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District of Columbia Board of Zoning Adjustment
441 Fourth Street, NW
Washington, DC 20001

By hand

Re: Appeal No. 16830 (Appeal of ANC 2A re 909 Hughes Mews, NW)

Dear Members of the Board:

Appellant Advisory Neighborhood Commission 2A submits the following response and additional exhibit.

By a prior submission, the ANC responded to the Board's question about the status of Queen Anne's Lane as an alley. In response to qu4stions at the hearing about whether a nearby dwelling could be restored or reconstructed if destroyed by a fire, the ANC's proposed findings demonstrate that the building could be reconstructed of destroyed under authorities cited in that text.

Thank you for your consideration of these matters.

Very truly yours,

Cornish F. Hitchcock

cc: Raouf M. Abdullah, Esq.
Paul A. Tummonds, Jr., Esq.

BZA
Case No. 16830
Exhibit No. 30

Board of Zoning Adjustment
District of Columbia
CASE NO.16830
EXHIBIT NO.30

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16830 of Advisory Neighborhood Commission 2A, pursuant to 11 DCMR §§ 3100 and 3101 from the administrative decision of the Zoning Administrator to issue Building Permit No. B439442 (October 17, 2001) to Farhad Nasseri to permit the construction of a new single-family dwelling located at 909 Hughes Mews, N.W. (Square 16, Lot 888), in the Foggy Bottom Overlay District ("FBOD") in a district that is zoned FBOD/R-3.

HEARING DATE: February 12, 2002
DECISION DATE: March 5, 2002

ORDER

PROCEDURAL HISTORY:

On August 22, 2001, Farhad Nasseri applied for a building permit to construct a new single family dwelling at 909 Hughes Mews, N.W. (the "subject property"), which is located behind the dwelling at 2513 I Street, N.W. The proposal contemplated demolition of a garage (a portion of which dates to 1925), which was sited on the northern half of Lot 888, along with the construction of the two and one-half-story dwelling where the garage stood. At the time the permit application was filed, Mr. Nasseri was acting as agent for Dr. Forest K. Harris, the then-owner of the subject property. In a pre-hearing filing with the Board in this appeal, Mr. Nasseri advised that he purchased the subject property on October 1, 2001. Under 11 DCMR § 3199.1, Mr. Nasseri (henceforth "the owner") is automatically a party to this appeal.

Because the subject property is in the Foggy Bottom Historic District, approval by the Historic Preservation Review Board ("HPRB") was required before the building permit could issue. In July 2001 the HPRB granted conceptual design approval of the proposed single-family structure and granted its staff authority to grant final approval of the application, which the staff did the next month. The ANC testified at that hearing and wrote several letters to the Department of Consumer and Regulatory Affairs ("DCRA") requesting a meeting before final action was taken on the permit application. The DCRA did not respond to those letters or meet with the ANC, but issued Building Permit No. B439442 on October 17, 2001.

On December 3, 2001 Advisory Neighborhood Commission 2A ("ANC 2A" or the "ANC") and Richard J. Price, an ANC Commissioner, filed the instant appeal, which alleges that issuance of the building permit resulted from an erroneous interpretation of the Zoning Regulations governing minimum lot area and alley lot abutments. In a nutshell, they contended that the new dwelling failed to satisfy the 2000 square foot minimum lot requirement for row dwellings in the FBOD/R-3 district and that the property did not meet the 30-foot abutment requirements applicable to structures in alleys such as Hughes Mews.

A hearing was held before the Board on February 12, 2002. Testimony was received from

the ANC (through Mr. Price), DCRA, Mr. Nasseri and his zoning expert, Gladys Hicks. As a preliminary matter, Mr. Nasseri objected to Mr. Price's standing as an appellant under the Zoning Regulations, on the grounds that Mr. Price does not live near the subject property, which is not in his Single Member District. The Board dismissed his objection as irrelevant under BZA rules.

FINDINGS OF FACT:

Based on the evidence of record, the Board finds as follows:

1. The subject property is located at 909 Hughes Mews, N.W. in an FBOD/R-3 district at Square 16, Lot 888.

2. The subject property is owned by Farhad Nasseri, who proposes to build a two and one-half-story single-family dwelling on the site. Prior to the permit application at issue here, the subject property was occupied by a garage.

