20 of 4

STEVEN S. WOLF, M.D.

HAND DELIVERED

February 24, 2004

Mr. Geoffrey Griffis, Chair
Board of Zoning Adjustment
441 4th St., N.W.
Suite 210 South
Washington, D.C. 20001

RE: Appeal No. 17054

Dear Mr. Griffis and Members of the Board:

On behalf of the Appellants, I enclose a proposed Findings of Fact and Conclusions of Law. It is our understanding that this must be submitted to the Board by February 24, 2004.

Sincerely,

Steven S. Wolf, M.D.

BZA
Case No. 17054
Exhibit No. 53

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17054
EXHIBIT NO. 53

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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

PROPOSED FINDINGS OF FACT

1. The subject property is located at 3101 Chain Bridge Road, N.W. (Square 1427, Lot 870) in the Kent section of Ward 3. The property has a record lot area of 15,654 square feet. The property directly abuts and overlooks Battery Kemble Park, an historic, steeply sloped and forested tract of land under the domain of the National Park Service.

2. The property is zoned CB/UT/R-1-A. The purposes of the Chain Bridge Road/University Terrace (CB/UT) Overlay District are to: (a) Preserve the natural topography and mature trees to the maximum extent feasible in a residential neighborhood; (b) Prevent significant adverse impact on adjacent open space, parkland, streambeds, or other environmentally sensitive natural areas; (c) Limit permitted ground coverage of new and expanded buildings and other construction, so as to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood; and (d) Limit the minimum size of lots to prevent significant adverse impact on existing infrastructure, especially on traffic and pedestrian safety. 11 DCMR § 1565.2.

3. The CB/UT zoning requirements apply in combination with the requirements of the R-1-A District. 11 DCMR § 1566.1. Where there is a conflict between CB/UT and the underlying zoning, the more restrictive provisions of the Title govern. 11 DCMR § 1566.2.

4. The following definitions and zoning requirements from 11 DCMR are applicable to the subject property and pertinent to the Appeal:

(a) "**Artist studio** - a place of work of one or more persons who are engaged actively, and either gainfully or as a vocation in the following: (a) The fine arts, including but not limited to, painting, printmaking, or sculpturing; (b) The performing and visual arts, including but not limited to, dance, choreography, photography, or filmmaking; (c) Ceramics; or (d) The composition of music." 11 DCMR §199.1.

(b) "**Building, accessory** - a subordinate building located on the same lot as the main building, the use of which is incidental to the use of the main building." 11 DCMR §199.1.

(c) "**Garage, private** - a building or other structure, or part of a building or structure, not exceeding nine hundred square feet (900 ft.2) in area, used for the parking of one (1) or more motor vehicles and having no repair or service facilities." 11 DCMR §199.1. An artist's studio is a permitted use in a private garage that is an accessory building. 11 DCMR §2300.3. In R-l-A District, an accessory private garage may also have a

second story used for domestic employees of the family occupying the main building. 11 DCMR §2500.5.

(d) "**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.

(e) "**Parking space** - an off-street area accessible and of appropriate dimensions to be used exclusively for the temporary parking of a motor vehicle." 11 DCMR §199.1.

(f) The principal building and any accessory building on the lot cannot exceed total lot occupancy of thirty percent (30%). 11 DCMR § 1567.1.

(g) The maximum impervious surface coverage on a lot cannot exceed fifty percent (50%). 11 DCMR § 1567.2.

(h) All buildings or structures must be provided with parking spaces as specified in the Schedule of Requirements for Parking Spaces. For uses other than those specifically classified in the Schedule ("All Other Uses"), one parking space is required for each 600 square feet of gross floor area and cellar floor area. 11 DCMR § 2101.1.

(i) Nothing contained in §2101.1 prohibits the establishment of accessory parking spaces in an amount that exceeds the minimum requirement, or prohibits the establishment of parking spaces accessory to buildings or structures for which no required parking spaces are specified in § 2101.1, provided that each case complies with all other applicable provisions of chapter 21 (Off-Street Parking Requirements) and chapter 23 (Garages, Carports, etc.). §§ 2101.2 and 2101.3.

(j) Each required parking space must be accessible at all times via graded and unobstructed private driveways that form an all-weather impervious surface. 11 DCMR § 2117.4.

