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VIA IZIS

May 6, 2016

Marnique Heath, Chairperson
Board of Zoning Adjustment
441 4th Street, NW
Suite 210S
Washington, DC 20001

**Re: Application No. 17535-A — 3254 O Street NW (Square 1230, Lots 125 and 825)
Applicant's Supplemental Submission**

Chairperson Heath and Honorable Members of the Board:

On behalf of Mary Goodman, please find enclosed the Supplemental Submission for the above-referenced application. At the conclusion of the hearing on April 5, 2016, the Board requested that the Applicant provide additional analysis regarding how the Applicant satisfies 11 DCMR § 202.10, specifically, the Board's ability to waive the detached dwelling requirement of § 202.10; additional analysis regarding the ability of other neighboring properties to add an accessory apartment to their property; and a shadow study. The Board set the case down for continued hearing on May 17th.

Thank you for your attention to this matter.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS, LLP



By: Meridith H. Moldenhauer

CC (via email): Jeff Jones, SMD 2E03
Stephen Mordfin, Office of Planning
Richard Murphy, Jr., ANC 2E Counsel

Board of Zoning Adjustment
District of Columbia
CASE NO.17535A
EXHIBIT NO.46

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

**APPLICATION OF
MARY GOODMAN
2E**

**3254 O STREET, NW
ANC**

SUPPLEMENTAL SUBMISSION OF THE APPLICANT

This Supplemental Submission is submitted on behalf of Mary Goodman (the “Applicant”), the owner of the property known as 3254 O Street NW (Square 1230, Lots 125 and 825) (the “Property”), in support of her application, pursuant to 11 DCMR § 3104.1, for special exception relief under § 223 of the Zoning Regulations to permit an addition to a one-family dwelling not meeting rear yard requirements (§ 404.1), and under § 202.10 to add an accessory apartment to an existing one-family dwelling (the “Project”).

I. DESCRIPTION OF THE PROPERTY AND THE PROJECT

The Property

The Applicant, Mary Goodman, is the owner of the Property, which consists of two lots comprising approximately 5,533 square feet of land area. The Property is improved with a detached single-family dwelling that occupies approximately 22% of the lot. The Property is also improved with a detached carriage house, which occupies approximately 19% of the lot. The Property is located in the Georgetown Historic District¹.

¹ The Applicant has elected to seek BZA approval for the Project before going to HPRB. As succinctly noted by the Zoning Commission, “. . . there are lots of parallel processes to the zoning process. HPRB review, street closings, things like that. Those are never taken into consideration and of course all of those things have to be taken care of before a project can be built.” Z.C. No. 14-11 Transcript, April 21, 2016 hearing, page 5, lines 7-12. Like any administrative agency, the Board must operate within the applicable statutory constraints in performing its assigned

The Project

The Applicant seeks to add an accessory apartment to her dwelling. She proposes to 1) construct a meaningful connection between the existing one-family dwelling and the existing accessory garage, resulting in a single principle structure; and 2) construct a second-story addition to the existing garage to be used as an accessory apartment (collectively, the “Project”). The Project will result in the elimination of the Property’s rear yard. Therefore, the Applicant seeks special exception relief under § 223 for rear yard relief, in addition to special exception relief under § 202.10 to add the accessory apartment.

II. COMMUNITY OUTREACH

The Applicant is happy to report that, despite the ANC’s assertion that there was widespread community opposition to the Project, the Applicant was able to obtain many letters of support following the initial hearing. The Applicant went door to door to explain the Project to her neighbors and of those she was able to speak with, the majority were very supportive. In total, the Applicant obtained 27 letters of support from neighbors within 0.1 miles of the Property. See **Tab A**, Letters of Support and Map.

