



November 14, 2017

**Meridith H. Moldenhauer**

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Frederick L. Hill, Chairperson  
Board of Zoning Adjustment  
441 4th Street, NW  
Suite 210S  
Washington, DC 20001

**Re: Application No. 19560 – 1739 Harvard Street NW (Square 2588, Lot 0160)**

Chairperson Hill and Honorable Members of the Board:

On behalf of the owners of the property located at 1737 Harvard Street NW (“1737 Harvard”), Bryan Thompson and Susanne Rinner (“Opposition Party”), we hereby submit this response to the Applicant’s supplemental filing (“Response”). After reviewing the proposed revised plans and the by-right option filed by the Applicant, the Opposition Party makes the following arguments that the special exception standard pertaining to undue impact has not been met, and that the Applicant is ignoring viable options that would *not* create undue impact on neighboring property.

First, as Commissioner May stated at the hearing, small houses are an important part of the housing stock and preserving them is important. These are small homes on Harvard Row and the lots are very narrow. There is no opportunity to extend these homes to the front, where they enjoy spacious green areas and open views. The Opposition Party believes that a special circumstance is created for these lots because the houses are positioned so close to the rear of the lot. Trying to fit a larger addition than permitted into a small space causes contention because the undue impact that it has is exaggerated on this very specific set of homes.

The contention and undue impact that the proposed project would create is well-documented in the record through letters and a petition in opposition. Although the Applicant testified at the hearing that they no longer wish to litigate with their neighbors, they have consistently turned down the Opposition Party’s proposed modifications in exchange for support of the project. They have also refused to even consider reviewing a construction management agreement that the Opposition Party requested very early on in the process. Moreover, if they wished to avoid further contentious proceedings, the Applicants could proceed with a matter of right project. It is the Opposition Party’s belief that even a by-right extension on two floors would have an undue impact and ideally had asked the Applicant if they would consider a design more sensitive to these circumstances.

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Unfortunately, that did not occur and the Applicant's updated plans do not incorporate either of the two options the Opposition Party would not object to.<sup>1</sup> See email communications at **Tab A**. The 11'/13' proposed plans filed by the Applicant would fully enclose the existing bedroom on the third floor as an office. This office would have a pass through to the newly constructed bedroom in the third-floor extension. An interior space equivalent to the size of the office could be constructed on the first floor by reconfiguring and digging out further below grade. The Opposition Party proposed a "1-up/1-down" addition such as this to the Applicant, but they rejected this option. Such a design would preserve the character of the row and have a minimum impact on their neighbors, while allowing the Applicants to enjoy as much inner space and obtain the same functional spaces within their home. While it would be less desirable from the neighbors' perspective, the Opposition Party also offered to support more living space on the main level in exchange for giving up a small amount of space on the upper level.<sup>2</sup> The Applicant also decided against this option. Either of the two alternate options proposed by the Opposition Party would reduce the impact on neighboring property and would not place the essential character of these homes at risk. Unfortunately, the Applicants did not agree to either of these alternatives and stayed with the "two up" plan at 11'/13' instead.

As shown on **Exhibit 83A**, a by-right development would provide adequate space for a living room and additional bedroom. The third floor front bedroom is currently 15' x 11-1/2'. And the third floor rear bedroom is 10' x 9-1/2'. Thus, the by-right extension would already provide a second bedroom to the back that would be nearly as large (15' x 10') as the existing master bedrooms (15' x 11.5') for the houses on this row. Thus, the Applicant's "need" for a larger addition in a top-floor bedroom does not justify the extent to which it impacts the neighbors' own light, air, and privacy. In addition, the second-floor extension proposes a large living room, offering them the opportunity to repurpose the existing living room as a formal dining room. Again, the by-right extension would create a quite ample 10' x 15' living room. The entire existing second floor (living room and kitchen) is only 15' x 24', thus the by-right extension would offer twice the non-kitchen space on the second floor. The Board should question, therefore, whether the requested relief is necessary in order for the Applicant to achieve the purpose of the addition they are seeking to construct.

Finally, the Opposition Party understands that these Regulations pertaining to rear additions are fairly new and that the Board is grappling with how to apply the standard in each case. In previous cases requesting relief from new Regulations, the Board asked an applicant for special exception relief to prove that their specific design is necessary and that they cannot comply with the Regulations. For instance, in BZA Case 19363 the Board struggled to apply the special exception standard when analyzing a request for relief from the equally-new penthouse setback requirements. There, Board member D'Souza requested that the applicant provide plan sets demonstrating why they absolutely could not comply with the regulations. "[With] these new regulations, it's very helpful to have a higher standard of expectation on the design front for that argument to be made." BZA Trans. 11/16/16 p. 30. She continued, "you can't just say, oh, we can't do it because of whatever reason" and requested that the applicant provide plans demonstrating exactly why they could not comply with the new Zoning Regulations. Commissioner Turnbull concurred and stated "I just think that in the future OP should be requiring

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<sup>1</sup> The Applicants also initially offered to reduce the proposed green roof to a 1-foot extension. When the Opposition Party did not agree to support the 11'/13' proposal, the Applicants withdrew their offer and filed a plan with the 2' extension. The Opposition Party therefore requests that the Board include a condition, should they grant special exception relief that would prohibit any use of the canopy besides a green roof.

