JORDAN & KEYS, LLP
ATTORNEYS AT LAW
SUITE 520
1400 SIXTEENTH STREET, N.W.
WASHINGTON, D. C. 20036-2217
(202) 483-8300
FACSIMILE (202) 328-6153

KATHLEEN A. CAREY+
RACHEL C. EVANS+
GEORGE R. KEYS, JR.+
O'NEIL S. KING+
+Also Admitted in Maryland

OF COUNSEL:
HAROLD E. JORDAN

June 21, 2005

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HAND-DELIVERED

Geoffrey Griffis, Chairman
District of Columbia Board of Zoning Adjustment
441 Fourth Street, N.W. - Room 210 South
Washington, D.C. 20001

Re: Board of Zoning Adjustment Application No. 17327 - 1812 35th Street, N.W. - Special Exception Under Section 223 of the Zoning Regulations

Dear Mr. Griffis:

This firm represents 1812 35th Street Associates, LLC, the applicant in the above-referenced special exception application (the "Applicant"). At the conclusion of the public hearing on June 7, 2005, the Board permitted the parties to file Proposed Findings of Fact and Conclusions of Law, and accordingly we enclose a draft on behalf of the Applicant for your consideration. The Applicant's witnesses observed that the record in this case is devoid of any photograph of the rear yard of Mrs. Stancioff, which seems an important element in the opposition based upon the hearing testimony. Enclosed for the Board's consideration are two photographs of her rear yard taken by Mr. Andres Dan from the subject property on June 10, 2005 in the early afternoon.

Respectfully submitted,

George R. Keys, Jr.
Counsel for the Applicant

Enclosures

cc: Andres Dan (w/o encl.)
Laurie B. Horvitz, Esq. (w/encl.)
Advisory Neighborhood Commission 2-E (w/encl.)
D.C. Office of Planning (w/encl.)

BZA
Case No. 17327
Exhibit No. 38

Board of Zoning Adjustment
District of Columbia
CASE NO. 17327
EXHIBIT NO. 38

APPLICANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
IN BOARD OF ZONING ADJUSTMENT APPLICATION NO. 17327
- 1812 35th Street Associates LLC

Application No. 17327 of 1812 35th Street Associates LLC pursuant to 11 DCMR § 3104.1 for special exceptions under 223.1 to allow an addition to an existing single family dwelling not meeting the lot occupancy and side yard requirements in an R-3 District at premises 1812 35th Street, N.W. (Square S-1296, Lot 27).

HEARING DATES: June 7, 2005
DECISION DATE: June 28, 2005

ZONING ADMINISTRATOR'S MEMORANDUM

By memorandum, dated March 2, 2005, the Zoning Review Branch certified the relief required under § 223.1 for a 3.75% variance in lot occupancy and the provision of only a 2.5 foot side yard.

PRELIMINARY MATTERS

Requests for Party Status. ANC 2E was automatically a party in this proceeding. The Board considered requests for party status from Richard Schmidt, Amy and David B. Monk, Robert Robelus and Deidre O. Stancioff. The Monks indicated on their party status application that they intended to sell their home on May 27, 2005, and did not appear at the hearing. Mr. Schmidt did not appear at the hearing, but Andres Dan, one of the Applicant's principals, explained that from recent conversation with Mr. Schmidt, he believed that Mr. Schmidt no longer opposed the construction of the addition to the house. The Board conferred party status on Mr. Robelus and Mrs. Stancioff as a single party to be represented by Laurie B. Horvitz, Esq. for the purposes of presenting their opposition and cross-examination.

PUBLIC HEARING. A public hearing on the application was held on June 7th at which time testimony and evidence were provided by the Applicant and its witnesses, by the Office of Planning and by the two party opponents and their witness.

SUMMARY OF TESTIMONY

1. Applicant's Case. The Applicant presented its case on the addition through the testimony of Andres Dan and Angel F. Clarens, an architect who consulted on the project.

(A) Andres Dan. The Applicant purchased the subject property in December 2003, after a fire which substantially destroyed the interior of the house. The existing dwelling, which had been vacant for at least one year, consisted of a small two-story dwelling with less than 1,000 square feet of floor area. The footprint of the dwelling was about 637 square feet, which meant that the partial second story was only a large room with a sloping front wall under the roof gable. The subject property is situated on a long, narrow 20-foot lot typical of the neighborhood and is under-built.

The Applicant testified that the subject property had some unusual features, which influenced the Applicant's plans for renovating the dwelling: (1) the dwelling was mostly one-story; (2) the front entrance was actually below the level of the sidewalk so that the dwelling presented a significantly lower profile than the adjoining structures; (3) the north wall of the building was situated on the property line for its entire 38-foot length with no windows; (4) the south side of the dwelling was only 2.75 feet from the property line; (5) the subject property had no alley access, its rear yard abutting a residential lot facing S Street.