(k) A driveway providing access to required parking spaces must meet certain standards, including that a driveway serving only one parking space must be at least 7 feet wide, and a driveway serving more than one parking space must be at least 12 feet wide if designed for one-way circulation or 14 feet wide for two-way circulation. 11 DCMR §§ 2117.8 (b) and 2117.8 (c)(2).

(l) The rules of interpretation in chapter 21 dictate that the parking requirements shall apply to both accessory parking spaces and parking spaces that are constructed as a principal use unless otherwise specified. 11 DCMR § 2118.9.

5. The original building plat submitted for permit showed a new single family home and an accessory building designated as a "New 2 Story Accessory Building Garage/Studio." The construction documents showed that the accessory building overlooked a swimming pool and had three sets of french doors opening onto the pool. The plat did not show a driveway leading to the accessory building although it was designated a garage. The accessory building was therefore inaccessible to motor vehicles. Building Permit No. B448548 was issued on January 29, 2003.

6. Construction of the accessory building on the property began on or around May of 2003.

7. In May 2003, in a series of written, email and telephone correspondences with DCRA and the Intervenor, the Appellants raised objections to the planned accessory building, noting that it was not allowed to be 2 stories in height because it was not a garage and could not be used as such since it had no vehicular access, as per the definitions noted in 4(c) and 4(e) above.

8. In a meeting attended by the Intervenor and two of the Appellants on May 21, 2003, the Intervenor acknowledged that the accessory building was not a garage but that he would, if necessary, modify the plan to show a driveway in order to nominally call the structure a garage.

9. In response to the Appellants concerns, DCRA advised the Intervenor that he would need to revise his plans to show driveway access to the garage. The Intervenor submitted a revised building plat showing a new "pervious drive to lower drive court" and a "pervious lower drive court." This revised plan was approved with Building Permit No. 452193, issued June 13, 2003.

10. Plans submitted by the Intervenor, both for the original and the revised building permit, show a total building occupancy of the site of 30% and a total impervious coverage of the site of 50%, which are the maximum allowed for each, respectively.

11. The Appeal challenges the revised Building Permit No. 452193 for creating a new violation by adding a "pervious driveway" which does not conform to the Zoning Regulations governing driveway surfaces. The Appeal further asserts that to replace said "pervious driveway" with an impervious driveway, as required, leads immediately to a violation of the 50% cap on impervious surface coverage of the property, since the Intervenor has already reached that cap.

12. The Advisory Neighborhood Commission 3D provided a unanimous resolution to the Board concluding that the Appellants had made a convincing case that either the zoning code and/or the Chain Bridge Road/University Terrace Overlay had been violated by the Zoning Administrator in issuing the building permits. The resolution urged the Board, should they concur with the violations, to severely reprimand the office of the Zoning Administrator and to take punitive action against the Intervenor.

13. The ANC resolution was supplemented by written testimony from the ANC Commissioner for 3D-05, in which the subject property is located. Noting the "great weight" to which the ANC is entitled, the Commissioner asked the Board to use the purposes of the CBR/UT Overlay District, as set forth above, as a guide when making their decision. The Commissioner noted that the Zoning Regulations do not provide for "pervious driveways" and urged the Board to require the Intervenor to restore such areas to more suitable pervious coverage. The Commissioner further urged that the Intervenor be required to remove the second story from the accessory building because it did not have the required vehicular access for a garage and was not intended to be a garage, noting that the construction foreman had disclosed that the structure was a poolhouse.

PROPOSED CONCLUSIONS OF LAW

The Board finds that, in order for the Intervenor's accessory building to be two stories, the first floor must, by regulation, contain a private garage, as per the definition and regulations pertaining to "Garage, private" as noted in paragraph 4(c) above. The garage, by this definition, must have at least one parking space, and parking spaces must be accessible to motor vehicles, as per the definition of a "parking space" in 4(e) above. Whether the parking space is a required parking space (as per § 2101.1) or an accessory parking space is immaterial to the definition of a parking space in the Zoning Regulations. Furthermore, accessibility to parking spaces is provided by driveways. The term "drive courts," as used by the Intervenor, is not recognized in the Zoning Regulations but is nonetheless synonymous with a driveway, or part of a driveway, if a vehicle must pass over it to access a parking space, as in the present case. Therefore, based solely on the definitions provided in the Zoning Regulations, the Board concludes that the accessory building must have a driveway for access to the parking space within the designated garage in the accessory building. Only with a driveway does the garage have the use and access requirements to be recognized as a garage by the Zoning Regulations, and only then can it have a second story to be used for domestic employees.