<sup>2</sup> The Opposition Party proposed a 9' addition on the third floor and a 15' addition on the second floor.

what I would call a proof of scheme for these things, that they really should show the due diligence effort of all the plans, and why -- the whys and wherefore of why it *cannot* be done.” BZA Trans. p. 30. (Emphasis added).

Here, the Applicant has not proven that the requested relief is at all necessary in order to create an additional bedroom and living space. In fact, they filed by-right plans at **Exhibit 83A** that would create an addition with ample living and bedroom space. In their statement at **Exhibit 83**, the Applicant simply states that “every little bit helps.” Unfortunately the “every little bit” approach disregards the undue impact that the added depth will have on the neighboring properties. Every case and property is unique and evaluated by the Board on its own merits. Here, the Opposition Party, and the neighbor letters in opposition, have provided adequate rebuttal that the Applicant has not met their burden in this regard. While special exceptions are appropriate in certain cases, this is one instance in which it is not.

In conclusion, the Opposition Party respectfully requests that the Board deny the Applicant’s requested relief. Thank you for your attention to this matter, and we look forward to the Board’s decision scheduled for November 15, 2017.

Sincerely,

COZEN O'CONNOR



BY: MERIDITH H. MOLDENHAUER

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I served a copy of this Response to the Applicant's supplemental filing via e-mail, to the following:

District of Columbia Office of Planning  
1100 4th Street SW, Suite 650 East  
Washington, DC 20024  
Stephen.Cochran@dc.gov

ANC 1C  
Ted Guthrie, Chair  
Tedguthrie3@gmail.com

ANC 1D  
Yasmin Romero-Latin, Chair  
yasminkikiANC1D04@yahoo.com

Peng Wu and Adam Ross  
1739 Harvard Street NW  
Washington, DC 20009  
adam\_ross001@yahoo.com  
pengwld@gmail.com



By: Meridith H. Moldenhauer

**TAB A**

## Bigley, Alyssa L.

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**From:** Peng Wu <pengwld@gmail.com>  
**Sent:** Monday, November 6, 2017 11:29 PM  
**To:** Bigley, Alyssa L.  
**Cc:** Moldenhauer, Meridith; Adam Ross  
**Subject:** Re: Response

Sorry that your clients are not happy with our concessions. In that case, we will keep the green roof as is, at 2 feet.

On Mon, Nov 6, 2017 at 6:24 PM, Bigley, Alyssa L. <[ABigley@cozen.com](mailto:ABigley@cozen.com)> wrote:

Peng and Adam,

We appreciate your reply, but our clients are honestly shocked and dismayed that you are unwilling to even consider reviewing a draft CMA and that you refuse to make any further changes to design or materials. They conclude from your communications to date that you are reluctant to offer any compromise except that which is required by the regulations or directly requested by the Board. Our clients made very reasonable and modest requests, not outside the usual discourse in cases such as this.

Seeing as you will not agree to the three main concerns/requests raised by our clients 1- amend the project to either option our clients propose; 2- remove the canopy overhang, which is a source of undue shadow impact on 1737; and 3- review a draft CMA, our clients will not agree to drop their opposition to your project.

Again, for only 60 square feet of additional space above a matter-of-right project, we ask you to reflect on the prolonged and expensive process to obtain this relief and decide if it is worth the effort and resulting anguish with the neighbors. Our clients reiterate that the proposed project will create undue impact on their property, and that the options they proposed would mitigate this impact. If your final decision is to move forward without any additional compromise, we will await your filing tomorrow and provide our response to it by the 14th, as requested by the Board.

Best Regards,

Alyssa



**Alyssa Bigley**  
**Attorney | Cozen O'Connor**  
1200 19th Street NW | [Washington, DC 20036](http://Washington, DC 20036)

**From:** Peng Wu [mailto:[pengwld@gmail.com](mailto:pengwld@gmail.com)]  
**Sent:** Monday, November 6, 2017 12:01 PM  
**To:** Bigley, Alyssa L. <[ABigley@cozen.com](mailto:ABigley@cozen.com)>; Moldenhauer, Meridith <[MMoldenhauer@cozen.com](mailto:MMoldenhauer@cozen.com)>  
**Cc:** Adam Ross <[adam\\_ross001@yahoo.com](mailto:adam_ross001@yahoo.com)>  
**Subject:** Response

Dear Alyssa and Meridith,

Thanks for your thoughtful proposal. We have discussed and our responses are below in **BOLD**.

Thank you for your detailed responses. While you express optimism about the potential success of your case, we would still ask you to consider if continuing with the case, at the risk of further expended time and money, is worth only 60 additional square feet above a matter of right project? **(Yes, we agree that our application at this point is very modest. We have already made reductions to the scope and are comfortable with the plans which we are submitting for Board approval.)** That being said, our clients have authorized us to send the following offer in exchange for their withdrawal of party status:

1- The parties will enter into a construction management agreement in a signed, written document containing the provisions summarized below. CMAs are not uncommon in projects such as these, and are useful to both parties to establish parameters for construction going forward. If you are agreeable, we can provide a draft CMA by Monday morning for your review.

