

Burden of Proof Special Exception Application

5330 42nd Street, NW

To: The Office of Zoning
Government of the District of Columbia
Suite 210 South 441 4th Street, NW
Washington DC 20001

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

Date: February 26, 2015

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

I. OVERVIEW:

We, Diana Kurnit and Jonathan Brumer, owners and residents of 5330 42nd Street, NW, hereby apply for a special exception under 11 DCMR §§ 223.1 and 3104.1 to enable us to re-build an elevated 1-story deck in the rear of the house over the brick driveway of our existing single-family semi-detached home. The new proposed deck would be approximately 19 feet wide (the width of our house) and would extend 9 feet, 6 inches beyond the rear of the house over our driveway. We are seeking this relief because the construction of our proposed deck would cause us to exceed the maximum allowable lot occupancy in the R-2 residence zone of 40%. *See* 11 DCMR §§ 223.1, 302.1, 403.2, 3104.1.

For the reasons set forth in detail in this document and our other application materials, we respectfully submit that our proposed deck fully satisfies the various preconditions to a special exception under these provisions, and would “*not* have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property” inasmuch as, among other things:

- (1) “The light and air available to neighboring properties” would “*not* be unduly affected” by our proposed deck;
- (2) “The privacy of use and enjoyment of neighboring properties” would “*not* be unduly compromised” by our proposed deck;
- (3) “The addition or accessory structure, together with the original building, as viewed from the street, alley, and other public way” would “*not* substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.” To the contrary, we will demonstrate that it would be entirely consistent with that character as many of our nearby neighbors have as large or larger enclosed porches, decks, and other additions in the same alley and indeed it would improve the appearance of the back of our home; and

(4) We will demonstrate compliance with those requirements using “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.”

See 11 DCMR §§ 223.1, 223.2(a)-(d) (emphasis added); *see also, e.g.*, 11 DCMR §§ 101.1(a), 101.2(a).

As is also explained below, granting us a special exception to enable us to rebuild our deck would also promote the “encouragement of . . . land values” in our immediate neighborhood as it would improve the appearance of the back of our house and therefore of the entire alley between 42nd Street and 42nd Place and between Military Road and Jenifer Street. 11 DCMR § 101.2(c). The construction of the deck we propose would represent a visual improvement and make the houses facing the alley more desirable. And, as is explained below, granting us the special exception we seek to enable us to rebuild our deck would also “promote . . . public health” and “safety,” *see* 11 DCMR § 101.1, for two reasons. First, because we demolished the prior deck that was attached to the rear of our home because it was unsafely attached to our home and causing water damage to our home. Second, we currently have no deck in the rear of our home and our kitchen door opens up to an empty elevated space a full story above the ground, and as we worry that, until we rebuild our deck, should either of us, our toddler son, our infant daughter, or a visitor to our home open our kitchen door and walk through it (despite all of the precautions we have taken to prevent such a calamity), he or she will fall a full story to the ground below and suffer serious injury or worse. **(See Attached Photo of view out of our kitchen door down to ground).**

II. RELEVANT FACTS AND PROCEDURAL HISTORY:

A. Why We Decided to Demolish Our Original Small, Improperly Constructed Potentially Unsafe Deck, Why we Wanted to Rebuild a Slightly Larger One, and Our Efforts to Comply with All Permitting and Zoning Requirements to Date

When we purchased our home in November, 2013, the house had a rear deck that extended approximately seven feet out from the rear of the house. This deck was not built to code or attached to the house correctly, and there was no flashing to prevent water damage or wood rotting. As a result, the deck was sagging and we were having significant water damage to our walls. Our home inspection report details the existing damage, and we originally sought to rebuild and repair our existing deck. **(See Excerpts from Home Inspection Report by Capitol Hill Inspection Report.)**

In September, 2014, we hired a contractor, Leveille Home Improvement Consultants, Inc. (Leveille HIC) to work on our deck re-build. Over the summer we applied for and received a DC Postcard Permit to rebuild our deck, as we expected that we could use a lot of the existing structure **(See Postcard Permit)**. Leveille HIC began work in early October, however as they started to do the work, they discovered that almost all of the original deck was unusable. Leveille HIC also discovered that the deck had no footings at all, and that the 6x6 posts supporting the

deck were simply sitting on the ground and on the small retaining wall to the left of the driveway. Therefore, they advised us that we could not reuse the existing footings and they recommended that we demolish the entire deck and build a new deck. We then had them demolish the deck so we could begin our rebuild.