III. SPECIAL EXCEPTION STANDARD OF REVIEW

Special exceptions are expressly provided for in the District of Columbia Zoning Regulations, and in considering applications for special exceptions, the Board must exercise its discretion consistently with the directives and guidelines found in the regulations. *Rose Lees Hardy Home & School Association v. District of Columbia Bd. of Zoning Adjustment*, 324 A.2d 701, 706 (D.C. 1974). Unlike a variance, relief granted through a special exception is presumed appropriate, reasonable, and compatible with other uses in the same zoning classification, provided the specific regulatory requirements for the requested relief are met. Moreover, the D.C Court of Appeals has found that, in reviewing an application for special exception relief, “[t]he Board’s discretion . . . is limited to a

task. See *D.C. Pres. League v. Dep’t of Consumer & Regulatory Affairs*, 646 A.2d 984, 990 (D.C. 1994). The Board should not withhold or delay its ruling pending HPRB review or pending action on the private alley.

determination of whether the exception sought meets the requirements of the regulation.” *First Baptist Church of Washington v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 695, 706 (D.C. 1981) (quoting *Stewart v. District of Columbia Bd. of Zoning Adjustment*, 305 A.2d 516, 518 (D.C. 1973)). If the applicant meets its burden, the Board must ordinarily grant the application. *Id.*

A. The Project satisfies section 3104.1

The Project satisfies the special exception provisions of § 3104.1, which requires that the Project be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and not tend to adversely affect the use of neighboring property.

The proposed accessory apartment is in harmony with the general purpose and intent of the Zoning Regulations and Maps for several reasons. First, the Property is located on a large lot with over 5,000 square feet of land area; the Property surpasses the minimum lot area requirement for adding an accessory apartment to a dwelling by 1,500 square feet of land area. Second, the proposed additions are behind the existing the house and will not be visible from the street frontage. Third, the Project has no impact on the residential appearance and character of the Property as viewed from O Street NW or the private alley. The view of the Property from O Street is not being altered. The Property will continue to have the appearance of a detached single-family dwelling from the street front. From the alley, the rear of the Property will match, in appearance and architectural style, other garage structures located along alleys in historic Georgetown.

As to the second prong, the Project will have no adverse effect on the “use of neighboring property.” The Property will continue to be used for residential purposes. Furthermore, the accessory apartment will be located at the rear of the Property, substantially setback from all neighboring homes. The closest residential dwelling, the adjacent property at 1317 33rd Street (the “Adjacent Dwelling”), will be over 24 feet away from the Project. The owner of the Adjacent Dwelling expressed concerns that the Project will have an adverse effect on the light and air available to her property. The Zoning Regulations outline the necessary setbacks that a property should provide in order to ensure adequate light and air.

The Adjacent Dwelling is setback a distance greater than 20 feet from the proposed addition, which is greater than the required rear yard setback for dwellings in the R-3. Moreover, the Adjacent Dwelling is an end-of-row dwelling and has access to light and air from the south as well.

It is important to note that, unlike many special exceptions that require that there be no undue impact on “light and air available to neighboring properties,”² § 3104.1 and § 202.10 do not enumerate that provision. However, pursuant to the Board’s request the Applicant prepared a shadow study. As the attached shadow study demonstrates, see **Tab B**, the Project will not have an undue impact on the light and air available to the Adjacent Dwelling. The shadow study shows that the difference between the shadow cast now and what would be cast with the Project is very limited in area and time of day. Thus, it is clear that the Project will not cause a substantial undue impact on the availability of light and air to the Adjacent Dwelling. Therefore, for all the reasons stated above, the Project satisfies the special exception requirements of § 3104.1.

B. The proposed project satisfies section 202.10

The Board requested that the Applicant elaborate on the Board’s authority to waive the detached requirement in § 202.10. The following outlines court rulings which the Board should apply to the statutory reading of the section.

“It is a basic rule of statutory construction that courts [and agencies] must follow the plain and ordinary meaning of a statute because that is the meaning intended by the legislature.” *Guerra v. District of Columbia Rental Housing Comm’n*, 501 A.2d 786, 789 (D.C. 1985) (citations omitted). Therefore, when interpreting a statute, we begin with “the words of the statute,” construing them “according to their ordinary sense and with the meaning commonly attributed to them.” *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979) (citation omitted); accord, e.g., *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (en banc); *Springer v. D.C. Dep’t of Empl. Servs.*, 743 A.2d 1213, 1219

² Several special exceptions contain a light and air provision. See 11 DCMR §§ 223, 336, and 337.

