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May 13, 2016

VIA IZIS

Marnique Heath, Chairperson  
Board of Zoning Adjustment  
441 4<sup>th</sup> Street, N.W., Suite 2105  
Washington, D.C. 20001

Re: Application No. 17535A – 3254 O Street, N.W.  
Response of ANC 2E

Chairperson Heath and Honorable Members of the Board:

On behalf of the Advisory Neighborhood Commission 2E, I have enclosed its Response to the Supplemental Submission filed by the Applicant on May 6, 2016. The hearing on the application is scheduled to continue on May 17, 2016.

Thank you for your attention to this matter.

Very truly yours,



Richard G. Murphy, Jr.

cc: Meridith H. Moldenhauer, Esq.  
Counsel for the Applicant (via email)

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

**APPLICATION OF  
MARY GOODMAN**

**APPLICATION NO. 17535A  
CONTINUED HEARING: MAY 17, 2016**

**RESPONSE OF ANC 2E**

Advisory Neighborhood Commission 2E (“ANC 2E”) submits the following response to the Supplemental Submission of the Applicant, Mary Goodman, (the “Submission”).

**I. INTRODUCTION**

The Applicant seeks a special exception that would permit her “to (1) *construct* a meaningful connection between the existing one-family [detached] dwelling and the existing accessory garage, *resulting in* a single principle (sic) structure; and (2) construct a second-story addition to the *existing* garage to be used as an accessory apartment.” Submission at 3. (emphasis supplied). Applicant correctly states that “...in considering application for special exceptions, the Board must exercise its discretion consistently with the direction and guidelines found in the regulation.” Submission at 3, citing, Rose Lees Hardy Home & School Ass’n v. District of Columbia Bd. of Zoning Adjustment, 324 A.2d 701, 706 (D.C. 1974). 11 DCMR § 3104.1 provides that the Board’s authority to grant special exceptions “is subject in each case to the special conditions specified in” Title 11. Thus, the Board does not have authority to grant a special exception to add an accessory apartment to Applicant’s existing garage unless all of the conditions specified in 11 DCMR § 202.10 are met. The Project proposed by the Applicant does not satisfy those conditions and the Application should, therefore, be denied.

**II. THE PROPOSED PROJECT FAILS TO SATISFY THE REQUIREMENTS OF 11 DCMR § 202.10.**

**A. Approval Of The Modifications To The Requirements of § 202.10 The Applicant Seeks Would Conflict With The Intent of 11 DCMR § 202 “to maintain a single-family residential ...character in the ...R-3” District.**

Under the provisions of 11 DCMR § 202.10(i)(2), the Board is prohibited from approving any modifications to the requirements of § 202.10 that would “conflict with the intent” of the regulation “to maintain a single-family residential...character in the...R-3” District. Applicant seeks approval to, among other things, “construct a second-story addition to [her] existing garage to be used as an accessory apartment.”<sup>1</sup> Fifteen years ago, the Board ruled on Applicant’s first request for approval of a second-story apartment on top of her garage, concluding that “the construction of a second story addition to an accessory private garage in an R-3 District for...human habitation would drastically alter the character of the zone district.”<sup>2</sup> Thus, the central issue raised by the Application has long since been decided. The proposed project would drastically alter the single-family residential character of the neighborhood by, in reality, placing two separate dwellings on the Applicant’s lot.<sup>3</sup>

Applicant’s attempt to re-litigate the issue by simply adding an open-sided covered walkway (a “Trellis”) to the proposed project should be rejected. The addition of the Trellis does not change the substance of the Applicant’s proposal. Her goal is the same as it was 15 years ago: the addition of a second story to her garage to be used for human habitation. The

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<sup>1</sup> Applicant’s Submission at 3.

<sup>2</sup> In the earlier case, having concluded that the applicants had not met their burden of proof for variance relief, the Board did not reach the question of whether such relief could be granted “without substantial impairment of the zone plan.” *BZA Order No. 16696 of Craig and Ann Goodman at 15(2002)*. The Board did, however, conclude that the second story addition proposed by the Goodmans would require a use variance because, “...the construction of a second story addition to an accessory private garage in an R-3 District for...human habitation would drastically alter the character of the zone district.” *Id.* At 23.

<sup>3</sup> In its report, the Office of Planning noted that neither the meaningful connection nor the second story apartment would be visible from O Street. The connection between the structures would also not be visible from the alley, 33rd Street or Potomac Street. For all intents and purposes, there would appear to be two structures containing two single-family dwellings on the Applicant’s lot.