3. Under 11 DCMR § 401.3, the minimum lot area requirement in an R-3 district for a one-family dwelling having no side yard is 2000 square feet. The total lot area for the subject property is 1486 square feet.

4. Under 11 DCMR § 2507.2, a one-family dwelling shall not be erected or constituted on an alley lot unless the alley lot abuts an alley that is at least 30 feet in width and that has from the alley access to a street through an alley or alleys not less than 30 feet in width.

5. Maps submitted by the ANC and the owner demonstrate that the subject property is located on an L-shaped alley that runs in front of and along the east side of the subject property. The alley in front of the subject property is of uneven width: That portion of the alley abutting the western front of the subject property is 30 feet wide, while that portion of the alley abutting the eastern half of the subject property is only 25 feet in width. In addition, the portion of the alley along the eastern side of the subject property is only 27.3 feet in width.

6. The alley lot on which the subject property is located has access to a street (26th Street, N.W.) through two connected alleys: Hughes Mews, which runs in a northerly direction from the subject property, and Queen Anne's Lane, which connects Hughes Mews to 26th Street on the west.

CONCLUSIONS OF LAW AND OPINION:

The Board of Zoning Adjustment has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code § 6-641.07(f) (2001). The ANC, as appellant, as the proponent in this matter, has the burden of proof pursuant to 11 DCMR § 3119.2. To reverse the Zoning Administrator's decision approving the issuance of a building permit, the ANC must show by a preponderance of the evidence that the building permit was issued in error because the proposed

building would violate the Zoning Regulations. For the reasons set forth below, and on the basis of the findings of fact set forth above, the Board concludes that the ANC has met its burden, that Building Permit No. B439442 was not properly issued, and that said Building Permit should therefore be vacated as violating the Zoning Regulations.

The ANC argues that the proposed dwelling would violate the Zoning Regulations with respect to minimum lot area and alley lot abutments. DCRA and the owner challenged those arguments. In addition, the owner placed great emphasis on the fact that the HPRB had granted conceptual approval of the proposal, an argument that is irrelevant to these proceedings, as the HPRB administers a separate statute and does not consider zoning issues; moreover, as the ANC testified, the HPRB declined to hear ANC testimony on zoning.

The Board has carefully weighed the competing arguments. The Board's conclusions with respect to each contention are set out below.

Minimum lot area.

The owner proposes to construct a row dwelling in an R-3 district. Under 11 DCMR § 401.3, the minimum lot area for such a dwelling must be 2000 square feet. Regulations creating the Foggy Bottom Overlay District, in which the subject property is located (11 DCMR §§ 1521-1524) does not affect this requirement.

It is undisputed that the proposed dwelling cover only 1486 square feet, which is the same dimension of the garage on that site. Thus, under the plain meaning of section 401.3, the new dwelling would be unlawful, and the ANC so argues.

DCRA and the owner counter that construction is nonetheless expressly authorized under 11 DCMR § 401.1, which reads in its entirety:

> Except as provided in chapter 20 through 25 of this title, in a case of a building located on May 12, 1958, on a lot area or width of lot, or both, less than is prescribed in §401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.

DCRA and the owner concede that the lot area is "less than is prescribed in §401.3." They argue nonetheless that the new dwelling should be viewed as a "new building" that will "replace" the garage previously on the site. Therefore, their argument goes, section 401.1 authorizes the replacement of a non-conforming garage with a non-conforming dwelling because the dwelling" complies with all other provisions of this title" *other than* the minimum lot requirement in section 401.3.

The ANC responds that when section 401.1 refers to "all other provisions of this title," the

reference is to "all" other provisions, including the minimum area requirements.

None of the parties has cited any decision in which this Board or the Zoning Commission has definitively construed these provisions of the Zoning Regulations in the present context. The issue thus appears to be one of first impression.

The Board concludes that the argument from DCRA and the owner may have virtue of simplicity, but fails adequately to deal with the special circumstances in this case.

As a textual matter, the ANC's reading is better than that of its opponents. Section 401.3 contains express language of exclusion at the beginning of the sentence ("except as provided in chapter 20 through 25"), which chapters deal with Planned Unit Developments and other uses that may be at odds with the default requirements elsewhere in the Zoning Regulations. The Zoning Regulations thus acknowledge one set of exceptions, yet DCRA and the owner ask the Board to read the "all other provisions of this title" language as creating yet another exception this one from the requirements of section 401.3. This is not the most natural reading of the language, and "all other" logically embraces section 401.3.

