Without consultation Ms Fowler requested that hearings be scheduled with ANC commencing April 7th.
8. Shelton requested from Eppolito by email dated March 30th a postponement in order to adequately prepare for these important hearings. Ms Fowler wrote back on March 30th asserting incorrectly "The plans have not changes since you received them in December". She concluded "We are on the ANC agenda already and we are planning to proceed."
9. The application includes photographs, drawings, plats, etc. Although they have been diligent in preparing for hearing this evening they have not been able to consult or retain professional assistance. They have been prejudiced thereby to a significant degree in a matter of substantial importance.
10. On Friday April 3, Ms Fowler sent by email a "Sun Study", which purports to deal with the Project's effect on light and air at 323 5th.
11. From the outset in our discussions with Applicant Eppolito, Shelton and Flynn have made it clear that these plans affect 323 5th street significantly and require careful review and consideration. We respectfully request the hearing to be postponed in order to retain appropriate expertise and thorough review and consideration.

Thank you for your consideration and attention to this matter.

Respectfully,

Robert Shelton and Mark Flynn

April 7th 2015