

Applicants' Response in Opposition to Party Opponent Ms. Waldmann's Motion for Reconsideration of the Board of Zoning Adjustment's Decision and Order

To: Board of Zoning Adjustment
441 4th Street NW Suite 200S
Washington, DC 20001

From: Diana Kurnit and Jonathan Brumer, Owners/Applicants
5330 42nd Street, NW
Washington, DC 20015

Date: November 26, 2015

Subject: BZA Case 18990, Rebuild of Rear Elevated Deck
5330 42nd Street, NW (Square 1664, Lot 30)

Dear members of the Board:

On November 23, 2015, the party opponent, Ms. Waldmann, filed a motion for reconsideration of the Board of Zoning Adjustment ("BZA" or "Board")'s November 9, 2015 decision and order. *See* Exhibits 49, 51. The motion for reconsideration argues that various factual findings and conclusions of law within that decision and order were inaccurate. The motion for reconsideration contains numerous inaccurate and misleading statements about the BZA's reasoning and decision, our position, and our filings and testimony all of which demand a response. Accordingly, we are filing this opposition.

We strongly oppose the motion for reconsideration of the decision and order by the BZA and ask that the decision stand. We note that the decision by the Board was made after the following important events occurred:

- 1) We presented our case to the ANC 3E at the April 8, 2015 meeting. After hearing our presentation, asking us questions, hearing from supportive neighbors, and hearing Ms. Waldmann's objections, the ANC voted unanimously (5-0) in favor of our plan to recommend approval of the requested special exceptions (Exhibit 40).
- 2) The Office of Planning (OP) carefully examined this matter and provided a written report in full support of our application (Exhibit 44).
- 3) We submitted 26 letters in support from nearby property owners within a 200 foot radius of our home—many of whom share our common alley and would be in view of our deck, including our other adjacent neighbor. (Exhibits 14-16, 26-27, and 36).
- 4) We presented our case to the BZA two times—during a hearing on May 12, 2015, which was interrupted by a fire alarm, and during a hearing on June 16, 2015. After hearing our presentation on June 16, 2015, and hearing from the party opponent, and asking both of us questions, the BZA voted 4-0 (one seat was vacant) to grant our request for a special exception and to build the deck subject to the plans submitted (Exhibits 5, 49.)
- 5) The decision was further scrutinized as we waited a full five months to have it approved by the District of Columbia Attorney General.

I. The Party Opponent's Initial Arguments in its Motion for Reconsideration

We would like to first address the opponent's initial arguments in her motion for reconsideration:

1. The opponent alleges that the Board "failed to note" that "all but one" of the 26 neighbors who signed letters in support of our application will be unaffected by our proposed deck. Although she concedes that our next door neighbor to the south who signed a letter of support might be affected as well, she argues that "there was no consideration" by the Board "of the singularly disparate and negative effect of the proposed deck" on her property. *See* Exhibit 51 at 1.

The regulations do not give an adjoining neighbor veto power over an application for a special exception. Nor do they require applicants for a special exception to solely consult with their adjoining neighbor. Instead, they require applicants to notify all of the neighbors within a 200 foot radius of applications, and encourage applicants to seek the support and address any concerns that all of those neighbors in the community may have. *See, e.g.*, 11 DCMR §§ 3113.5(a), 3113.14-3113.15, 3113.18-3113.20. We feel strongly that the opinions of the 26 neighbors who signed support letters should be given some weight, and they believe that we should be allowed to build a modest deck well within our property limits in our own backyard. Moreover, the opposing party is not the only affected neighbor, as many of these neighbors share the back alley with us and will have a view of our deck. Moreover, all of the neighbors who signed letters of support share an interest in the zoning regulations being applied in an even handed and reasonable way.

Moreover, Ms. Waldmann's suggestion that the Board gave her concerns and wishes short shrift is belied by the fact that she was granted party status, has been allowed to file five written submissions to date including her recent motion for reconsideration, *see* Exhibits 32, 41, 41, 47, 51, and participated in two separate hearings. It is also belied by the fact that the Board's decision and order contains extensive, careful, detailed discussion of the impact of our proposed deck on Ms. Waldmann's light, privacy, and use and enjoyment of her property and extensive discussion of her concerns, stated positions, and allegations in great detail. (*See* Exhibit 49 at 2, 3, 4, 5, 7-8.)

