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September 11, 2015

VIA IZIS

Lloyd Jordan, Chairperson
Board of Zoning Adjustment
441 4th Street, N.W., Suite 210S
Washington, DC 20001

**Re: BZA Appeal of Zoning Decision for Building Permit 1500981
Square 2164, Tax Lot 850 (the "Property")**

Dear Chairperson Jordan & Members of the Board:

Please accept for filing the enclosed appeal of Kelly Callahan and Steven Bradley (the "Appellant"). The Appellant appeals the zoning decision for Building Permit 1500981 which certified a proposed structure's compliance with the Zoning Regulations.

We believe that the appeal is complete and acceptable for filing, and request that the Board schedule a public hearing for the appeal as soon as possible. If you have any questions, please do not hesitate to contact me on behalf of the Applicant.

Thank you for your attention to this application.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP



By: Meredith H. Moldenhauer

Board of Zoning Adjustment
District of Columbia
CASE NO. 19143
EXHIBIT NO. 3

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

**Appeal of Kelly Callahan and Steven Bradley
Regarding 1865 Park Road NW**

STATEMENT OF APPEAL

Kelly Callahan and Steven Bradley, owners of 1857 Park Road NW (hereinafter “Appellant”) by and through their undersigned counsel, respectfully submits this Statement of Appeal of the decision of the Department of Consumer and Regulatory Affairs Zoning Reviewer for Building Permit 1500981, approved on July 30, 2015 and issued on September 4, 2015, which certified a proposed structure’s compliance with Zoning Regulations at 1865 Park Road NW, also known as tax lot 850 in Square 2614 (the “Vacant Lot”). The zoning approval relies on, in substantial part, a Zoning Administrator Determination (the “Determination”) which erroneously applied the provisions of 11 DCMR §2001.9 to the Vacant Lot. For the reasons set forth below, the zoning decision and the Determination it relies upon, should be REVERSED.

I. JURISDICTION

The Board of Zoning Adjustment is authorized to hear this appeal pursuant to The Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended, D.C. Official Code §§6-641.01 to 6-641.15 (formerly codified at D.C. Code §§5-413 to 5-432 (1994 Repl. & 1999 Supp.))) (the “Zoning Act”) and 11 DCMR §3100.2.

II. STATEMENT OF THE FACTS

1865 Park Road-A vacant lot

Appellant owns 1857 Park Road. The Vacant Lot is west of the Appellant’s property. The Vacant Lot has 25 feet of frontage along Park Road NW and is approximately 112 feet deep. In 1904, the Vacant Lot was improved with a single family detached dwelling. The construction of that dwelling occurred in conjunction with the construction of a dwelling on 1867 Park Road, which is west of the Vacant Lot. See, 1913 Baist Map at **Exhibit A**. Both lots were improved with a dwelling designed by the same architect and both dwellings were constructed by the same builder. The dwellings stood just a few inches apart from one another.

In the 1950s, the dwelling on the Vacant Lot was destroyed by fire. At an unknown point, but prior to 1978, the owner of 1867 Park Road incorporated the Vacant Lot into their property.¹ A portion of the Vacant Lot was subsequently covered with concrete and used as a patio for the benefit of 1867 Park Road. The Vacant Lot was never subdivided and remained a separate record lot; however one tax lot was created for 1867 Park Road and the Vacant Lot.

In 2014, a developer applied for a building permit to construct a new “two-family flat”. To move forward with the proposed concept, the developer excavated the Vacant Lot and unearthed a series of bricks below grade, nine inches wide. The series of bricks on the Vacant Lot were claimed to be the original foundation wall by the developer.