***We truly sympathize with your clients' wish to have something in writing. We think most of their concerns are reasonable, and already required under DC law (e.g., doing a survey, building along the property line). However, they must also understand that we will not enter into an agreement that exposes our family to additional liability beyond what is already required by DC law and regulations. We are trying to find the right balance and trying to do the right thing. Our architects have informed us that in their 30 years of practice, they have never seen a CMA for a residential project of this scope. We have consulted an attorney, who has confirmed our architects' view that this type of agreement would not be appropriate for our project. Also, there is an issue of us guaranteeing something in the CMA that binds our architects or our contractors, who are both licensed and insured, and operating under their own set of professional standards. However, we are willing to consider drafting up a Memorandum of Understanding that covers the key issues of concern to your clients, so that we have a common understanding in writing.***

a. Downspout: ensure that the downspout indicated on page 2 of Exhibit 32 will not cross over the property line into Bryan and Susanne's lot. Ensure that the runoff from this downspout will be adequately channeled away from Bryan and Susanne's lot to prevent any water damage to their property. ***We have discussed this with our architect - this should not be an issue. His response is below, underlined:***  
MWH - we are not allowed to project into their property for any reason anyway, so no hardship on this item.

Same issue for water drainage beyond natural overall grade / site drainage. (I assume their downspouts and drains work properly too?)

b. Materials: Bryan and Susanne request a brick only exterior, not wood cladding. ***During the conference call in late August, our architects discussed some of this with your clients. At that point, we actually had not finished the design yet. Our architect incorporated your clients' comments into the final design by adding brick to a large portion of the addition. We do not plan to further change the design elements beyond what is required for approvals.***

c. All other terms you marked "agreed" in Peng's email including but not limited to a new fence, survey of the lot lines, safety measures, and potential noise reduction efforts, subject to request from the 1737 tenants. ***We will need to see the specific text in order to comment more specifically, but agree in principle.***

2- Amend the design of the addition to one of the following two options:

a. Option A: A "1-up/1-down" scheme where the below-grade addition extends beyond 10' and the second-floor addition extends up to 15'. There would be no addition at all on the third floor under this option. ***Unfortunately, we cannot agree to this proposal. We actually considered this option at the beginning, and even visited a neighbor's house with this addition. The extensive digging required would actually be more invasive for your clients' yard. Also, we currently have a toddler and we may or may not have another child. We can't really keep the toddler or a new infant by himself in the basement.***

b. Option B: A 2' for 2' exchange. Instead of 11' and 13' as you indicate the plans are being amended to, Susanne and Bryan would agree to a 9' third-floor addition and a 15' second-floor addition. ***We cannot agree to this either. We have considered various options for this project, and have already reduced the scope. We plan to seek Board approval at 11' / 13'.***

c. Either option must remove any additional canopy/green roof that extends past the rear wall of the second floor. And, we will draft a condition to proffer to the Board prohibiting use of the green roof as a balcony or terrace. ***(Sure, we will agree to the condition re future uses of the green roof.)*** Also, as demonstrated by our sun study, although it may help minimally to absorb rainwater, the canopy creates more shadow than the addition. The proposed sedum plantings in a shallow green roof are meant to withstand extreme arid conditions, and therefore would not absorb an amount of water enough to make a marked impact on water runoff. So, Susanne and Bryan request the reduced green roof. ***We will agree to reduce the green roof by 1 feet. Our architects have informed us that in general we are allowed 24" architectural projections by-right on our own property. Green roofs absolutely have an effect on rain water run-off. They are actually a remarkable device. <https://doee.dc.gov/greenroofs>***

***Using your helpful formulation above, please understand that our current proposal is actually 1-down/1-down/1-down - a lot of concessions to your client. Our initial application was 12/14, with a 2 feet green roof. We have listened to your clients' concerns and the concerns of our neighbors. We are reducing the top floor by 1 ft, bottom floor by 1 ft, and green roof by 1 ft. Again, we are not doing this to make enemies; we are just a young family trying to get some extra space. Our preference is to not to continue any more adversarial litigation with your clients and we would hope that these concessions will encourage them to drop further opposition at the BZA and allow us all to focus our efforts on ensuring that this project proceeds smoothly and without unnecessary delays and expense for all parties involved.***

Sincerely,

Peng and Adam

***Notice: This communication, including attachments, may contain information that is confidential and protected by the attorney/client or other privileges. It constitutes non-public information intended to be conveyed only to the designated recipient(s). If the reader or recipient of this communication is not the intended recipient, an employee or agent of the intended recipient who is responsible for delivering it to the intended recipient, or you believe that you have received this communication in error, please notify the sender immediately by return e-mail and promptly delete this e-mail, including attachments without reading or saving them in any manner. The unauthorized use, dissemination, distribution, or reproduction of this e-mail, including attachments, is prohibited and may be unlawful. Receipt by anyone other than the intended recipient(s) is not a waiver of any attorney/client or other privilege.***