

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

APPEAL NO. 18991 – 1521 VARNUM STREET, NW

PROPERTY OWNER’S RESPONSE TO APPELLANT’S SEPTEMBER 1 SUBMISSION

This Response to Additional Submission is being filed on behalf of Varnum Holdings LLC (the “Owner”), the owner of the property located at 1521 Varnum Street, NW (Square 2698, Lot 817) (the “Subject Property”), in response to The Appellant’s additional submission dated September 1, 2015.

I. No New Information or Analysis.

The Appellant’s most recent submission does not offer any new allegation or analysis beyond that submitted in previous submissions. In fact, the entire argument, including his previous submissions, seems to acknowledge that the proposed project is within the boundaries of the Zoning Regulations in effect when the subject building permit was issued; it’s just that the Appellant doesn’t like the result that the Zoning Regulations permitted in this instance. When reviewing the subject building permit application for compliance with the Zoning Regulations, the Zoning Administrator has no discretion to make subjective value judgments. He is bound by the Zoning Regulations. If a proposed project meets those Regulations, as this one safely does, the Zoning Administrator has no choice but to approve it.

The question then before the Zoning Administrator, and now before the BZA, is not whether or not a project is “too big” or of the “wrong character” or whether or not a neighbor objects. The question is whether or not the project complies with the Zoning Regulations. The Appellant and his neighbors claim that the Zoning Administrator not only had the authority to deny a building permit in this case, but was required to deny one, simply because they are offended by what the Zoning Regulations clearly permitted. The problem with that position is that it has no support, and the Appellant hasn’t actually identified an instance of Zoning Administrator error.

The community at large has been successful in asserting their rights as citizens by urging the Zoning Commission to amend the R-4 regulations under which the subject project was designed. But that does not give them, or this Board, or the Zoning Commission for that matter,

the authority to arbitrarily punish this property owner by retroactively applying the newly adopted regulations to this project, when that owner has complied with the regulations in effect when the building permit was issued.

Other than a challenge to the Zoning Administrator's grant of minor flexibility – a decision for which the Zoning Administrator is on solid footing – this Appeal is devoid of any specific allegation or articulation of error by the Zoning Administrator in applying the D.C. Zoning Regulations. The Appeal should therefore be denied.

II. Minor Flexibility.

The Owner has argued the minor flexibility issue in past submissions, and will only summarize here. The only standard for the Zoning Administrator to consider is whether or not granting minor flexibility impairs the purpose of the otherwise applicable regulations. Because the minor flexibility grant changed nothing about the character or purpose of the proposed project (it has allowed a 7-unit building instead of a 6-unit building), and had no impact whatsoever on the purpose or intent of the otherwise applicable regulations, the Zoning Administrator had full, and sole, authority to grant the minor flexibility.¹

The leading appeal case from the BZA on minor flexibility (#18108) for minimum lot area involved a case in which a lot that could contain only one detached one-family dwelling was granted flexibility to allow a second detached one-family dwelling. That grant of minor flexibility resulted in a 100% increase in the number of permitted units, rather than the 17% increase in this case. As noted in previous submissions, the Board confirmed in that case that the Zoning Administrator did not commit error by exercising the grant of minor flexibility provided in Section 407 of the Zoning Regulations. Just as in that case, the Board should not substitute its judgment for that of the Zoning Administrator in this instance. Minor flexibility was adopted by the Zoning Commission specifically to provide the Zoning Administrator with authority which had previously been reserved to the BZA in minor variance and special exception applications. It is not for the BZA to take back the authority that the Zoning Commission gave to the Zoning Administrator, as long as the Zoning Administrator's decision was not unreasonable.

¹ This is also an area for which the Appellant wishes to retroactively enforce new regulations, as the grant of minor flexibility is no longer (as of June 26, 2015) available for minimum lot area calculations involving the 900-foot rule.

III. Response to the Appellant's Architect "Peer Review" Report.

The report from the Appellant's expert architect, Patrick Williams (dated June 9, but filed August 31) (BZA Exhibit #68), to the extent it is accurate and current, does an excellent job of describing how the project actually *complies* with the Zoning Regulations. In direct conflict with previous testimony from Mr. Stokes about the project's lack of compliance with density, lot occupancy, and side yard requirements, his expert sets the record straight by acknowledging that the project complies with all of these zoning requirements, in addition to acknowledging compliance with minimum lot area, building height, rear yard, and court size. In addition, the expert's report also contradicts comments from others regarding the level of demolition, noting that all but the rear exterior wall will be retained in their entirety.