When we removed the deck, we discovered rotten wood, which confirmed what our inspector had found – that the old deck wasn't attached properly. **(See Photos of Rear of House After Old Deck was Removed.)** We removed and replaced all of the rotten planks.

We wanted to construct our deck properly and in full compliance with the rules and regulations, so through Leveille HIC, we applied for a permit through Department of Consumer and Regulatory Affairs (DCRA) and submitted our plans for a deck that was approximately 9 and a half feet deep by 19 feet wide (the width of our house) with stairs. **(See Attached Plans for Deck).** This proposed deck would be just two feet deeper than the deck that came with our home when we purchased it. And it is approximately the same size as the screened in porch of our adjacent neighbor at 5332 42nd Street, NW. Since our adjacent neighbor received building permits in the mid 1980s first to build and then to enclose a screened in porch with a staircase in the rear of her home with dimensions comparable to those that we are requesting, we believed that we would be approved for a similar building permit. **(See Attached Copy of Adjacent Neighbor's Permits.)**

Our contractor applied for this building permit on our behalf, but the plans were not approved. After much back and forth, DCRA told us that they could only approve a deck that is at most 7 feet deep by 19 feet wide and would have no stairs, and therefore no way to exit in case of an emergency or to access our alley or downstairs entrance.

We worked closely with Kathleen Beeton and other representatives at DCRA to gain a better understanding about what would and would not be compliant in their view. We ultimately requested and received a referral memorandum, dated January 27, 2015, which advised us that "Board of Zoning Adjustment approval [was] required," namely a "Special Exception from § 223.1 to allow a new 1-story rear deck addition to an existing single-family semi-detached structure that exceeds the maximum allowable lot occupancy in the R-2 residence zone (§ 3104.1)." **(See Attached Referral Memorandum.)**

* Please note that the DCRA referral memorandum appears to contain a few typographical and calculation errors, which we note here for the record:

(1) First, the first page of the referral memorandum erroneously indicates that our property is in Lot 1664 in Square 0030, when we understand that in fact our home is located in Lot 0030 and Square 1664 (the second page of the referral memo gets it right.);

(2) Second, much more importantly, the second page of the referral memorandum, which is entitled "Notes and Computations, inaccurately states (in the "variance" column) that our proposed deck would be 334 square feet. In fact, the plans that Leveille HIC drafted and that we in turn submitted to DCRA state that our proposed deck would only be 224 square feet in area (plus 16 square feet for the landing above the stairs that lead to the driveway), or **240 square feet** in total. **(Compare Attached Referral Memorandum, page 2, to Attached Leveille Original Plans, and see Revised Leveille Plans, Plan number 1.)**

(3) Because the 334 square foot number that DCRA used is erroneous and appears to overstate the square footage of our proposed deck by almost 100 square feet, it in turn appears to have caused DCRA to miscalculate (that is, to overstate) the “variance” percentage number and a “proposed” “lot occupancy” square footage percentage number on the second page of the referral memo as well. The true “proposed” “lot occupancy” square footage and percentage and the true “variance” percentage must be significantly lower given that those numbers were based on DCRA’s erroneous assumption that our proposed deck was 334 square feet, and not 240 square foot. **(Compare Attached Referral Memorandum, page 2, to Attached Leveille Original Plans, and see Revised Leveille Plans, Plan number 1.)** As best as we can tell, the construction of our proposed deck would in fact cause our percentage lot occupancy to in fact increase to about **49.7%**, not the 54% identified in the second page of the referral memorandum.¹

B. Our Preliminary Outreach Efforts, Our Neighbors’ Responses, and the Possibility of Alternative Deck Designs

Once we had a clear vision of what sort of a deck we were seeking and what sort of relief we needed, we began the process of reaching out to our neighbors to discuss our proposal, hear their concerns if any, and solicit their support. To date we have discussed our proposal and shared our plans with four sets of neighbors who live in the houses we think would be most affected. Two of those houses are located to the south of us, one to the west of us, and one to the east of us. The neighbors we contacted to the west and south of us expressed support and agreed to sign letters of support. **(See Attached Letters of Support).**