2. The opposing party claims that we did not try to accommodate her concerns, and that none of our proposed alternatives were included in the plans that we submitted to the Board for approval. *See* Exhibit 51 at 1. That is untrue. As shown in Exhibit 13, we did in fact submit three alternative designs to the Board that we had our contractor draft solely to try and accommodate the opposing party's wishes. However, we consistently made it clear in our written submissions and our oral testimony from the beginning that our first preference was for our original proposal. During the year-long process that we have been working on trying to obtain permission to rebuild our deck, we have had several email exchanges with her, a lengthy meeting with her and our ANC representative prior to the ANC meeting, we met for over an hour on the day of our first BZA hearing and tried to negotiate some type of compromise with her. When it became clear during that session and between the two BZA hearings that the opposing party would only consider supporting plans that put the stairs on the northern side or that involved a large triangular cutout from our deck which would create

an awkward, irregularly shaped deck, we ultimately decided that an mutually agreeable solution could not be reached. We decided to move forward with our original plan for the deck that we wanted, which would give us the most usable amount of outside space, while preserving the most amount of green space. We described some of those negotiations and explained the reasons why we preferred our original proposal for a normal rectangular shaped deck to one with a triangular cutout in our filings and in testimony at the two hearings. *See, e.g.*, Exhibit 8; Transcript of May 12, 2015 Hearing (“T. May”), p. 41-43, 45-46; Transcript of June 16, 2015 Hearing (“T. June”), p. 73-76, 80-82.

II. The Party Opponent’s Arguments Concerning the BZA’s Findings of Fact

Regarding the opponent’s arguments that the following “Findings of Fact” are erroneous, *see* Exhibit 51 at 2, please see our responses to each item:

Item 5: We are indeed replacing a previous deck that was in an unsafe condition prior to our demolition of it in October 2014. But we made clear in our filings and in our testimony at the BZA’s hearings that our proposed new deck would be deeper and would place the stairs on the other side. We explained that we preferred this new design to create a more usable and safer deck in our small outdoor area. *See* Exhibits 8, 11, 17, 18, 37, 40, 44; T. June, p. 77-79. And the BZA’s decision and order clearly reflected an appreciation of those differences between the original deck and our proposed new deck and the reasons for them. *See, e.g.*, Exhibit 49, Findings of Fact at 3-4, ¶¶ 5, 10-13; Exhibit 49 at 7 (“[w]hile the proposed deck will be slightly larger than the previous deck...”) Thus, the sentence Ms. Waldmann quotes in isolation – when considered in the context of the BZA’s other statements in its decision – in no way indicates error or confusion by the BZA about the nature of our proposed deck.

Item 8: Ms. Waldmann is correct that in 1986 she obtained a permit to build a deck and that in 2002 she obtained a permit to enclose that deck. *See* Exhibits 35, 37. But, she does not explain how the fact that she did not enclose her porch until 2002 in any way undercuts the BZA’s findings on any of the legal issues material to our application for a special exception.

We are unclear as to how our opponent was able to obtain those permits without seeking or obtaining a special exception from the BZA. She shares a wall with us and is, and as far as we can tell was, subject to the same zoning requirements that we are at present. Her addition clearly put her in excess of the lot occupancy limits applicable to her property as well. *See* Exhibit 37 at 3 (¶ 9).

Certainly, the fact that she was easily able to obtain permits for her enclosed porch does not cut against the BZA’s approval of our special exception; rather it militates in favor of it, by confirming that our deck is very much in step with the “character, scale and pattern of houses along the subject street frontage.” 11 DCMR §§ 223.1, 223.2(c). Thus, any error the BZA may have made in this finding was legally immaterial and in no way undercuts the BZA’s conclusions and decision.

Item 12: We do not know what our party opponent based her estimates of the square footage of the green space on the north and south of our driveway on. But what is important is that our site survey and the photos we filed clearly demonstrate, and our opposing party concedes, that there is more green space on the north side of our driveway than on the south side of our driveway (Exhibit 3, 19.)

As we have explained, with a larger deck, placing the stairs on the North side would require us to build our stairs out further in the green space on the North side in order to maintain our crepe myrtle tree. This is one reason we preferred to place the stairs on the South side of our deck. With all due respect to our opponent, it is not up to her to decide how we plant and use our own property to maximize our green space. The BZA clearly understood this when making their decision. The opponent's arguments about green space in her motion for reconsideration amount to an improper attempt to re-argue a position she raised and that was already rejected by the Board. *See, e.g.,* Exhibit 32 at p. 2.