While the Intervenor acknowledged this deficiency in his plan by revising his permit to show a driveway to the garage, the revised permit showed a driveway that was designated "pervious." Again turning to the definitions presented in the Zoning Regulations (11 DCMR § 199.1), driveways are found under the definition of "Impervious Surfaces" as a prototypical example of an impervious surface. In other words, the Zoning Regulations subsume driveways under the category of surfaces and structures that are impervious. The definition of impervious surfaces in the Zoning Regulations does not contain the qualifier "some driveways." For purposes of clarification of the definitions, the Zoning Regulations further specify that "[w]ords in the singular number shall include the plural number, and words in the plural number shall include the singular number." 11 DCMR § 199.2 (b). Hence, the term "driveways" used in the definition of "impervious coverage" includes any particular instance of a driveway. Moreover, the definition of "impervious surface" in § 199.1 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." Although the Board recognizes that driveways may be pervious by regulation in some jurisdictions, and carry specific requirements in those jurisdictions, "pervious driveways" are not countenanced in 11 DCMR.

The Board also looks to the decisions of the DCRA and prior decisions of the Board of Zoning Adjustment for guidance in determining if there is a precedent for the Intervenor's revised permit. Mr. Edgar Nunley, the former Chief of Zoning Review for seventeen years at DCRA, averred in a statement submitted to the Board on behalf of the Appellants, that in his seventeen year tenure he had never seen a permit issued for a "pervious driveway" specifically because no provision existed within the the Zoning Regulations that would allow DCRA to approve such a driveway. His statement is fully compatible with a review of the Zoning Regulations and the definitions therein.

Approval or denial of a "pervious driveway" serving any type of parking space, whether required by § 2101.1 or accessory, is rightly a matter for the Board to decide, specifically because the Zoning Regulations do not provide for such driveway surfaces. A review of the entire computer database available on the Office of Zoning website, covering orders by the Board and the Zoning Commission from 1960 to present, reveals that approval of accessory parking or driveways always stipulated that the surface of these driveways must be impervious, with one notable exception which approved a plan to use pervious materials for a driveway as an important concession to mitigate danger to an historic tree (ZC Order No. 921). There were only two other requests specifically for pervious-surfaced driveways or parking spaces. In a request for a Special Exception at a residential property/doctor's office to allow a preexisting group of seven grass parking spaces to continue noncommercial use as accessory automobile parking spaces for several neighbors, the owner's patients, and occasional use by a local church, the Board's Order approving the Special Exception specified that the grass parking spaces would need to be made impervious: "All areas devoted to driveways, access lans, and parking areas shall be maintained with a paving of material forming an all-weather impervious surface." (BZA Order No. 13388). Another request for a variance for a pervious driveway to accessory parking (which was denied for more overriding concerns; BZA Order No. 11956), once again illustrates, as with all these cases, that such requests are appropriately the province of the Board, not the DCRA, to decide. Because the Zoning Regulations do not distinguish surface requirements for residential parking from other types of parking, it is immaterial that, as the Intervenor argues, they are unable to find any instance in which the Board required "extra parking spaces serving a single family home in a residential zone district to be impervious." Were such an instance to have been found, the same rules would apply. The Board therefore concludes that the precedent of the longstanding interpretation of the Zoning Regulations by both the DCRA and the Board lends further support to an interpretation of the regulations that does not countenance "pervious driveways" except as allowed by decision of the Board.

The Intervenor and Appellee argue 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 additional non-required parking spaces that are accessed by "pervious driveways." This position contradicts not only the definition in 11 DCMR of "impervious surfaces" that subsumes all driveways in the impervious category, and the precedent of interpretation of the regulations to the present time, but also contradicts the explicit standards set forth for required parking spaces when applied to the Intervenor's accessory building. The driveway proposed in the Intervenor's revised permit leads to an accessory building of well over 600 square feet gross floor area and cellar area, serving a combined use as a private garage, artist studio and domestics quarters, and therefore falls under the Schedule of Requirements for Parking Spaces, under the final heading of "All Other Uses" (§ 2101.1). Such a building must have at least one required parking space, and therefore requires access

