BEFORE THE DISTRICT OF COLUMBIA

BOARD OF ZONING ADJUSTMENT

APPLICATION OF PENG WU & ADAM ROSS 1739 HARVARD ST. NW - ANC 1D

STATEMENT OF THE APPLICANT

I. Efforts at compromise

First, we want to emphasize that we have made an offer to our immediate neighbors at 1741 and 1737. We have offered to scale back to 11 feet on the second level, and 13 feet on the first level, contingent upon our neighbors dropping their opposition at BZA. As of the date of this Statement,[1] the neighbors have not responded to our offer.

We think this is a fair offer because there is not much room for compromise between 10 feet and 12 feet on the upper level. Our initial plans were already modest and reasonable, smaller than most of the 2-story setbacks in Mount Pleasant, also smaller than the two other existing 2-story setbacks on our row of Harvard Hill. The compromise of 11 feet on the second level is a good faith effort to end this adversarial proceeding with our neighbors.

II. What is the purpose of the regulations here?

If the ANC and the BZA want to deny applications that request 1 or 2 extra feet, then what is the point of the special exception process at all? DC lawmakers should just repeal section 5201.3 altogether. DC zoning laws and regulations allow for special exceptions and variances for a reason – to prevent usable land from remaining undeveloped due to a strict interpretation of the regulations. *See DeAzcarate, et al. v. Board of Zoning Adjustment*, 388 A.2d 1233, 1236 (1978).

The legislative history of the regulation at issue here, Section 205, is also instructive. When the amendments to Section 205 were first proposed in 2016, it appears that the stated purpose was to "address concerns about excessively disproportionate rear extensions relative to adjoining row buildings." *See* Amendment to the Zoning Regulations, 2016 DC Reg. Text 437500 (September 30, 2016). For rear additions that extend beyond 10 feet, applicants must apply for a special exception under Section 5201.

There has been a lot of hand-wringing over what "unduly affected" means in Subtitle E, Section 5201. According to the dictionary, "unduly" means to an extreme, unreasonable, or unnecessary degree. Merriam-Webster Dictionary. "Undue" can also mean excessive, immoderate, intemperate, disproportionate. Oxford American Writer's Thesaurus. *See also* Black's Law Dictionary at 743 ("undue" means "excessive or unwarranted"). This dictionary definition is supported by the legislative history cited above, showing that lawmakers in DC were concerned about "excessively disproportionate rear extensions." In sum, "undue" impact

[1] October 25, 2017.

Board of Zoning Adjustment
District of Columbia
CASE NO.19560
EXHIBIT NO.62

does not mean "*any*" impact, though that is how some of the opposition appear to interpret this word.

We argue that given the meaning of "undue" and the factors set forth in Section 5201.3, our application for a special exception of 2 feet on top and 4 feet on bottom is not excessive or egregious. We will focus on the alleged impact on our immediate adjacent neighbors at 1741 and 1737, because BZA only granted party opposition to those who are adjacent.

In reviewing an application for special exception relief, "[t]he Board's discretion…is limited to a determination of whether the exception sought meets the requirements of the regulation." *First Baptist Church of Wash. v. District of Columbia Bd. of Zoning Adjustment*, 432 A.2d 695, 701 (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.* We also urge the Board to focus on the exact issue at hand – using a 10 feet setback as the benchmark, whether an extra 2 feet on the second floor and 4 feet on the first level actually results in a structure that "unduly affects" the immediate adjacent neighbors.

III. The light and air and privacy and enjoyment available to neighboring properties will not be unduly affected

Privacy. The proposed structure will not have any windows on the side that would look into the neighbors' yards, so privacy will not be affected. There is no roof deck that would overlook the neighbors' property. The extension of the rear wall of the applicant's property would actually increase the privacy available to the first 12 to 14 feet of the neighboring properties' rear yards. The Office of Planning had previously reached a similar conclusion. *See* Office of Planning Memorandum, Exhibit 39, at 4 ("The privacy of nearby properties should not be unduly impacted.").