This interpretation is buttressed by the regulations that created the Foggy Bottom Overlay District, which the Zoning Regulations deem "a unique resource to the city which must be preserved and enhanced," especially in light of the "high density development pressures" in that neighborhood. 11 DCMR § 1521.1. Under 11 DCMR § 1523.1, buildings constructed before the creation of the Overlay District (April 17, 1992), as well as existing legitimate uses within those buildings, are deemed to be conforming. When as here, however, a property owner proposes the "replacement"of such a building by a new building, the Overlay District rules require "conformance with the requirements of the underlying R-3 District." 11 DCMR § 1523.1.[1]

The bedrock principle in both the default zoning regulations and the Overlay Districts is thus full compliance with the requirements of the underlying R-3 District, including the minimum lot area requirement at issue here. As section 1523.1 put it, the "requirements of the underlying R-3 District" include the 2000 square foot minimum lot area that the owner has failed to satisfy here. This requirement is especially important here, since the case at hand deals with a very constrained alley system surrounding the lot in question.

The Board notes that this interpretation leaves property owners with some measure of flexibility to deal with unforeseen situations. During the hearing, the Board asked the ANC whether its interpretation would permit the replacement of a non-conforming building in Hughes

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[1] We note that this provision does permit a "change in use" of an existing structures to "to a more conforming residential use other than a dormitory." 15 DCMR § 1523.1. Here, of course we do not deal with a mere change of use from a garage to a private home, but the "replacement" of an existing structure with a new building.

Mews that had been destroyed by fire, citing the nearby house on Lot 853 as an example. There is a general prohibition in 11 DCMR § 2001.4 against the restoration or reconstruction of a non-conforming structure that is more than 75% destroyed by fire, collapse, explosion or act of God. There is an exception however, in section 2001.9 that allows the restoration or reconstruction of a non-conforming structure that contributes to the historic district (such as the building on Lot 853) "regardless of the extent of destruction, of the structure, subject to the provisions of the Historic Landmark and Historic District Protection Act and all other municipal laws and regulations." Restoration or reconstruction of any building destroyed in the Foggy Bottom Overlay District (even if they are not contributing buildings) is authorized by section 1523.2, which allows the reconstruction or restoration to its previous condition of a conforming building that is destroyed by fire, collapse, explosion or act of God.

We thus conclude that the ANC's arguments must prevail and that the interpretation advanced by DCRA and the owner is fatally flawed and cannot be accepted.

Alley lot abutment.

Because the new construction will take place in an alley, the requirements applicable to alleys are germane here. The ANC argued, and the Board agrees, that the new dwelling runs afoul of 11 DCMR § 2507.2, which states:

> A one-family dwelling shall not be erected or constituted on an alley lot unless the alley lot abuts an alley thirty feet (30 ft.) or more in width and has from the alley access to a street through an alley or alleys not less than thirty feet (30 ft.) in width.

It is important to note that there are two requirements, both of which must be met, given that the regulation is written in the conjunctive.

First, the alley lot must "abut[ ] an alley thirty feet (30 ft.) or more in width." Second the alley lot must provide "from the alley access to a street through an alley or alleys not less than 30 feet (30 ft.) in width. The owner has satisfied neither requirement here.

The surveyor's plat map (ANC Ex. 1) is relevant here. It shows that Lot 888 sits at the southern end of Hughes Court, a complex alley system encircling the subject site. The alley width to the north of and in front of Lot 888 (the side where the proposed new building would face the alley) is not uniformly even. The western half of the frontage of Lot 888 does satisfy the 30-foot width requirement is met. The same cannot be said as to the eastern half of the frontage of Lot 888. As Ex. 1 states, the eastern half of the frontage of Lot 888 is only 24.96 feet wide, and thus the 30-foot width requirement is not satisfied on the north side of Lot 888.

Nor is the 30-foot width requirement satisfied on the eastern side of the property either, given that the width there on that side, which faces the small historic row houses in that alley, is

27.3 feet wide. These dimensions are plainly less than the 30 feet that § 2507.2 requires. Section 2507.2 is therefore not satisfied, as "the alley lot [does not] abut[ ] an alley thirty feet (30 ft.) or more in width."