One of our neighbors had some concerns, and we want to be fair and forthright in describing them. We recently reached out to our adjacent neighbor, Jane Waldmann, at 5332 42nd Street, NW, shared the plans for our proposed deck, and asked if she would be willing to support our application. Ms. Waldmann said that she is supportive in principle of our effort to rebuild our deck and has no concerns about the size of that proposed deck, but that she has some concerns about its design. Specifically, she told us that she would prefer that we place the stairs on the left side of the deck (from the perspective of the driveway behind the house), rather than the right as provided for in our proposal, to create additional separation between activity on the two decks. We have taken her concerns very seriously. Upon learning of them, we immediately reached out to our contractor and asked him to draft additional possible construction plans, changing the configuration and/or stair placement in an effort to accommodate her stated concerns.

We have attached two alternative plans that we are willing to consider, along with the initial design, and are continuing to discuss the matter with her. **(See Attached Three Proposed**

¹ Just to explain how we arrived at this tentative number: Assuming that DCRA is correct that our existing lot occupancy is 925.9 square feet (something we are not sure about), then our proposed deck would increase our lot occupancy to $925.9 + 240 = 1165.9$ square feet. And assuming that DCRA is correct that 40% of our lot is equal to 938.6 square feet (something we are also not sure of), this would mean that our total lot is $(938.6 * 100) / 40 = 2,346$ square feet, a number consistent with what our attached boundary plat survey indicates. These two facts in combination would mean, in turn, that the construction of our proposed deck would cause our percentage lot occupancy to increase to $(1165.9 * 100) / 2346 = 49.697\%$, not 54%, as DCRA’s Referral Memo claims. Our two alternative proposals are for decks that are even smaller than 240 square feet, and therefore would result in an even lower lot occupancy percentage.

Alternative Plans.) We recently shared the drawings of the two proposed alternative plans as well of the original plan with her. One of the alternative plans is a similar plan to our initial plan, but has a substantial cut-out on the corner near Ms. Waldmann's home. This would allow some additional light into her basement door, as well as some open space and separation between our two houses, but still keep the staircase on the side that we strongly prefer and therefore some usable green space for us below. Our second alternative proposal is a version that places the stairs on the side of the deck closest to her house, but reduces the square footage of our deck as well as our usable green space, and consequently is less appealing to us. One final option that we might also consider and are exploring is having no stairs at all, but we do not have drawings that show this option as of yet, as this is something we recently considered. This is all to say that we are trying to remain flexible, reasonable, and responsive to our neighbor's stated concerns, not because we believe that such changes are necessary for us to comply with the regulatory preconditions to a special exception, but rather because we wish to be accommodating, respectful, and reasonable neighbors.

We hope to ultimately gain Ms. Waldmann's support for at least some of our proposed deck configurations. If possible, we would like the Board's approval for a deck that will both allow us to have a usable, suitable, safe outdoor deck to enjoy and which Ms. Waldmann will feel does not unduly compromise her light or space or privacy. We are happy to hear her thoughts about the proposals and keep open a line of communication with her during the period our application is being considered.

Our preference is still to move forward with our original proposal, which places the stairs to the right of the driveway, as this would maximize the more usable (albeit small) plot of green space on the left side of our driveway and preserve an important beautiful crepe myrtle tree that provides shade and privacy for both our houses. We also note that both alternative proposals would result in a smaller deck than the original design. But we again hope to arrive a mutually agreeable amicable plan that addresses both her concerns and ours.

We understand that, as part of the normal Special Exception application process, that the ANC and Office of Planning will be consulted and will have an opportunity to weigh in our proposal. We welcome the opportunity to answer any questions they may have and will be happy to provide them with any documents or information they may find helpful in evaluating the proposal. We also are happy to share and discuss our proposed plan with additional neighbors, most of whom we have not yet met since we are still new to the neighborhood.