Light. The sun studies that have been done to date barely show any difference between the shadows that are cast upon neighboring houses at different parts of the year between the 10 feet addition and 12/14 feet addition. For December 21 (and much of the winter), there is actually no difference at all. *See* 1739 Harvard St. – Shadow Study 2 (A0015-A0017). When there is a difference between the 10 feet rear addition by right and the 12/14 feet addition, that difference is less than 10%. *See id.* at A0006- A00014. In some instances, the difference is less than 1% (*See id.* at A0013, Sept. 22 at 1 pm; *id.* at A0007, March 21 at 1 pm). The sun and shadow study supports the Office of Planning's previous analysis that "[i]t does not seem likely that the additional four feet on one level and two feet on the other level would have an undue impact on the light available to the interior of neighbor properties or to the northern portions of the gardens in the rear of the neighboring properties.") *See* Office of Planning Memorandum, Exhibit 39, at 4.

Also, the sun and shadow studies do not appear to take into account the fact that our neighbors' yards are already shaded by existing trees. For example, the immediate neighbor at 1741 has three tall trees in his small yard that already cast shadows, both into his yard and into

ours. The other immediate neighbor at 1737 has a large tree in his driveway that casts shadows into his yard.

Air. Air is all around and we breathe it. The proposed addition will not be housing a polluting factory that will emit fossil fuel emissions; it is meant to add a family room and a bedroom for our family. Many 2-story rear additions of this size and larger already exist in Mount Pleasant and throughout DC. To date, we are not aware of any tragedies involving suffocation for those neighbors who live next to similar rear additions. *See* Office of Planning Memorandum, Exhibit 39, at 4 ("The air available to neighboring properties is not likely to have an undue effect…").

Enjoyment. Enjoyment is a very subjective thing. To the extent that our neighbors argue they will no longer enjoy themselves in their yard, it is difficult to show a casual link between the alleged lack of future enjoyment and the extra 2/4 feet. The truth is, perhaps they would prefer to have no rear addition at all, but that is not the issue before the Board. The issue is the whether the extra 2/4 we are applying for is so excessive and unwarranted that it will "unduly affect" their enjoyment. Based on the analysis above involving air, privacy and light, the answer is no.

IV. Opposition of the neighbors

We would have preferred to avoid this litigious and adversarial process with our neighbors, all of whom we were previously reasonably friendly with. As of the date of this Statement, the immediate neighbors have not responded to our offer of settlement for 11/13 feet. As a result, we will address their opposition below.

Neighbors at 1737

Our immediate neighbors at 1737 object to our special exception application and they have hired the law firm of Cozen O'Connor to represent their interests. A partner at the firm – Meridith H. Moldenhauer – has filed a pleading on their behalf in our BZA case, arguing that granting the extra 2 feet and 4 feet will "effectively block a large portion of the light and air available to the rear yard, causing undue impact." Exhibit 37-1, at 2. She further argues that this street has "*very few* number of two-story additions" and "[t]he character of the block and its composition of *one-story modest rear additions should be preserved*." *Id.* at 2 n.2 (emphasis added).

These arguments are not credible, plausible, or believable, because Ms. Meridith Moldenhauer also represents the homeowners at 1665 Harvard Street. The proposed structure behind 1665 is over 25 feet wide, over 24 feet long, and includes a roof deck that will tower over the existing roofs on Harvard Hill. (*See* BZA case number 19629, Exhibit 9) (thereafter "1665 Brief"). This structure will require multiple special exceptions and variances to be granted. In her advocacy of that project, she argues:

- "The alley has *numerous* two-story structures, garages, and decks along both the rear of Harvard St. NW and Hobart Street NW." 1665 Brief at 3 (emphasis added). "The project is designed to be in keeping with these existing structure…" *Id.*

- Of the proposed multi-story structure with a roof deck, Ms. Moldenhauer further argues that it "will not jeopardize the existing light, air and privacy available for neighboring properties." 1665 Brief at 6.

