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February 17, 2004

Mr. Geoffrey Griffis, Chair
Board of Zoning Adjustment
441 4th St, NW
Suite 210 South
Washington, DC 20001

RE: Appeal No. 17054

Dear Mr. Griffis and Members of the Board:

On behalf of the Appellants, I have enclosed a response to the post-hearing submissions by the Appellee, the Intervenor and Mr. Armando Lourenco.

Sincerely,

Steven S. Wolf, M.D.

BZA
Case No. 17054
Exhibit No. 52

Board of Zoning Adjustment
District of Columbia
CASE NO. 17054
EXHIBIT NO. 52

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF HENRY SAILER, *et al.* **BZA APPEAL NO. 17054**

APPELLANTS' RESPONSE TO POST-HEARING SUBMISSIONS BY APPELLEE, INTERVENOR AND MR. ARMANDO LOURENCO

In Appellee's February 10, 2004 response to the Board's request for a post-hearing submission on the meaning of "pervious" and a response to the Declaration by Mr. Edgar Nunley, Appellee correctly quotes the Zoning Regulations definition of "impervious surface" as follows:

"**Impervious Surface** – an area that impedes the percolation of water into the subsoil and impedes plant growth. Impervious surfaces include the footprints of principal and accessory buildings, footprints of patios, driveways, other paved areas, tennis courts, and swimming pools, and any path or walkway that is covered by impervious material." 11 DCMR § 199.1.

In item 6 of his response, Appellee asserts that, although the Zoning Regulations definition of an impervious surface includes driveways as an example, the definition is referring only to impervious driveways. On the contrary, the definition clearly places driveways squarely in the same unconditional category of structures which are always to be considered impervious, such as buildings, other paved areas and swimming pools. It does not delimit the definition to "some driveways." The same definition provides a contrasting example of a surface that is impervious only when specified as such ("...any path or walkway that is covered by impervious material."). The Zoning Regulations clearly do not entertain the concept of a "pervious driveway," nor is this concept entertained elsewhere in the Zoning Regulations or in a search of 40 years of decisions by the Board and the Zoning Commission, with one unusual exception which further proves the rule[1].

Intervenor, in their February 10, 2004 post-hearing submission to the Board, are correct that Appellants reviewed a large number of BZA Orders (the entire database available on the Office of Zoning Website was searched) and indeed found that every Order relating to driveways, whether

[1] ZC Order No. 921: Commission concluded that an applicant's plan to use pervious materials for a driveway was an important concession to mitigate danger to an historic tree. Search of all BZA and Zoning Commission orders from 1960 – 2003 on the DC Office of Zoning Website was conducted using terms "accessory," "parking," "impervious," "pervious," and "driveway."

serving principal use or accessory parking lots or parking spaces, stipulated that the surface of these driveways must be impervious, with the one important exception noted above. The Intervenor's comment that they could not find any instance in which the Board required "extra parking spaces serving a single family home in a residential zone district to be impervious" is irrelevant, since the Zoning Regulations do not distinguish surface requirements for residential parking from other types of parking and further begs the question since all driveways are impervious per definition of the Zoning Regulations (199.1). In contrast to the Intervenor's statement that at the hearing on February 3, 2004, Appellants cited only one case, BZA Order No. 11956, in support of their argument, it should be noted that Appellants cited the case record of the Board since 1960 as illustrative of the fact that accessory parking and driveways (immaterial whether parking lots, parking spaces, commercial or residential) have always been treated as requiring impervious surfaces. BZA Order No. 11956 was in fact cited by Appellants at the request of the Board, in response to a query from the Board whether Appellants were aware of any cases in which a request for a variance or special exception for a pervious driveway or parking space was ever tendered. The particular case cited, while not germaine to the issues under dispute in the present case, was the only case even remotely related to the question posed to the Appellants by the Board. It is, however, fully worth noting that the supplicant in that case recognized that a request for a variance "to permit a brownstone surface instead of an all-weather impervious surface" for accessory parking was rightly the province of the Board . In other words, the request for a variance was appropriately before the Board, not before the DCRA, specifically because the Zoning Regulations do not provide for pervious parking and access.

In items 7 and 8, Appellee asserts that the requirement for impervious driveways (as set forth in § 2117.4) only applies to "required" parking (as defined in § 2101.1) and does not preclude a property owner from having a pervious driveway serving additional non-required parking spaces. Again, this statement contradicts the definition in the Zoning Regulations (199.1) that categorizes driveways under the heading of impervious surfaces and makes no allowance for pervious driveways. Even allowing for this unusual interpretation of the Regulations that permits unspecified "pervious driveways," the driveway in question leads to an accessory building of well over 600 ft^2 gross floor area and cellar area, serving a mixed use as a private garage (which must have parking for at least one motor vehicle), studio and domestics quarters, and therefore falls under the Schedule of Requirements for Parking Spaces, under the heading of "All Other Uses" (§ 2101.1). Such a building must have at least one required parking space, and requires access via an impervious driveway – even by Appellee's own definition of "required" parking.