via an impervious driveway even using the interpretation of the regulations proposed by the Intervenor and Appellee. In addition, by adding a second required parking space in the accessory building separate from the first space associated with the primary residence, the Intervenor is now required to meet the standards for driveway width specified in 4(k) above. Specifically, the main driveway shown on the revised Building Permit provides access to two parking spaces required under § 2101.1, and provides the only ingress and egress for both spaces; hence the main driveway must at all points be not less than 12 feet in width for one-way circulation and 14 feet in width for two-way circulation. § 2117.8 (c)(2). By the Intervenor's own measurements, the width of the side yard containing this driveway is only 11.3 feet wide, while the driveway itself is considerably narrower. The placement of the Intervenor's required parking space for the main building at the head of the main driveway, as depicted for the first time in Exhibit H of Intervenor's Statement in Opposition to the Appeal, dated January 22, 2004, does not modify the width requirement, and in fact raises additional concerns about violation of use and access requirements for the accessory parking beyond that point by virtue of superimposing a required parking space over a driveway and effectively blocking access. Therefore, the Board concludes that, even by this interpretation, the Intervenor must have an impervious driveway to the accessory building. Moreover, the Board finds that the main driveway is too narrow to meet the width requirements of § 2117.8 (c)(2) because it serves two required parking spaces.

If the Board was to reject the precedent of longstanding DCRA and Board interpretation of the regulations, and the proposition that all driveways must inherently be impervious by definition of "impervious surfaces" in the regulations, and was further to reject the classification of the Intervenor's parking space as required under § 2101.1, and instead accepted the proposition of the Intervenor and the Appellee that the parking space in the accessory building is extra and not required, then the rules governing accessory parking spaces must presumably be applied. These rules, which allow accessory parking spaces in excess of the minimum requirement, or parking spaces accessory to buildings for which no required parking spaces are specified, also dictate that each case must comply with all other applicable provisions for off-street parking and garages. §§ 2101.2, 2101.3. The Rules of Interpretation in the parking regulations further stipulate that the parking requirements apply to both accessory parking spaces and parking spaces that are constructed as a principal use unless otherwise specified. § 2118.9. The intent of these regulations, which is borne out by the precedent of longstanding and conventional interpretation of the regulations by DCRA and by the Board over many years, is clearly to allow property owners to have 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 requirement meet the same basic standards. These regulations anticipate the alternative interpretation, i.e. the absence of any standards governing access to accessory parking spaces which flows logically from the Intervenor and Appellee's interpretation of the regulations. Their unprecedented interpretation of the Zoning

Regulations stipulates that the access requirements governing parking spaces required by § 2101.1 do not apply to non-required or accessory parking, which leads to the inescapable conclusion that driveways to non-required parking spaces may be built of any pervious or impervious material whatsoever, can be of any grade beyond the 12% limit specified for required parking spaces, and may be narrower than the minimum width of 7 feet specified for required parking spaces, since the Intervenor and Appellee argue that non-required parking spaces are not covered by the regulations. The hazards implicit in this interpretation are obvious. The Board concludes that the Intervenor and Appellee have misinterpreted the regulations governing access to driveways, and specifically concludes that all driveways must be impervious barring a Special Exception from the Board.

In summary, the Board finds that the Zoning Adminstrator erred in issuing Intervenor's revised Building Permit. This Permit, while correcting the absence of driveway access to the garage, engendered a new violation by adding a "pervious driveway" which does not conform to the Zoning Regulations governing driveway surfaces. The alternative solution, to add an impervious driveway as required by regulation, leads immediately to a gross violation of the 50% cap on impervious surface coverage of the property, since the Intervenor already reached that cap before adding the impervious driveway. The Board finds that the only viable solution is for the Intervenor to remove the driveway to the accessory building altogether, as it cannot be made to conform in any manner with the Zoning Regulations. The Board therefore concludes that the Intervenor must restore the "pervious driveway" to more appropriate pervious coverage that is compatible with the principles of the CB/UT Overlay District. The Board also concludes that, in the absence of driveway access, the Intervenor must remove the second story from his accessory building since it can no longer be considered to be a garage. Finally, the Board concludes that these actions will eliminate the need for a second required parking space in the accessory building, which renders moot the violation of the main driveway width requirements proscribed by § 2117.8 (c)(2).

Respectfully submitted,

Veronica Steinsdl, Appellant, on behalf of Steven S. Wolf

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[1] Address all correspondence to Dr. Wolf

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent via first class mail this 24h day of February, 2004 to:

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