We cannot imagine what basis the opponent has for her claims that “[p]lacing the staircase on the north side will result in retention of green space on the south side that *will more than compensate for* . . . any loss of green space on the north side” and that “[t]he net effect of placing stairs on the north side will be the retention of *more green space, not less.*” (emphasis added).

The BZA's finding that the green space to the north is more usable is also supported by Mr. Brumer's testimony at the Board hearing that “there is a retaining wall on the southern side” of the driveway, that “we have some concerns because we have two small children, we have a toddler son and an infant daughter, about them playing near that retaining wall or falling off it,” and that “for that reason we've wanted to not have that be an area where they play and congregate so it's that reason as well as the fact that the green space on the northern side of our property, the side that is next to Ms. Waldmann's property, is the side we wanted to preserve as much as possible and have it be a safe play space for our kids and an area where we could do a little gardening.” *See* T. June, p. 78-79; *see also* T. June p. 77. That retaining wall is visible in one of the photos in the record. *See* Exhibit 19 (last photo in series).

Item 13: We explicitly stated at the ANC meeting and at both BZA hearings and the record confirms that we *never* had any intention of removing or moving the crepe myrtle tree and that our original and three alternative plans for our proposed deck all preserved that tree (It was in fact our opposing party that suggested that we consider moving or chopping down that tree, during a conversation in our driveway early on in the process--a suggestion we rejected.) We have always said that we will keep the tree as-is with additional room to grow, and testified to this fact at the BZA hearing. *See, e.g.,* T. May, p. 47, lines 1-8; T. June, p. 83, lines 9-21.¹ Thus, Ms. Waldmann is simply mistaken in her claim that “Applicants' statements to the Board relating to the crepe myrtle” are “misleading at best.” Exhibit 51 at 1 (bottom paragraph).

We know that preserving the tree was important to the ANC and the BZA and believe that the BZA understood that we had no intention of removing the tree under any scenario. The BZA's finding that placing the stairway to the south of the deck would “preserve the mature myrtle tree which is located on the north side of the property,” is true – and did not necessarily imply as the opponent would have

¹ For example, at the May hearing for example, we had this exchange with a BZA member:

COMMISSIONER TURNBULL: Well, I'm assuming your original plan of 10 feet saved the tree still.

MS. KURNIT: Absolutely.

COMMISSIONER TURNBULL: Okay.

MR. BRUMER: Yes. And that was something that we made clear to our contractor was a concern, that we wanted to preserve the trees both on the left and right side. So all the configurations do that.

T. May, p. 47, lines 1-8.

it that the BZA assumed that placing the stairs on the south side was the *only* way to preserve that tree. It just indicated that the BZA understood, correctly, that placing the stairs to the south was consistent with the tree's preservation.

Item 23: The party opponent seeks to challenge OP's finding (which the BZA credited) that her own porch and stairway block the light and air that she receives through her basement window. But, she fails to mention or explain why at the BZA hearing, she conceded this point. When **Chairman Jordan** asked her "... Your deck stops light from coming down to the basement level. Isn't that correct?" **Ms. Waldmann** admitted: "Yes it is." (T. June, p. 90).

Ms. Waldmann claims that "the sun's trajectory means that" the light she receives will be "far more impacted" by our proposed deck than by her enclosed porch, and implies that a significant amount of afternoon sun can at present reach her basement window, but she has never substantiated either of those claims. But, to the contrary, several photos in the record clearly show that despite the fact that we have NO deck at present, because of the opponent's existing enclosed porch, little to no light reaches the opposition party's own basement window even on sunny days when sunlight reaches her second floor and the rear of our building. *See* Exhibit 19, 47 (second to last photo). If it is in fact true that her stairs "let light [pass] through" to her basement window as she claims, there is no logical reason why that would not continue to be the case after our proposed deck is built.

Nor has Ms. Waldmann ever explained why she believes that having stairs on the northern side of the deck would cause *more* light to reach her basement window than having no stairs there would. After all, even if open risers were used, some portion of the stairs would necessarily need to be solid, and one would think that she would prefer not to have any stair material on the northern end of the deck, which is closer to her basement window.

Item 26: The BZA credited OP's finding that the placement of the stairway to the south will help reduce movements between the deck and the northern yard and reduce any noise generated by the use of the proposed deck. (OP Report, Exhibit 44). In an effort to attack this finding, the opponent for the first time in this proceeding raises the concern that our children will generate bothersome noise on the deck. Surely, she cannot be suggesting that our application for a special exception should be denied because we have young children who might sometimes make noise on the deck.