In item 9, Appellee offers an opinion as to what constitutes proper surfacing for a "pervious driveway." This opinion is irrelevant: since the Regulations do not entertain the concept of a "pervious driveway," there are no guidelines or stipulations for pervious surfacing materials. Using Appellee's interpretation of the Regulations, a property owner could use whatever "pervious" surfacing material they choose for an accessory driveway to non-required parking spaces, however unstable or impractical, since pervious driveways are not addressed in the Regulations. Likewise, this novel interpretation of the regulations which draws a distinction between "required" parking and additional parking regarding access requirements, and which is endorsed also by Intervenor and Mr. Laurenco, leads to the inescapable conclusion that accessory driveways, by virtue of not being "required" by § 2101.1, need not comply as well with other access requirements for grade or width specified in § 2117.8, since such driveways are not "required driveways." Hence, any additional driveways built beyond the minimum requirements could be built of any pervious material, could be steeper than the maximum grade of 12%, and narrower than the required width of 7 feet. The fully untenable nature of Appellee's position, which is apparently also the position of Intervenor and of Mr. Laurenco, is made clear not only by the inclusion of driveways under the definition of "impervious surfaces", but by the Rules of Interpretation governing off-street parking (§2118.9), which address the subject of accessory parking as follows: "The [parking] requirements shall also apply to both accessory parking spaces and parking spaces that are constructed as a principal use unless otherwise specified." The intent of this rule of interpretation is made even more clear by 2101.2: "Nothing contained in this section shall be construed to prohibit the establishment of accessory parking spaces in an amount that exceeds that required by § 2101.1; provided, that each case complies with all other applicable provisions of this chapter and chapter 23." The unequivocal intent of these regulations is to permit additional parking spaces and driveway access beyond the minimum requirement, but at the same time to ensure that such parking spaces and driveways built in excess of the minimum requirements follow the same standards for access. These regulations anticipate the alternative absence of standards proposed by the Appellee, Intervenor and Mr. Laurenco.

In response to Appellee's assertion (item 10) that, "it is irrelevant whether or not Mr. Nunley was aware of, or approved, a pervious driveway during his tenure as Chief of the Zoning Division," it should be noted that Appellee responded to only the first half of Mr. Nunley's statement. His full statement was, "[i]n all of my seventeen years as Chief of the Zoning Review Branch of the DCRA, I never have seen a permit issued for a 'pervious' surface driveway, particularly as no such provision

exists within the zoning regulations for a 'pervious' surface driveway." As can be seen from Mr. Nunley's full statement, it was for good reason, and in fact highly relevant, that he had never seen a permit for a "pervious driveway" in 17 years. In contrast to the Intervenor's assertion that Mr. Nunley "failed to cite any Zoning Regulations that contradicts the decision of the Department of Consumer and Regulatory Affairs," Mr. Nunley made very clear that no provisions exist within the zoning regulations that would allow DCRA to make such a decision. In other words, Appellee has revised the prevailing and longstanding interpretation of the Zoning Regulations, and would now act upon an area of zoning which has heretofore been the province of the Board or Zoning Commission. As previously mentioned, the latter bodies have consistently stipulated that accessory parking and driveways must be impervious. There is no separate set of regulations distinguishing pervious driveways for private residences.

Despite the fact that driveways are clearly subsumed by the Zoning Regulations under the category of impervious surfaces (Definition of "Impervious Surface," §199.1), Appellee, Intervenor and Mr. Laurenco state without citation from the regulations that impervious surfaces are unnecessary for select driveways, i.e., those subserving accessory, or non-required, parking spaces. Appellee, Intervenor and Mr. Laurenco have further proposed in their post-hearing submissions to the Board that a private garage (which must have a parking space by definition, §199.1), and a parking space (which must by definition be accessible, §199.1), may yet have no vehicular access at all – or may be accessed via driveways that meet no regulatory standards.

Respectfully submitted,

Steven S. Wolf M.D 2/17/04

On behalf of the Appellants: Steven S. Wolf, M.D [2]
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[2] Address all future correspondence to Dr. Wolf

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing was sent by first class mail this 17th day of February, 2004 to:

Laura Gisolfi Gilbert, Esq.
Office of Compliance
Department of Consumer and Regulatory Affairs
941 N. Capitol St, N.E. Suite 9400
Washington, DC 20002

John T. Epting
ShawPittman, LLP
2300 N St., NW
Washington, DC 20037-1128

Steven S. Wolf, M.D.

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By Facsimile

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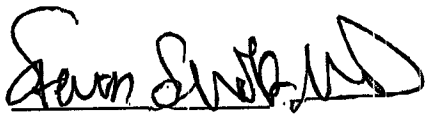
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To:	Mr. Rick Nero	**From:**	Steve Wolf, MD
Fax:	727-6072	**Pages:**	7 with cover page
Phone:		**Date:**	2/17/2004
Re:		**CC:**	

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