Our neighbors' opposition to our special exception application is fundamentally undermined by the fact that their attorney is simultaneously and zealously advocating for an even larger, higher structure on the very same street and making inconsistent arguments about what is reasonable development for Harvard Hill. If the multi-story garage and apartment with a roof deck at 1665 is reasonable, desirable, good for the public, and "in keeping with…existing structures" on the row, 1665 Brief at 3, then so is our project at 1739, even at 12 feet and 14 feet.[2]

Neighbor at 1741

Our argument with respect to the neighbor at 1741 is even more simple. If we look at the diagram of the houses on Harvard Row, his house is not level with ours – it is set back at least 2 feet to north. The Office of Planning previously noted this difference:

> The addition would be 14 feet deep on the 2nd floor and 12 feet deep on the 3rd floor, extending those same depths past the rear wall of the house to the east [1737] and 12 and 10 feet past, respectively, the 2nd and third floors of the house to the west [1741]. With respect to the resident to the east, this would be a difference from by-right permissions of four feet on the section (main) floor and two feet on the third (upper floor). The distances would be two feet less than this on each floor for the house to the west [1741], which extends further back than the house to the east of the applicant's.

Office of Planning Memorandum, Exhibit 39, at 2.

This means that for this neighbor, our proposed 2-story addition, relative to his house, is actually only 10 feet on top and 12 feet on the bottom. Again, using the 10 feet 2-story set back as a benchmark (which we are allowed to do by right), an extra 2 feet extension on the first floor does not "unduly" affect him – it is not extreme, egregious or beyond the pale.

V. The ANC Resolution

The ANC's recommendation is not well-reasoned. First, while opposition of the neighbors is one factor that can be considered, the ANC seemed to make this the deciding factor,

[2] By taking on both 1665 and 1737 as clients simultaneously, one could make the argument that the firm of Cozen O'Connor has a conflict of interest. In general, attorneys are allowed to make opposing arguments in unrelated matters, but there are situations where positional conflicts of interest render the attorney unable to be a zealous advocate for his or her client. Here, the proximity of the two projects (on the same street, on the same alleyway, behind the same kind of rowhouses), and the simultaneous proceeding (indeed these 2 projects were discussed at the same ANC meeting) call into question whether this law firm has violated DC Rules of Professional Conduct, Rule 1.7 (b)(2)-(3), governing conflicts of interest. While the regulations at issue are different, the supporting arguments in both cases require the attorney to make contradictory statements about what is a reasonable development for this alleyway, as discussed above.

admitting that it would make the ANC "uncomfortable" to disagree with the neighbors' assertions about substantial adverse impact. The ANC doesn't want to "declar[e] that these neighbors are wrong." Taking this train of thought to its logical conclusion, neighbors' complaints will always prevail and neighbors will essentially have a veto power over a homeowner's special exception application. To the contrary, it is the duty of the neutral decision-maker, whether it be BZA or ANC, to assess whether the opposition's assertions about "undue impact" are valid or not. Even if they are valid, neighbors' opposition is only one factor to be considered, and should not be the deciding factor.

Second, the ANC appears so eager to accept the neighbors' complaints about substantial/undue impact at face value, that the ANC did not consult the sun/shadow studies that have been done do date. In other words, they did not look for any evidence to corroborate or support the neighbors' statements. In its resolution, the ANC does not appear to have analyzed or even looked at these studies.

Third, ANC's analysis of the size and shape of the lots at issue is also flawed. If anything, the unique shape of the lots on Harvard Hill should weigh in favor of granting the special exception. Under section 5201.3(e), the BZA may approve lot occupancy of all new and existing structures on the lot up to a maximum of 70%. For the project at 1739, if the special exception is granted, the lot occupancy would only be about 34.4%, well below (actually <u>less than half</u>) the maximum that is capped by regulations. *See* Office of Planning Memorandum, Exhibit 39 at 5. These lots are unique because of the extra land that is available to the homeowners in front of their houses, where homeowners also have gardens and usable outdoor space. The ANC failed consider that the neighbors' spacious lots and gardens in front of their houses will be totally unaffected. When the entire lot is taken into account, it is difficult to swallow the conclusion that a rear addition which would only result in 34.4% lot occupancy is "excessive" or "disproportionate." This conclusion is inconsistent with the intent and legislative history of this regulation, as discussed above.

VI. <u>BZA Proceeding</u>

The opposition at 1737 has requested the right to call several witnesses to testify. If the Board deems that this testimony (from neighbors who are not immediately adjacent to our house) is acceptable and relevant, then we would like to call witnesses as well:

Joe McReynolds and Aditi Gorur at 1755 Harvard St. NW.

Furthermore, we request time to ask follow-up questions and respond to the testimony provided by the opposition's witnesses.

Respectfully submitted,

Peng Wu and Adam Ross