Our opponent has her own privacy fence on the second floor alongside the walkway to her enclosed porch which covers about a third of the porch which should at least slightly reduce the noise she hears. She also has the additional buffer of her four foot wide stairway, which will also slightly reduce any noise resulting from the presence of our children on our deck, and she is free to close her existing window shades on her porch. (Exhibit 19). In good faith, we have also repeatedly offered and remain willing to put up some type of privacy screen of our own, bushes, etc. to further shield her from noise and views of us and our children. (T. June, p. 91.)

Item 27: The party opponent claims that the OP's finding (which the BZA credited) that the Opposition Party's fence will help to lessen views from the proposed deck onto the enclosed porch at the 5332 property is inaccurate because she has a fence one story below her porch at that fence will not lessen those views. But Ms. Waldmann fails to mention that she also has a privacy fence on the second floor walkway to her enclosed porch that extends from the rear wall of her home to about 1/3

of her porch, a fact clearly established by photos in the record. (Exhibit 19). The relevant statement in OP's report was clearly referencing that second floor fence (not the first floor fence). After all, the relevant sentence in the OP report read: "The *neighbor's deck has a fence* which would lessen views from the proposed deck onto their enclosed porch." See Exhibit 44 at p.4 (emphasis added). Neither OP nor the BZA erred in their assessment of the privacy fence and its significance.

Furthermore, our opponent also has the aforementioned buffer of her own stairs and has shades on her enclosed porch that she can lower if she wishes to further obstruct views from our proposed deck into her enclosed porch's sitting area. See Exhibit 19. Moreover, the opposing party must realize that when living in a shared duplex in a densely populated urban neighborhood filled with houses in very close proximity to one another and when both parties wish to have an outdoor area, there are some limits to how much privacy may be reasonably expected.

III. The Party Opponent's Arguments Concerning the BZA's Conclusions of Law

Regarding the opponent's arguments that the following "Conclusions of Law" are erroneous, please note the following:

1. Ms. Waldmann argues that the BZA's legal conclusion that the light and air available to neighboring properties shall not be unduly affected is erroneous because "[t]here is clear evidence of negative impacts by the proposed expanded deck to the light and air available to [her] property." See Exhibit 51 at 3. But, as noted in connection with item 23 above, she simply has failed to provide clear evidence of such negative impacts much less clear evidence that the light and air available to her property would be "unduly" affected.
2. Ms. Waldmann argues that the BZA's conclusion that "the fact that the stairway will be located farther away from the 5332 property may, in fact, provide more privacy than if the stairway were closer" is "unsupported conjecture which is contradicted by the record." See Exhibits 49, 51 at 3. But this finding is logical and supported photos in the record. It was reasonable for the Board to conclude that placing the stairs farther from Ms. Waldmann's property will enhance her privacy by reducing the proximity and views any users of those stairs have of Ms. Waldmann's property.
3. Ms. Waldmann argues that the BZA's conclusion that "[t]he Opposition Party's privacy will also be protected by the enclosure of her own porch and by the wooden privacy fence on her property" is erroneous because "[p]rivacy on the porch/deck level is not 'protected' by the porch's screens, nor by a privacy fence which is a story below." See Exhibit 51 at 3. But, as noted in connection with items 26 and 27 above, that the privacy fence that the OP and BZA were referencing was clearly the fence that Ms. Waldmann has on the porch/deck level, not the fencing she has on the ground level, and that second floor privacy fence *does* enhance her privacy.

IV. The Party Opponent's Request for Relief

In the request for relief section of her motion for reconsideration, Ms. Waldmann asks the BZA to either order us to "[p]ut the stairs on the north side along our shared property line" or to "[m]ove the north edge of the deck to the south to create a four foot space between applicants' proposed deck's living space and [her] stairs." See Exhibit 51 at 3. But, for the reasons set forth in this filing and our

earlier filings, as well and our BZA testimony, she has not established that either order is necessary to ensure that: (1) the light and air available to neighboring properties shall not be unduly affected; (2) that the privacy of use and enjoyment of neighboring properties shall not be unduly compromised; or (3) that the addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.

Conclusion

In conclusion, the opposing party has not shown that any of the Board's findings of fact or conclusions of law were erroneous or based on material mistakes of fact. Ms. Waldmann has had ample opportunities to voice her concerns, interests, and arguments in this process and the Board has carefully considered the parties' contentions and all of the evidence and has made its ruling. We therefore ask that the Board to deny the opponent's motion for reconsideration and that the special exception stand as is.

Respectfully submitted,

Diana Kurnit and Jonathan Brumer