The Zoning Administrator might have been warranted in his decision if § 2507.2 had been written to require that "the alley lot abuts an alley *twenty-four feet (24 ft.)* or more in width," or that "the alley lot abuts an alley that is *at least in part* thirty feet (30 ft.) or more in width." But the regulation contains neither formulation. It requires that a row dwelling must abut an alley that is "thirty feet (30 ft.) *or more* in width" (emphasis added). Thirty feet is plainly the bare minimum acceptable, and one would have to torture the language of § 2507.2 beyond recognition to permit the new construction that the Zoning Administrator allowed here.

The owner argues for a different result, relying on a seeming inconsistency between this map and a separate surveyor's map (Owner's Ex. A), which shows in the upper left portion of the drawing, in an area marked "public alley," a legend that says "30'." A cursory examination this Exhibit might suggest that the alley portion in front of Lot 888 is 30 feet wide at all points and that section 2507.2 is therefore satisfied. That conclusion is not warranted for two reasons.

First, Owner's Ex. A contains a horizontal line across the top of the drawing, which line might superficially suggest the existence of a uniform horizontal boundary on the north side of the alley at least 30 feet in width. An examination of ANC Ex. 1 – as well as the comparable map that the owner included as part of its Ex. C – demonstrates that this is not so. The northern boundary of the alley that fronts on the subject property is, in fact L-shaped, with the eastern half only 25 feet wide and the western half at least 30 feet wide, as depicted on ANC Ex. 1.

We note in this regard that the HPRB agrees on this point. Its memorandum relating to this case, which the owner attached as Ex. C, states unequivocally that "the lot [Lot 888] is as close as 25 feet to the alley dwellings" on the north side of the alley. The Board fails to see how the owner can deny this fact when it is, in fact, pressing the HPRB analysis upon this Board.

Second, it is possible to harmonize Owner's Ex. A with ANC Ex. 1 if one reads the "30'" legend as referring to the alley at the portion of the alley where the 30' legend is written in, i.e., to the west of Lot 888. The ANC does not dispute, as Ex. 1 makes clear, that the portion of the alley abutting the western portion of Lot 888 is at least 30 feet wide. That is not the point. Under section 2507.2, an alley lot must abut an alley that is at least 30 feet wide at all points, not just in part. Here, a portion of the alley in front of the eastern part of Lot 888 is only 24.96 feet wide, and a portion of the alley on the eastern side is only 27.25 feet wide. Thus, the building permit fails to satisfy the alley width requirement as well.

The Board believes that compliance with the 30-foot width requirement is important, given the creation of the special Overlay District in this neighborhood as a way of protecting the residential character here, including the preservation of "alleyways that provide the only access to historic alley buildings, and to protect light, air, and the privacy that they provide." 11 DCMR §

1523.1(d).

At the hearing the question arose as to whether an additional element in section 2507.2 had been satisfied, namely, the requirement that a one-family dwelling in any alley have access to a street through an alley or alleys not less than 30 feet in width. Following the hearing, the ANC submitted evidence from the Department of Public Works that established the status of Queen Anne's Lane, which connects Hughes Court to 26th Street, NW, as an "alley." The Zoning Administrator, responding to the Board's request to submit an official document establishing the width of Queen Anne's Court, filed a surveyor's plat demonstrating that this alley is 30 feet wide, thus satisfying the additional element in section 2507.2.

CONCLUSION:

This appeal concerns the proposed construction of a dwelling in place of a garage in the FBOD/R-3 district. For the reasons stated above, the Board concludes that the Appellant has carried its burden of showing, by a preponderance of the evidence, that the building permit for the proposed new dwelling was issued in error, and the appeal of Advisory Neighborhood Commission 2A is hereby granted. The Zoning Administrator is directed promptly to take such steps as may be necessary to withdraw Building Permit No. B439442.

VOTE:

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director

Final Date of Order: _____

UNDER 11 DCMR SECTION 3125.9, "NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6" OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT RULES OF PRACTICE AND PROCEDURE UPON ITS FILING WIN THE RECORD AND SERVICE UPON THE PARTIES.