Landmarking Ten Homes on Park Road and the Mount Pleasant Historic District

On July 14, 1978, a National Register of Historic Places Inventory Nomination Form (“Nomination Form”) was filed with the US Department of Interior National Park Service. See, Park Road Nomination Form at **Exhibit B**. The Nomination Form sought to preserve the “North side of the 1800 block of Park Road, N.W.” which in 1978 included ten homes and their related outbuildings, including five original carriage houses. If the Vacant Lot was intended to be part of this group, the Nomination Form would have been for eleven homes not ten. The Nomination Form noted that the “houses are an excellent collection of representative turn-of-the-century suburban architecture for the rising middle class.” The Nomination Form specifically identified “buildings”, not “structures” or “sites”², as the category of historic places it was seeking to protect. Additionally, the Nomination Form identified which buildings the application sought to protect, of which the Vacant Lot was not included. The Nomination Form also identified the block and lot numbers of the buildings it sought to protect; the Vacant Lot is lot 32 in Square 2614 - it was not included. Furthermore, each building’s architect and the unique architectural elements of each building were discussed in great detail. The only reference the Nomination Form made of the Vacant Lot was that it was destroyed by a fire in the late 1950s and that the “resulting vacant lot was attached to the property on which 1867 Park Road stands”.

The Nomination Form was approved on November 15, 1978, and the ten buildings and their related outbuildings received landmark status. A few years later, efforts to designate the entire Mount Pleasant neighborhood as a historic district began. On October 15, 1986, the D.C. Historic Preservation Review Board voted to designate all of Mount Pleasant as a Historic District in the District of Columbia, and a Nomination Form was subsequently submitted and approved by the US Department of Interior National Park Service. See, Mount Pleasant Nomination Form at **Exhibit C**.

¹ At an unknown period of time, but prior to 1978, the Vacant Lot was razed. The Appellant reserves the right to modify the history of the Vacant Lot as more information is obtained.

² Structures and sites are categories on the Nomination Form that could have been marked to include a structure or a site with no buildings on it as a part of the nomination application.

Zoning Approval and Building Permit B1500981

On October 28, 2014, a building permit to construct a new two-family flat on the Vacant Lot was filed. The initial zoning reviewer determined that the proposed development created two nonconforming side yards and exceeded lot occupancy. However, on July 30, 2015, the zoning reviewer approved the proposed development stating:

Approval of new two family flat: zoning approval for the in-kind re-build of an historic resource/structure as per dcmr-11 section 2001.9 and as per hprb approval and zoning administrator determination. Approved construction of original conditions existing between the 1904 and 1927 pursuant to the 1904 dc surveyors plat, the 1927 sanborn map and the 1960 baist map for lot 32 in square 2614.³ A wall-check is required to verify compliance with approved zoning setbacks.

The zoning approval for the proposed development of the Vacant Lot relied heavily upon the Determination issued by the Zoning Administrator. See, Determination at **Exhibit D**. The Determination noted that the Vacant Lot was previously improved with a detached dwelling that was lost to casualty before the creation of the Mount Pleasant Historic District. The Determination found that the foundation of the dwelling lost to casualty is present. The Determination also found that the developer plans to reconstruct a dwelling on the same footprint and in similar likeness as the previous dwelling. Consequently, the Determination reasoned that because “the prior house was designed by the same architect and constructed at the same time as the house next door, it would have been a contributing structure to the historic district” and can thereby be reconstructed pursuant to 11 DCMR §2001.9.

In light of the aforementioned zoning decision and the Determination it relied upon the Appellant hereby brings this appeal.

III. THE DETERMINATION ERRED IN APPLYING 11 DCMR §2001.9 TO THE PROPERTY

A nonconforming structure is a structure that lawfully existed at the time the Zoning Regulations were enacted but that does not conform to all the provisions of the Zoning Regulations and any amendment thereof. 11 DCMR §199. Pursuant to 11 DCMR §2001.4, if a nonconforming structure is destroyed by fire, collapse, explosion, or act of God to an extent of more than 75% percent of the cost of reconstructing the entire structure, the nonconforming

³ The 1904 DC Surveyor’s Plat, the 1927 Sanborn Map and the 1960 Baist Map do not agree. Each map documents different conditions on the Vacant Lot. As such, “construction of original conditions” by reviewing the referenced maps is not possible.

structure cannot be restored or reconstructed unless it conforms with the provisions of the Zoning Regulations. However, an exception exists for certain nonconforming structures if the following criteria⁴ are satisfied:

- 1) the structure must be a nonconforming structure
- 2) the nonconforming structure must be a historic landmark or
- 3) the nonconforming structure must contribute to the character of the historic district in which it is located. 11 DCMR §2001.9.