The report does allege – in a chart on Page 7 – four zoning violations, responded to by the property owner as follows:

(i) The stairway penthouse 1:1 setback from exterior walls. Mr. Williams claims a penthouse height of 18' 6". The mechanical penthouse has a height of only 8' 5". While the penthouse was originally within the 1:1 setback area from the western exterior wall, this was corrected prior to the first scheduled hearing date for this appeal. The penthouse is now set back 8' 6" from the western exterior building wall, meeting the 1:1 setback requirement. Regarding the eastern side of the building, that side is not considered an exterior wall and the penthouse is not required to be set back from that wall.²

(ii) Mechanical equipment in more than one location. Pursuant to Section 411.17, roof structures less than four feet in height above a roof or parapet wall are not subject to the roof structure requirements of Section 411. There are no roof structures four feet in height outside of the one penthouse enclosure.

(iii) Pervious Surface comments. The Appellant's expert doesn't identify a violation here, but rather merely offers an opinion that there should be more detail on the Plat regarding the pervious surface requirement. The project meets the 20% requirement, regardless of whether or not there was sufficient detail for Mr. Williams. Neither he nor the Appellant is even claiming that the project hasn't met the 20% requirement of Section 412.

(iv) Green area ratio. The GAR requirements are not applicable in the R-4 zone district.

² Pursuant to the Board's ruling in BZA Appeal No. 17109 of Kalorama Citizens Association, exterior walls of row houses, for purposes of determining the roof structure setback, are only those walls that are adjacent to streets, alleys, or open yards on the property.

In addition to the Appellant's expert's chart (his Page 7), the expert makes a few additional claims, some of which are not zoning-related, and others which repeat some of the claims from the Page 7 chart. These are noted as Peer Review Notes #1 – 8 on Pages 3-6 of the report. These are briefly addressed as follows:

Peer Review Note #1. This is not an allegation of zoning error, but the plat submitted for the roof structure revision was limited to the roof structure revision. The full original building permit application included a fully-drawn Surveyor's Plat.

Peer Review Note #2. This is also not a zoning issue, but the purported encroachment was corrected in the latest plan revision.

Peer Review Note #3. Pervious surface identification comment. See above.

Peer Review Note #4. Roof structure setback comment. See above.

Peer Review Note #5. The Appellant's expert makes a claim that because the subject lot was a slightly smaller size at some point in its history, minor flexibility is no longer available. Mr. Williams relies on the general language of Section 101.1. The implication is not made clear, but at any rate, enlarging a property does not forego the ability to enjoy the matter-of-right zoning regulations and does not alter the criteria for granting minor flexibility.

Peer Review Note #6. One Location of Roof Structures. Any equipment not in the one enclosure is lower than four feet in height and exempt from the requirements of Section 412. See above also.

Peer Review Note #7. Pervious surface comments. See above in Peer Review Note #3 and the Page 7 chart.

Peer Review Note #8. Green Area Ratio. R-4 properties are not subject to the GAR requirements.

IV. Conclusion.

The property owner in this case began this saga by simply applying for and receiving a matter-of-right building permit for a not uncommon project in the District: the conversion of a one-family dwelling into an apartment house subject to the 900-foot rule. You wouldn't know it from the comments from the community and the Appellant, or from comments made by others at a Zoning Commission hearing on January 15, 2015 on the R-4 amendments, but the property

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owner is entitled to equal treatment under the law, regardless of how connected neighbors might be, or how much opposition a matter-of-right project invites for whatever reason. The property owner commends the Zoning Administrator for diligently following and enforcing the Zoning Regulations in the face of the vitriol from those who believe that some property owners should be treated differently from others, or that some property owners should be denied due process and the benefit of the existing law in how they choose to use or develop their property. This property owner has done nothing wrong. The project was approved by the Zoning Administrator, because of its crystal-clear compliance with all applicable Zoning Regulations. It is a matter-of-right project. The Appeal should be denied.

Respectfully Submitted,

A handwritten signature in black ink that reads "Martin P. Sullivan". The signature is written in a cursive, flowing style.

Martin P. Sullivan

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, a copy of this Response was delivered to the following, via e-mail or first class mail:

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