(D.C. 1999). The plain and ordinary meaning of the § 202.10 permits the waiver of the detached dwelling provision found in the introductory provision of § 202.10.

Section 202 of the Zoning Regulations specifies accessory uses permitted in the R-1 Zone District. Subsection 202.10 notes that accessory apartments are permitted as a special exception, subject to several requirements. Pursuant to § 202.10(i), the Board may modify or waive no more than two of the requirements “specified in paragraphs (a) through (h)” of § 202.10. The full text of § 202.10(i) states:

- (i) The Board may modify or waive not more than two (2) of the requirements specified in *paragraphs (a) through (h) of this subsection*; provided, that the following occurs:
 - (1) The owner-occupancy requirement of paragraph (f) shall not be waived;
 - (2) Any modification(s) approved shall not conflict with the intent of this section to maintain a single-family residential appearance and character in the R-1, R-2, and R-3 Districts; and
 - (3) Any request to modify more than two (2) of the requirements of *this subsection* shall be deemed a request for a use variance. (Emphasis added.)

The use of the distinct terms “paragraph” and “subsection” is important and cannot be ignored. Paragraph (i) unambiguously states that the Board may waive no more than two of the requirements specified in *paragraphs (a) through (h)*, and thus places a limitation on the number of requirements, specified within those paragraphs, that can be waived. Paragraph (i) does not restrict or ban the waiver of any requirements of the *subsection*, except for paragraph (f). Moreover, sub-paragraph (i)(3) unmistakably implies that the Board may waive or modify the requirements of *subsection 202.10*, not merely those explicitly identified in *paragraphs (a) through (h)*, when it notes that “any request to modify more than two (2) of the requirements of *this subsection* shall be deemed a request for a use variance.” (Emphasis added).

The plain reading of subsection 202.10 places only one limitation on the Board’s broad authority — paragraph (f) cannot be waived. All other requirements of the subsection may be waived, and the number of requirements waived determines whether the request falls under a special exception or a use variance. To find that the Board does not have the authority to waive the detached dwelling

provision of § 202.10 would run counter to the plain and ordinary meaning of § 202.10, and particularly to the plain meaning of the terms “paragraph” and “subsection.”

C. The Board has repeatedly found that it can waive the detached dwelling provision

The Board’s prior decisions to waive the detached dwelling requirement of § 202.10 are not arbitrary, an anomaly, or an aberration. In every instance in which relief from the detached dwelling provision was requested, the Board has consistently found that the detached dwelling provision of § 202.10 may be waived.³ Of all the § 202.10 cases found on the Office of Zoning’s website, the Board has waived the detached dwelling provision **20%** of the time. See, Previous 202.10 Cases Chart at **Tab C**. As the attached exhibit illustrates, the Board has waived the detached dwelling requirement in five cases, most recently for a row dwelling located in the R-3 Zone District. Importantly, the Board has always interpreted the waiver of the preamble as a singular requirement, not several separate requirements. The Board has had several opportunities to reconsider its interpretation of § 202.10 and, to the Applicant’s knowledge, the Board has never found that it does not have the authority to waive the detached dwelling provision. Of note, the Office of Planning (OP), whose guidance in interpreting the Zoning Regulations is invaluable due to its unique role in the drafting process, is supportive of this case. OP supports the Board’s prior and consistent of interpretation of § 202.10, the Board’s ability to waive the detached dwelling provision, the waiver of the preamble being one area of relief, and the relief requested in this case. Given all of the above, a finding that the Board cannot waive the detached dwelling provision would be a stark and sudden departure from the Board’s established interpretation of law.

³ The Board first considered a request for an accessory apartment in a semi-detached dwelling in *BZA Application No. 18232*, upon a referral from the Zoning Administrator. The fact that the Zoning Administrator sent the case to the Board for special exception relief implies that the Zoning Administrator also interpreted 202.10 to permit the waiver of the detached dwelling provision of the preamble. Notably, the Board affirmed this interpretation when it approved *BZA Application No. 18232*.