The Applicant made plans to renovate and expand the existing dwelling with the intention to sell the subject property after its redevelopment. The Applicant engaged an architect who planned a matter-of-right addition complying with applicable zoning regulations: an addition of less than 40-foot height, a 53-foot rear yard and occupying no more than 40% of the lot. The original dwelling on the subject property was 17 feet in height and its first floor was set lower than the properties to either side. Noting that the dwelling to the north was 28-feet in height, and the dwelling to the south was 22-feet, the Applicant determined to erect a three-story dwelling that was consistent with development trends within the square and the immediate area. The Applicant presented photographs of the houses along 35th Street from R Street to Whitehaven Parkway showing the variety of housing styles and heights within the R-3 zoning district. The architect retained the front facade of the original dwelling and setback the three-story addition so as to alter the street scape as little as possible.

The Applicant filed its building plans with DCRA on August 12, 2004 and was issued a building permit on November 5, 2004. In October 2004, while the building permit application was in process, Faye Ogunneye informed the Applicant that the proposed addition could not be built as a matter-of-right because the side yard was non-conforming and the architect had failed to include the area of the side yard to the south of the dwelling into "building area", and had thereby exceeded the maximum lot occupancy by 77 square

feet, adding 3.17% to the lot occupancy figure. At the express suggestion of Ms. Ogunneye, the building plans were altered on October 21, 2004 to extend the proposed addition across the side yard in the form of a "trellis" improvement. As such, she deemed the subject property a "row dwelling", which eliminated the side yard nonconformity and raised the maximum lot occupancy to 60%. On that basis, the building permit was issued and the Applicant began its work.

The Applicant consulted with Mrs. Stancioff and Mr. Schmidt and displayed the plans of the proposed addition, both before and after the commencement of construction. Recognizing that the new structure would have additional shading effect on Mrs. Stancioff's property, in particular, the Applicant offered to install additional skylights in her dwelling at its own cost.

In late February 2005, the Applicant, its counsel and Mr. Clarens, its architectural consultant, met with Toye Bello, the then Zoning Administrator, and were told that in spite of its reliance on the issued building permit, that the Applicant should file for a special exception under § 223.1 in order to obtain authorization for an addition to a "semi-detached" dwelling. Mr. Bello explained that his office's interpretation of the building plans was being challenged and that, unless the Applicant did so promptly, DCRA would have to act to halt construction. The Applicant obtained the referral memorandum from DCRA on March 2, 2005, and filed the instant application on March 21, 2005, as soon as the necessary filing requirements were obtained.

By the time of learning of the need for a special exception, the exterior walls were all erected, framed-out and closed-in on three sides. Since that time, Mrs. Stancioff has withdrawn any cooperation with the construction and the Applicant managed only to complete the fire wall on the north side of the addition, the installation of siding (but not on the side facing Mrs. Stancioff), roofing, windows, doors and other safety features. The Applicant claims to have acted in good faith and has tried to accommodate its neighbors during construction, whenever possible.

(B) Angel F. Clarens. Mr. Clarens was admitted by the Board as an expert in architecture based on his professional experience and prior appearances before the Board. Mr. Clarens used the shadow studies prepared by the Applicant's architect to illustrate the impact of shadow produced by: (A) the original dwelling, (B) the present addition, (C) a row dwelling and (D) a hypothetical structure erected in conformity with the Zoning Regulations. He observed that the original dwelling, Mr. Schmidt's residence and the stockade fence between the subject property and

Mrs. Stancioff's dwelling all had a day-long shading effect on the rear yard and house to the north in the middle of winter, but little or no effect for the rest of the year. Mr. Clarens noted the worst case effect of the addition on Mrs. Stancioff's property which would occur in the middle of winter when the addition's shadow would affect a portion of the rear yard and the rear and side of the Stancioff dwelling. He contrasted this condition with the minimal effect of shadow in mid-summer. Even at the equinoxes, all but a small portion of the rear yard would receive afternoon sun.

Mr. Clarens maintained that the applicable standard of § 223.1 is whether the addition would "unduly affect" neighboring properties and that this standard could only be assessed in relation to what could have been built on the property as a matter-of-right. To demonstrate the potential of matter-of-right development on the subject property, Mr. Clarens utilized shadow studies of two hypothetical structures: one a row dwelling with a height of 40 feet and 60% lot occupancy; the other, a "detached" dwelling meeting all side yard, rear yard, height and lot occupancy restrictions in the R-3 zoning district. In both instances, the resultant structures are larger than the addition and both cast significantly greater shadows to the north, not only during the worst-case mid-winter period, but also during equinoctal periods and during the summer months. Both hypothetical cases of permissive development on the subject property result in more serious effects on neighboring property. Mr. Clarens concluded from this comparison that the negative impact of the addition does not "unduly affect" Mrs. Stancioff, which is not to say that the addition has no effect, but only that the effect was minimal in relation to potential effects of alternate development of the subject property.