Board has already held that doing so would “drastically alter the character” of the neighborhood. For that reason alone, the Application should be denied, but the Applicant’s proposal also fails to meet other conditions of §202.10.

**B. In Order To Approve The Application The Board Would Have To Modify More Than Two (2) of the Requirements Of 11 DCMR § 202.10.**

Assuming *arguendo*, that the Board even has the authority to waive or modify the requirements set forth in the first three lines of § 202.10 (the “Preamble”),<sup>4</sup> it would be necessary for the Board to waive or modify as many as six (6) of the requirements of § 202.10 in order to grant the Applicant the relief she seeks.

The term “requirement” is not defined in the regulations. Therefore, 11 DCMR § 199.2(g) directs us to Webster’s Unabridged Dictionary to find the meaning to be used when analyzing § 202.10. According to Webster’s, “requirement” means “that which is required; a thing demanded or obligatory.”<sup>5</sup> The Preamble requires that the proposed accessory apartment be added (1) *within* an (2) *existing* (3) *detached dwelling*. Each of the three traits of the subject dwelling set out in the Preamble is a “thing” that is “obligatory”, and is, therefore, a separate “requirement”.

The Applicant’s claim, for which she cites no authority, that “the Board has always interpreted the waiver of the preamble as a singular requirement, not several requirements”<sup>6</sup> is plainly erroneous. In each of the five cases the Applicant cites, the proposed project met two of

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<sup>4</sup> A discussion of whether the Board has authority to waive requirements expressed in the Preamble follows in section C.

<sup>5</sup> Webster’s New Universal Unabridged Dictionary (1996).

<sup>6</sup> Submission at 7.

the three requirements set out in the Preamble. In each case, the accessory apartment was proposed to be added *within* an *existing dwelling*.<sup>7</sup>

It is worth noting that the respective applicants faced no opposition in four of the five cases, with the result that the Board issued summary orders, with no findings of fact or conclusions of law. The fifth case, Application No. 18232 of Herbert J. Sanborn, was the case in which the Board concluded that the language of § 202.10(i)(3) “implies that the Board may consider, as a special exception, a request for a waiver of any requirement of § 202.10, not only those requirements listed in paragraphs (a) through (h)”. *Id.* at 4 Mr. Sanborn’s application was for a special exception under § 202.10 to allow an accessory apartment to be added inside an existing one-family semi-detached dwelling. All of the other requirements of § 202.10 were met. As a result, there was no reason for the Board to consider whether the Preamble to § 202.10 contains several separate requirements, and the Board did not. Because the current application strays so far from the obvious intent of § 202.10, the Board is now faced, apparently for the first time, with the question of how many “requirements” are contained in the Preamble.

Applicant asks the Board to approve the addition of an accessory apartment on top of an existing garage that technically would become part of the dwelling through the construction of a Trellis. *See* Submission at 3. Therefore, she is asking the Board to waive or modify the following obligatory things set out in the Preamble: (1) the new accessory apartment must be “within” a one-family dwelling; (2) the one-family dwelling to which the apartment is to be added must already be in existence; and (3) the existing one-family dwelling must be a detached dwelling.

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<sup>7</sup> The only requirement that was not met in each of the cases was the requirement that the dwelling be detached. Four of the five existing dwellings for which a special exception was sought were semi-detached. The fifth was a row dwelling.

In addition, Applicant is asking the Board to waive or modify three explicit requirements of § 202.10(d): “that the new apartment may be created” (1)...“only through internal conversion of the house...” and (2) “...without any additional lot occupancy or ...” (3) “...gross floor area...”<sup>8</sup> Applicant acknowledges, as she must, that the Project contemplates (1) the construction of an apartment on top of her existing garage; (2) an increase in lot occupancy resulting from the construction of the Trellis and the expansion of the garage footprint; and (3) an increase in the gross floor area of the garage.

In summary, the Applicant is asking the Board to waive or modify as many as six (6) of the requirements of § 202.10, of which three (3) are specified in paragraphs (a) through (h) of §202.10. This is yet another reason why the Application should be denied.

**C. The Board Is Not Authorized To Waive The Requirements Of The Preamble Of 11 DCMR § 202.10.**

ANC 2E acknowledges that the Board held in Application No. 18232 of Herbert J. Sanborn, Jr., that 11 DCMR § 202.10(i)(3) “implies that the Board may consider, as a special exception, a request for a waiver of any requirement of § 202.10, not only those requirements listed paragraphs (a) through (h).” *Id.* at 4. ANC 2E believes, however, that the Sanborn case was a classic example of a hard case that made bad law<sup>9</sup> and that the decision should be reconsidered.