III. ARGUMENT

A. The light and air available to neighboring properties would *not* be unduly affected by our proposed deck

- Neighbors to East of us on the other side of 42nd Street and beyond: **No effect**—these neighbors will have no view of the proposed deck.
- Neighbors to South of us: The light and air available to our neighbors who live to the south of us would not be adversely affected by our proposed deck. Indeed, both our adjacent neighbors who live immediately south of us in 5320 42nd Street, NW and our neighbors who live two doors to the south of us at 5318 42nd Street, NW of us understand our deck proposal, are in favor of our application, and have written letters in support of it. In those letters, they note that after reviewing drawings of the proposed deck and discussing the project with us, it is clear to them that the proposed addition would in no way adversely affect adversely affect the light and air available to their properties or to any other neighboring property. **(See Attached Letter of Support by Erin Clinton and Kevin Clinton, and Attached Letter of Support by Natalie Guerrier and Mike McKnight).**
- Neighbors to North of us: Our adjacent neighbor at 5332 42nd Street, NW, whose house is attached to ours, has a one-story screened-in porch approximately the same size as our proposed deck with stairs down to the lower level. Our proposed deck would be to the right of the stairs that connect to her enclosed porch. Our proposed deck would have no effect on the air that neighbor receives anywhere in her house or in her enclosed porch, much less unduly affect it. Nor would our proposed deck have any effect on the light she would receive through any of her east or north facing windows. Nor would it have any effect on any of her west facing windows, except possibly it might reduce some of the light she receives through one basement window, during some times of the year, depending on the configuration of our deck. **(See Attached Photos of Ms. Waldmann’s enclosed porch, and See Plan of our Proposed Deck.)** She has no south facing windows because the southern side of her house is attached to ours.
- Neighbors to West of us: The light and air available to our neighbors who live west of us would not be in any way affected by our proposed deck. Indeed, our neighbors who until very recently lived directly across the alley from us at 5325 42nd Street, NW, facing our past and future proposed deck, understand our deck proposal, are in favor of our application, and have written a letter of support of it. In their letter of support, they note that, after reviewing drawings of the proposed deck with us and discussing the project with us, it is clear to them that the proposed addition would in no way adversely affect the light and air available to what was until recently their home when they were across the alley way from our property at 5325 42nd Place NW or the light and air available to any other neighboring property. **(See Attached Letter of Support by Catherine Potter and Alix Guerrier).**

Accordingly, the proposed deck would not unduly affect the light and air available to neighboring properties. *See* 11 DCMR §§ 223.1, 223.2(a), 302.1; *see also, e.g.*, 11 DCMR § 101.1(a).

B. The privacy and the use and enjoyment of neighboring properties would *not* be unduly compromised by our proposed deck

- Neighbors to East of us on the other side of 42nd Street and beyond: **No effect**—these neighbors will have no view of the proposed deck.
- Neighbors to South of us: The privacy and use and enjoyment of our neighbors who live to the south of us would not be in any way be compromised by our proposed deck. Indeed, both our adjacent neighbors who live immediately south of us in 5320 42nd Street, NW and our neighbors who live two doors to the south of us at 5318 42nd Street, NW of us understand our deck proposal, are in favor of our application, and have written letters in support of it. In those letters, they note that, after reviewing drawings of the proposed deck and discussing the project with us, it is clear to them that the proposed addition would in no way adversely affect their privacy, other neighbors' privacy, the use and enjoyment of our or any other neighbor's property to their properties or to any other neighboring property. **(See Attached Letter of Support by Erin Clinton and Kevin Clinton, and Attached Letter of Support by Natalie Guerrier and Mike McKnight).**
- Neighbors to North of us: As noted, our adjacent neighbor's enclosed porch at 5332 42nd Street, NW will be next to our deck. She has a one-story screened-in porch approximately the same size as our proposed deck with stairs down to the lower level. One of the features of her enclosed porch is a privacy wall which lines part of the walkway that leads from her upstairs door to her enclosed porch and is parallel to and close to the property line between our properties. That privacy wall, along with the fact that her porch is separated by a flight of stairs from our proposed deck, help create separation between her porch and any deck that we might construct in the rear of our house. In that way they would help to ensure that her privacy and enjoyment of her house and porch is protected. **(See Attached Photos of Ms. Waldmann's Porch).** Moreover, because the portion of our deck that is closest to her home will be narrow (only 4 1/2 feet wide) and next to a door (which leads to our kitchen), our adjacent neighbor can rest assured that that space is unlikely to ever be a place where people sit or congregate. Rather, by virtue of the shape of the deck any activity on the deck can be expected to be primarily in the portion of the deck farthest from her back windows and porch. **(See Attached Photos of Jane's Porch and See Attached Plan for Our Proposed Deck.)** We intend to put our table and chairs towards the opposite side of the deck towards her house, further reducing our proximity to her space. Accordingly, we believe that she has little reason to fear that her privacy or the use or enjoyment of her property will be unduly compromised by our proposed deck, or compromised by it at all.
- Neighbors to West of us: Our proposed deck would not in any way compromise the privacy of our neighbors who live to the west of us, or their use and enjoyment of their properties. Indeed, our neighbors who until very recently lived directly across the alley from us at 5325 42nd Street, NW, facing our past and future proposed deck, understand our deck proposal, are in favor of our application, and have written a letter of support of it. In their letter of support, they note that, after reviewing drawings of the proposed deck with us and discussing the project with us, it is clear to them that the proposed addition