Mr. Clarens also felt that the design of the addition was within the range and variety of styles and building heights within the immediate area.

2. Government Reports.

Office of Planning. By written report, dated May 31, 2005, the Office of Planning (OP) recommended denial of the subject application on the grounds that it did not meet the standards of § 223.1 for two reasons: (1) the addition "may affect the utility of the rear yards" of neighboring dwellings to the north of the subject property, and (2) "the new front facade represents a significant intrusion upon the 35th Street front in terms of architectural character and scale." OP recommends that the Applicant consider stepping-down the height of the addition to one-

story for that portion extending beyond the original dwelling, pulling the front facade toward the street, using dormers and a sloped roof and requesting the elimination of the required parapet on the north wall.

The OP Report concluded that the addition did not seem out of place when viewed from the alley in the rear in relation to the facade of other dwellings. The OP report found that there were no undue privacy impacts on the properties to either side of the subject property.

On cross-examination, Arthur Jackson, who presented the OP Report indicated that he barely saw the yard of Mrs. Stancioff and did not know how she used this portion of her property. He did admit that the impact of shade on the yard was greatest in the late fall and winter months when one would expect less use to be made of the rear yard. Mr. Jackson admitted that the OP Report analyzed the special exception application as if the subject property was a "detached dwelling" under the Zoning Regulations, and as if it required additional relief for not meeting minimum lot size, for having two nonconforming side yards and for exceeding lot occupancy limits. By contrast, the Zoning Administrator came to different conclusions about the character of the original dwelling and found that the only nonconforming side yard was the yard to the south of the original dwelling which was only 2.5 feet from the lot line.

3. ANC 2E Report. On May 3, 2005, at a public meeting at which a quorum was present, ANC 2E passed a resolution opposing the special exception application for both the nonconforming side yard and the excess lot occupancy without stating the reasons. The resolution alleges improper permitting for the addition. The resolution notes the opposition of the adjoining neighbors, especially the concerns of Mrs. Stancioff "about the adverse impact of light and air affecting her property." No spokesperson or witness for ANC 2E appeared at the public hearing.

4. Parties and Persons in Opposition to the Application.

A. Mrs. Diedre Stancioff. Mrs. Stancioff lives at 1814 35th Street, N.W., immediately to the north of the subject property. She states that her home is affected by the loss of light sat the rear of the house where a bedroom is located and by the unaesthetic blank wall, 33-feet in height, now erected within four feet of her home. She indicated that she uses her garden at least two hours per day everyday, all throughout the year, and that the garden was a principal reason she purchased the property four years ago. The plants in her garden have been adversely affected by the shade cast by the addition on the subject property.

B. Mr. Robert Robelus. Mr. Robelus lives at 1816 35th Street, N.W., two houses to the north. Mr. Robelus has a deck in the rear yard and has observed that his view, which was formerly of trees and greenery, is now impacted by the addition to the subject property, which can be seen from the side of his house. Mr. Robelus has observed no change in the light affecting his property, possibly because his house is further removed from the subject property and separated from Mrs. Stancioff's lot by an intervening driveway. Mr. Robelus acknowledged that he was not able from his home to see the existing dwelling on the subject property.

C. Mr. Peter Stancioff. Mr. Stancioff, the brother-in-law of Mrs. Stancioff, whose testimony as an architect was admitted as expert testimony, commented on the architecture in the front facade of the addition which, in his opinion, was out of character with the neighborhood. Mr. Stancioff was familiar with the houses in the neighborhood.

FINDINGS OF FACT:

1. The subject property is located on the west side of the 1800-block of 35th Street, N.W. and is zoned R-3.

2. The subject property is a 2400 square foot, 20-foot wide lot improved by a partially completed three-story addition to a small dwelling.

3. The surrounding area is zoned R-3 and is developed primarily with single family semi-detached and row dwellings to the south, north and west of the subject property. To the east, across 35th Street is a three-story apartment house and the Filmore School, now used by the Corcoran Art Gallery. The lots along the west side of 35th Street are only 20-feet wide and the existing houses typically have one party line wall and a narrow, nonconforming side yard on the other side, like the subject property and the two adjacent properties.