The Vacant Lot does not satisfy the aforementioned criteria. Consequently, the application of §2001.9 to the Vacant Lot was improper.

A. The Vacant Lot is not improved with a nonconforming structure

11 DCMR §2001.9 is only applicable to nonconforming structures. The Vacant Lot is not improved with a nonconforming structure. Unearthed lines of brick in various locations on the Vacant Lot do not qualify as a structure. The Zoning Administrator has determined several times what qualifies as a structure, and a line of bricks is deviation from those determinations.

i. A line of bricks is not a structure

The Determination, in finding that the foundation walls still exist, relied upon pictures showing a line of nine inch bricks, below grade, at various sections on the Vacant Lot, and a boundary survey indicating that there was an existing nine inch foundation wall at the Vacant Lot. Section 2001.9 applies to structures, not a line of bricks. There is nothing in the record to indicate that the few sections of laid brick qualify under zoning as a structure. Moreover, there is no evidence in the record that indicates that the nine inch wide line of bricks had footers which would confirm the status of the bricks as being part of a foundation wall. Lastly, the record is absent any documentation that supports the notion that the nine inch, below grade, bricks could support a reconstructed dwelling. At best, from the supporting documentation submitted to the Zoning Administrator, the unearthed nine inch bricks represent a ruined foundation.

ii. A ruined foundation is not a nonconforming structure

Previous decisions issued by the Zoning Administrator support the argument that lines of brick on the Vacant Lot are not a structure. The Zoning Administrator has on numerous

⁴ Notwithstanding the restrictions of § 2001.4, a nonconforming structure that is a historic landmark or certified by the State Historic Preservation Officer to be a structure that contributes to the character of the historic district within which it is located, may be restored or reconstructed regardless of the extent of destruction of the structure, subject to the provisions of the Historic Landmark and Historic District Protection Act of 1978, effective March 3, 1979, D.C. Law 2-144, as amended; D.C. Official Code §§ 6-1101 to 6-1115 (2001)(formerly codified at D.C. Code §§ 5-1001 to 5-1015 (1994 Repl. & 1999 Supp.)), and all other municipal laws and regulations.

occasions defined what is and what is not a structure for zoning purposes. The Zoning Administrator's decisions have been consistent and strongly relied upon as to how much of a structure must be present to vest nonconformities or how high a building, patio or deck may stand to be deemed a structure. Several determination letters have declared that in order to protect or benefit from existing nonconformities, four feet of the perimeter wall of a building must be retained. The implication of these previous determination letters is that unless four feet of the perimeter wall exists, the structure has been razed and all nonconformities that were previously vested are thereby extinguished. For example, in a Zoning Determination letter from March 2013, the Zoning Administrator states clearly:

4) Retention of existing foundation- You asked how much of the existing foundation must be retained in order to protect any current nonconformities. It has been the practice of this Office to require that a minimum of four feet of the existing enclosing perimeter wall coming out of the ground be retained so as to not constitute a raze which would result in the loss of any "grandfathering" of existing nonconforming side or rear yards or lot occupancy conditions. See, March 19, 2013 Zoning Determination Letter, 1436 Chapin Street NW at **Exhibit E.**

In the present case, the structure at the Vacant Lot was effectively razed, and the vesting of nonconformities extinguished over a decade before the ten distinct homes along the north side of Park Road were landmarked and decades before the creation of Mount Pleasant Historic District. The decision to permit the "reconstruction" of a brand new structure at the Property, despite the lack of a perimeter wall, is a deviation from previous Zoning Administrator decisions.