would in no way adversely affect the privacy of the residents of 5325 42nd Place NW, other neighbors' privacy, the use and enjoyment of our or any other neighbor's property. **(See Attached Letter of Support by Catherine Potter and Alix Guerrier).**

Accordingly, the proposed deck would not unduly compromise the privacy of use and enjoyment of neighboring properties. *See* 11 DCMR §§ 223.1, 223.2(b), 302.1 (emphasis added).

C. The addition, together with the original building, as viewed from the street, alley, or other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.

- Neighbors to East of us on the other side of 42nd Street and beyond: **No effect**—these neighbors will have no view of the proposed deck.
- Neighbors to South of us: Indeed, both our adjacent neighbors who live immediately south of us in 5320 42nd Street, NW and our neighbors who live two doors to the south of us at 5318 42nd Street, NW of us understand our deck proposal, are in favor of our application, and have written letters in support of it. In those letters, they note that, after reviewing drawings of the proposed deck and discussing the project with us, it is clear to them that the proposed addition would not adversely affect the appearance, character, scale, and pattern of houses in the neighborhood. To the contrary, they note, the proposed addition would improve the appearance of our home and of the back alley way. **(See Attached Letter of Support by Erin Clinton and Kevin Clinton, and Attached Letter of Support by Natalie Guerrier and Mike McKnight).**
- Neighbors to North of us: As noted, our adjacent neighbor's porch at 5332 42nd Street, NW, will be next to our deck, and she has a one-story screened-in porch approximately the same size as our proposed deck with stairs down to the lower level. As our houses are adjoined, we believe a deck, comparable to her size, is completely consistent with and does not visually intrude upon the character, scale and pattern of the back of her house and would make the rears of our homes more consistent architecturally.
- Neighbors to West of us: Indeed, our neighbors who until very recently lived directly across the alley from us at 5325 42nd Street, NW, facing our past and future proposed deck, understand our deck proposal, are in favor of our application, and have written a letter of support of it. In their letter of support, they note that, after reviewing drawings of the proposed deck with us and discussing the project with us, it is clear to them that the proposed addition would in no way adversely affect the appearance, character, scale, and pattern of houses in the neighborhood. To the contrary, they note that they believe that the proposed addition would improve the appearance and value of our home and the appearance of the back alley way. **(See Attached Letter of Support by Catherine Potter and Alix Guerrier).**
- In addition, other neighbors in the alley between 42nd Street and 42nd Place and between Jenifer Street and Military road to the west, north, and south of our house have decks, porches and other enlargements off the back of their homes. **(See Photos of Neighbor's Decks, Porches and Other Structures.)**

Accordingly, our proposed deck, together with the original building, as viewed from the street, alley, or other public way, shall not substantially visually intrude upon the character, scale and

pattern of houses along the subject street frontage. *See* 11 DCMR §§ 223.1, 223.2(c), 302.1 (emphasis added); *see also, e.g.*, 11 DCMR § 101.2(a). To the contrary, it would be entirely consistent with that character as many of our nearby neighbors have as large or larger enclosed porches, decks, and other additions in the same alley and indeed it would improve the appearance of the back of our home, and therefore the entire alley.