4. The larger R-3 area along 35th Street, N.W. is characterized by a diversity of architectural styles. Photographs of houses which can be seen from the rear of the subject property suggest that the massing of the addition is not dissimilar to other properties in the immediate vicinity.

5. While there are as many aesthetic judgments as there will be observers, this Board cannot say that the addition is so out of character with its neighborhood and its constitutes an intrusion on the streetscape. While it is taller than adjacent properties, it is still significantly under the 40-foot height limit for the R-3

zoning district and the retention of the original building's entry and gabled facade minimizes the visual change at street level.

6. Without making a judgment concerning the propriety of the Zoning Administrator's actions in modifying the Applicant's plans, our previous decisions in a series of applications involving row houses and semi-detached dwellings (BZA App. Nos. 16935, 17007, 17085 and 16811) have attempted to define circumstances when a row dwelling can be said to exist. Without accepting every particular of Mr. Clarens' hypothetical examples, the Board is persuaded that a row dwelling of some configuration could be established on the subject property as a matter-of-right with as much bulk and massing as the addition and that adjacent owners would have no basis to object to such construction.

7. The opposition of the Office of Planning is based in major part upon the supposition of a loss of utility of the rear yards of properties to the north of the subject property, but the OP Report contains no evidence from which the Board can infer the nature, duration or extent of any such loss of utility. The Office of Planning did not enter the rear yard of Mrs. Stancioff nor did they ever interview Mrs. Stancioff. The only evidence offered by the Office of Planning are the shadow studies of the Applicant. The Board is not persuaded that the Office of Planning has offered anything probative for the Board's consideration of §223.1 standards.

8. The addition will clearly have adverse impacts on Mrs. Stancioff's property, but to the extent that Mrs. Stancioff and Mr. Schmidt have been located next to a dwelling substantially under-built both in comparison to the R-3 requirements and to the size of their own dwellings, they have enjoyed more light and air into their properties than they could reasonably expect.

9. The adverse effects on the rear yard are highly seasonal and the Board is persuaded by the Applicant's shadow studies that the period of heaviest shadow coincides with period when one could expect the least use of a rear yard, i.e. the coldest months from October to March.

10. Mr. Schmidt, who was one of the party-opponents of this application did not appear at the hearing nor has he made or appended any subsequent statement for the record. The Applicant's witnesses testified at the hearing that Mr. Schmidt's concerns about the construction of the addition were resolved. We note that Mr. Clarens and the Office of Planning were of the same opinion that the addition posed little adverse impact on Mr. Schmidt's property either through loss of privacy or light and air.

11. Mr. Robelus, the party-opponent residing to the north of Mrs. Stancioff, alleged adverse impacts of the addition on his property, yet he also stated that he had noticed no loss of light even though the addition has substantially been erected. Mr. Robelus' other claim that the addition caused the loss of a "green view" from his house cannot constitute an "adverse impact" which this Board can or should recognize in special exception or variance applications.

12. The Board is mindful that Gladden v. D.C. Board of Zoning Adjustment, 659 A.2d 249, 255 (D.C. App. 1995) instructs the Board that in the case of special exceptions, "[t]he Board's discretion is limited to a determination whether the exception sought meets the requirement of the regulation."

Decision. At its business meeting conducted on June 28, 2005, the Board voted as follows: ___-___ to grant the application for a special exception pursuant to §§ 223.1 and 3104.1 of the Zoning Regulations to permit an addition to the subject property which has a non-conforming side yard and exceeded the lot occupancy limits.

CONCLUSIONS OF LAW AND OPINION

The Board conclude that it has accorded ANC 2E the "great weight" to which it is entitled. The record reflects that ANC 2E opposed the application but failed in its resolution to propound any facts that related to a rational basis to oppose the addition other than to express the discontent of adjacent property owners. In the findings above, the Board has responded to the claims made by ANC 2E in opposition to this application.

For the reasons stated above, the Board concludes that the Applicant has satisfied the burden of proof with respect to the application for a special exception to erect an addition to an existing single family dwelling under §223.1 not meeting the lot occupancy and side yard requirements of the R-3 district. Accordingly, it is **ORDERED** that this special exception application to is **GRANTED;** provided that:

VOTE: __-__-__ (_____, to approve; _____,to oppose)

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

Each concurring Board member approved the issuance of this order.

FINAL DATE OF ORDER: July ___, 2005

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

THE APPLICANT SHALL COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, CODIFIED AS CHAPTER 25 IN TITLE 1, OF THE D.C. CODE. SEE D.C. CODE § 1-2531 (2001). THIS ORDER IS CONDITIONAL UPON FULL COMPLIANCE WITH THE HUMAN RIGHTS ACT. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.


06.10.2005 12:19