B. 1865 Park Road is not a historic landmark or a contributing structure

In addition to being a nonconforming structure, §2001.9 requires that a structure ***be a historic landmark*** or certified by the State Historic Preservation Officer as being a structure ***that contributes to the character of the historic district*** within which it is located. The dwelling that previously improved the Vacant Lot was never landmark nor considered a contributing structure to the historic district because it was destroyed long before the landmarking of the north side of Park Road and long before the creation of the Mount Pleasant Historic District.

i. The Vacant Lot is not a landmark

In July 1978, "ten houses and their related outbuildings, including five original carriage houses" along the 1800 block of Park Road were found to contribute significantly to the cultural heritage and visual beauty and interest of the District of Columbia. The Nomination Form that was submitted to the National Park Service noted each homes architectural elements and

features. Though a nomination for historic designation can, and does include structures, sites and objects, the nomination for the north side of Park Road only included buildings. The Vacant Lot was not improved with a building at the time the north side of Park Road was landmarked. Consequently, it was not included in the Nomination Form. The address was not mentioned, the lot was not mentioned and the home that previously improved the lot was not described. The only reference to the Vacant Lot in the entire Nomination Form was a brief note that the dwelling that previously improved the lot was destroyed by a fire in the 1950s. Landmarking and historic designation are tools used to protect places of historical significance from demolition, alteration or subdivision without heightened review. Once a place has been demolished, the purpose for landmarking or granting historic designation becomes moot. Since 1865 Park Road was not landmarked, the first clause of §2001.9 is not applicable to the Vacant Lot.

ii. The Vacant Lot does not have a contributing structure

Pursuant to §2001.9, if a nonconforming structure is not a landmark it must be certified by the State Historic Preservation Officer (SHPO) to be a structure that contributes to the character of the historic district in order to be restored or reconstructed. A contributing building is “a building, structure, or site located within a historic district that adds to the district's sense of time and place and historical development.” 10C DCMR §9901. The dwelling that improved the Vacant Lot was destroyed *before* the creation of the historic district and the nine inch brick at the Property have never been certified by the SHPO to be a structure that contributes to the historic district. Therefore, the Vacant Lot does not satisfy this clause. Concluding that a structure that “would have been a contributing structure to the historic district”, as the Determination found, is improper as it adds a provision to the text that is not provided for. §2001.9 simply does not authorize the restoration or reconstruction of structures that would have contributed to a historic district.

Moreover, the lines of nine inch brick currently scattered about the Vacant Lot have never been deemed to contribute to the Mount Pleasant Historic District. At the time the Mount Pleasant Historic District was created in 1986, the home that previously improved the Vacant Lot had been lost for over 20 years. The Nomination Form for the Mount Pleasant noted that the neighborhood was “a distinct architectural entity” holding a “rich array of architectural forms representing every period of its development.” A line of nine inch brick below grade does not contribute to the “rich array of architectural forms” found in Mount Pleasant. Assuming, *arguendo*, that the lines of nine inch brick were visible on the Vacant Lot at the time Mount Pleasant was being designated as a historic district, an affirmative statement noting the importance of the lines of brick or remnants of the destroyed dwelling should have been noted in the Nomination Form. Absent an affirmative statement in the Nomination Form or an explicit decision from the Historic Preservation Review Board finding that the line of bricks contributes

to the Mount Pleasant Historic District, the Vacant Lot and the bricks that are scattered about it cannot be found to be a contributing structure to the Mount Pleasant Historic District.

Consequently, for all the reasons discussed above, there is no way to interpret the facts of this case such that the provisions of §2001.9 apply to the Vacant Lot. A reasonable interpretation of the plain reading of the section results in only one conclusion- the Vacant Lot fails to meet the criteria specified in §2001.9 that would permit a nonconforming structure to be restored or reconstructed on the Vacant Lot.

IV. EXHIBITS

Exhibit A: 1913 Baist Map

Exhibit B: Park Road Nomination Form

Exhibit C: Mount Pleasant Nomination Form

Exhibit D: Determination Letter

Exhibit E: 1436 Chapin Street NW Determination Letter

V. CONCLUSIONS

For the foregoing reasons, and for reasons that will be set forth in the Appellant's Pre-Hearing Statement and at the hearing in this appeal, the Appellant urges the Board to grant the appeal and reverse the zoning decision and the Determination it relies upon.

Respectfully submitted

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