D. Additional Arguments as to why our proposed deck should be approved:

This new deck is very important to us, and below are the reasons that we strongly believe that we should be able to construct and rebuild a deck simply a two feet larger than our previous deck:

- First, granting us a special exception to enable us to rebuild our deck would also promote the “encouragement of . . . land values” in our immediate neighborhood as it would improve the appearance of the back of our house and therefore of the entire alley between 42nd Street and 42nd Place and between Military and Jenifer streets. 11 DCMR § 101.2(c).
- Second, granting us the special exception we seek to enable us to rebuild our deck would also promote. . . “public health” and “safety,” *see* 11 DCMR § 101, for two reasons: We have already demolished our original deck due to the fact that it was not structurally sound and was causing damage to our home. As we made plans to rebuild and repair, under our postcard permit, our contractors dug huge holes in our backyard for footings, and have placed deck building materials that have been outside, while we wait to see if we will be granted relief from the Board. The construction of the deck we propose would represent a visual improvement and make the houses facing the alley more desirable.
- Third, we have no recreational outdoor space without this deck. Our front porch is exposed with unusable shrubbery. Our back area consists of a brick driveway leading to our garage and a few areas of plantings. Having a deck out back was one of the main factors that led us to purchase this house a little over one year ago and was factored into the purchase price of our home. The rest of our green space is completely unusable.
- Fourth, we purchased the house with an existing deck and stairs off the back. When we bought it, we assumed we would be allowed to make repairs or construct a similar deck to make it safe for us to use. Once we learned that we had to replace it altogether, we chose a slightly different plan to make it as usable as possible for our family and wish to maximize our space as much as possible.
- Fifth, our proposed one-story deck would go directly above a brick driveway that leads to our garage. This deck would not be covering any usable land and would create a much more appealing aesthetic when viewed from the alley.
- Sixth, we have pointedly asked our contractor to only draw up plans for the proposed deck that preserve all of the trees on our land and preserve as much green space as possible, and are otherwise environmentally sensitive. Neither our original proposal nor our alternative proposals would result in the destruction of a single tree. We have made every effort to be sensitive to the environmental impact of our proposed deck, and cannot think of any reason why our proposed deck would cause any problems with storm water runoff, habitat for wildlife, or the tree canopy. We also would like to place some plants on our deck, once it is built (assuming our application is granted), which will mitigate

any loss of green space that might occur in connection with the deck and have some additional plantings in the green space below the deck.

- Seventh, it is very important to us that we have a deck that is usable for our family, ideally with stairs, so that we have a safe way for us and our children to exit the deck while outdoors.

IV. CONCLUSION:

For the aforementioned reasons, we respectfully request that the Board grant our application for a special exception, to enable us to rebuild our rear deck.

We are submitting the following supporting documents:

1. Memorandum from the Zoning Administrator at DCRA directing the applicant to the BZA.
2. Excerpts from our home inspection report from Capitol Hill Home Inspection, LLC, specifically showing the original deck and the poor condition of the deck.
3. Photos of the following:
 - a. Our original deck
 - b. The water damage and rotten wood once we removed the originally poorly-attached deck (this damage has subsequently been repaired).
 - c. Our adjacent neighbor's screened in porch and staircase
 - d. Back decks, porches and structures of other neighboring homes in the back alley
4. Approved building permits for our adjacent neighbor, Jane Waldmann (at 5332 42nd Street, NW) for her to build her deck, turned into a porch, which is a similar dimension and placement to our proposed deck.
5. Official Building Plat from Snider & Associates
6. Plan and elevation drawings of the proposed deck from Leveille HIC.
7. Letters of support from adjacent property owners
8. Original Approved Postcard Permit to rebuild/refurbish our existing back porch/deck.
9. Alternative Plans and elevation drawings of the proposed deck from Leveille HIC.

If you require any further clarification or have any questions regarding the application, we are available at any time to discuss them with you.

Thank you,

Diana Kurnit and Jonathan Brumer