An analysis of the structure of 11 DCMR § 202.10(c) supports the conclusion that the Board’s authority is limited to waiving or modifying the requirements of paragraphs (a) through (h) of § 202.10. § 202.10(i)(3) is a subparagraph of § 202.10(i) that follows the clause “provided

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<sup>8</sup> It could be argued that the requirement that the apartment be created only through internal conversion of the house duplicates the Preamble’s requirement that the apartment be added “within” the single-family detached dwelling, but the provisions on lot occupancy and gross floor area are expressed in the disjunctive and are clearly completely separate obligatory things, and, therefore, separate requirements.

<sup>9</sup> The Applicant in Sanborn was seeking a special exception that would allow him to construct an accessory apartment in a semi-detached dwelling that was “already divided up and...formerly rented to students.” All of the other conditions of § 202.10 were met by the Application.

the following occur:...”. Thus, § 202.10(i)(3), like the two subparagraphs that precede it, appears to have been intended to refer to the mandatory language in § 202.10(i) that prohibits the Board from modifying or waiving “more than two (2) of the requirements specified in paragraphs (a) through (h)...”. The structure further suggests that the provision was included to explain what procedure should be followed if an applicant were to request that more than two of the requirements of paragraph (a) through (h) be modified. If the provision had been intended to apply to the entirety of §202.10, it would have been included as paragraph (h). Thus, the logical and proper reading dictated by the structure of the regulation would be: “Any request to modify more than two (2) of the requirements of [paragraphs (a) through (h)] of this subsection shall be deemed a request for a use variance.”

**D. This Case Matters.**

Remarkably, the Applicant appears to argue that the Board need not be concerned about making the correct decision in this case because, “[t]he Applicant’s case is the last case that will seek relief under § 202.10.” Submission at 9. In essence, the Applicant is asking the Board to allow her to use a discredited device (the “meaningful connection”) that will not be available under the Zoning Regulations of 2016 to distort the meaning and intent of § 202.10, and telling the Board that it need not be concerned about the implications because no one will ever be able to do it again.<sup>10</sup> The argument is specious. The Board has a duty to “exercise its discretion consistently with the direction and guidelines found in the regulation” that governs the Application. Rose Lees Hardy Home & School Association v. District of Columbia Bd. of Zoning Adjustment, 324 A.2d 701, 706 (D.C. 1974).

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<sup>10</sup> The addition of an accessory apartment is not a matter-of-right use, but rather requires approval from the Board as a special exception. ANC 2E submits that it would not be appropriate for the Board to exercise its discretion to allow Applicant to use a “meaningful connection”, a device that has been determined to be bad policy, to reverse the result of the Board’s carefully reasoned decision on the Applicant’s 2001 proposal.

### **III. COMMUNITY OPPOSITION**

ANC 2E notes that, except for specific submissions it requested, the Board closed the record in this case at the end of the hearing held on April 5, 2016. Therefore, the 27 identically-worded form letters that Applicant appended to her Submission should not be admitted. However, if the Board decides to admit the letters, it should note that a majority of the signatories appear to be either tenants occupying rental units or residents of multi-unit buildings located on nearby streets, individuals with interests that diverge significantly from homeowners whose residences are in the same square as the Applicant's property. Importantly, the only person who both lives in a dwelling that abuts the alley and signed one of the Applicant's form letters is a tenant who rents a unit in the house located at 1316 Potomac Street. The homeowners who would be most affected by the Applicant's proposal are unanimous in their opposition.

### **IV. CONCLUSION**

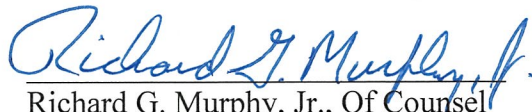
The current application is, quite simply, a bridge too far. The Applicant is asking the Board to ignore the plain meaning and the intent of 11 DCMR § 202.10 to allow her to complete a project that the Board has previously concluded would "drastically alter the character of the zone district." As Applicant correctly stated in her Submission, "consistent legal interpretation of law is necessary to avoid being arbitrary and capricious." Submission at 8. If the Board were to approve the current application it would, for all practical purposes, reverse the decision it made fifteen years ago with respect to a substantively identical project proposed by the same Applicant. Such an action by the Board would undeniably be arbitrary and capricious.



Applicant has merely poured old wine into a new bottle. The container may be different, but the substance has not changed. The Application should be denied.

Respectfully submitted,

**Advisory Neighborhood Commission 2E**

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