D. A sudden change in the Board's interpretation would be arbitrary and capricious

Consistency in the Board's interpretation of the Zoning Regulations is important to applicants and to members of the public because it fosters actual and perceived integrity of the judicial process. According to the Supreme Court, *stare decisis*⁴ "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (citation omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. *Id.* at 244. As a quasi-judicial body, the principles of *stare decisis* should not be casually ignored in Board decisions.

In addition to fostering actual and perceived integrity in the judicial process, consistent legal interpretation of law is necessary to avoid being arbitrary and capricious. A decision is arbitrary and capricious when it is not based on reason or evidence, or when there is an unaccountable change in reasoning. The D.C. Court of Appeals has found that an "[u]nexplained' inconsistency in an agency's interpretation of its governing statute can be 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Hensley v. D.C. Dep't of Empl. Servs.*, 49 A.3d 1195, 1203 (D.C. 2012) (internal citations omitted). In light of the Board's consistent prior interpretation of § 202.10, in several cases with varying fact patterns, we submit that the Board can and should waive the preamble.

IV. TRANSITION TO ZR 2016 LIMITS THE PERSASIVE VALUE OF THE BOARD'S DECISION IN THIS CASE

The ANC has consistently opposed the Project on principle. The ANC has argued that if the Board grants a waiver of the detached dwelling provision and approves this case, it will set bad precedent.⁵ To counter that proposition, the Applicant presented evidence to the Board noting that only a

⁴ *Stare decisis* is the doctrine of following prior case precedent.

⁵ The ANC's contention that the present case will "set bad precedent" is misplaced. Each application before the Board must rest on its own unique set of facts. While previous cases with similar factual patterns may have *persuasive* value in new applications before the Board, previous cases, in and of themselves, are not binding and do not, in and of themselves, establish precedent. The Board's consistent interpretation of the law and subsequent

few properties in the immediate vicinity would be able to apply for a special exception to add an accessory apartment to their premises at the initial hearing on April 5th. The Applicant noted that many of the properties in the area would need relief from three or more of the requirements of § 202.10, thereby tipping the special exception request for an accessory apartment into a use variance. In response to the ANC's concerns that this case could allow for a whole series of rental properties along the alley "up the street between 33rd and 34th," the Board requested additional analysis regarding which properties would be able to apply for an accessory apartment through § 202.10 in that location.

Due to the unique timing of this case, the Board's decision in this case will have limited persuasive value moving forward. The Office of Zoning is no longer accepting applications for special exception or variance relief applying the Zoning Regulations of 1958. The Applicant's case is the *last* case that will seek relief pursuant to § 202.10.⁶ No other properties in the District of Columbia will be able to apply for a special exception pursuant to § 202.10. Therefore, in addition to the reasons outlined above, any contention that this particular case will set bad precedent moving forward is misplaced, unwarranted, and moot. Under the Zoning Regulations of 2016, accessory apartments are permitted as a matter of right in all areas of the District, except Georgetown, where they are permitted as a special exception.

The 2016 Zoning Regulations regarding accessory apartments have changed. Consequently, the analysis concerning which additional properties would be eligible for an accessory apartment pursuant to § 202.10 is moot. Since the law, the standard and requirements have changed, the Board's analysis under the current zoning regulations will not impact future cases. Any accessory apartments applied for in Georgetown will not be able to reference this case because precedent is based on the Board's interpretation of the law and the law has been modified.

application of the law establishes precedent. At the initial hearing, the Applicant attempted to describe the *persuasive* value of prior cases by using the word "parallel" arguments. To be clear, prior cases with similar factual patterns are persuasive, not binding. Prior cases provide guidance and are instructive when reviewing new cases because the Board's interpretation of the law/regulations and application of the law/regulations should be consistent.

⁶ The Applicant confirmed with the Office of Zoning that no other applications seeking review under § 202.10 were filed prior to the May 1st cutoff date.

V. CONCLUSION

In response to the Board's questions, comments, and requests the Applicant has included with this Supplemental Submission the following documents and will be prepared to present additional testimony at the continued hearing on May 17th.

Tab A: Letters of Support and Map

Tab B: Shadow Study

Tab C: Previous 202.10 Cases Chart

Respectfully submitted,

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