Appellant Adjoining Owner's Pre-Hearing Statement

On May 2, 2017, the Zoning Administrator approved a 3rd floor side deck to be constructed at the property line between 3616 11th St NW and the adjoining property at 3618 11th St, NW. But as outlined below, the BZA has a duty to conclude that the Zoning Administrator (ZA) erred in approving the side roof deck on the North side of the subject property, pursuant to numerous zoning codes, including following:

1) Subtitle A, 303.3; 304.3; and 304.10
2) Subtitle B, 100.1g;
3) Subtitle C, 1502.1c1A; and
4) Subtitle Y, 604.10; 703.3
5) Subtitle X, 901

Pursuant to Subtitle Y Section 703.3, the ZA overstepped its bounds in approving the side roof deck as a minor modification. This section states that: '"minor modifications" shall mean modifications that *do not change the material facts upon which the Board based its original approval* of the application.'

This side roof deck cannot be deemed a "minor modification" as it changes a material fact upon which the BZA based its original approval. Specifically, the original BZA Summary Order in case 19387 states that the special exception for the subject property is " **PURSUANT TO SUBTITLE Y SECTION 604.10, SUBJECT TO THE APPROVED PLANS"** (*emphasis added by the BZA*).

Section 604.10 states that: "An applicant *shall be required* to carry out the construction, renovation, or alteration *only in accordance with the plans approved by the Board,* unless the Board orders otherwise." Further, Subtitle A Section 303.3 states that: "If a building permit … has been issued under the authority of a decision of the Board of Zoning Adjustment … *each condition* to the approval of the special exception…*shall be treated as a condition to the issuance of the building permit* ..."

The amended architectural plan is clearly a changed material fact. As such, DCRA's ZA had no authority to approve the amended permit with the changed building envelope without a BZA order.

The Office of Open Meetings issued a binding opinion in May 2017 stating that the BZA gave the Intervenors' recent former BZA Chairperson attorney Meredith Moldenhauer (2009-2012) preferential treatment at the initial hearings that approved the special exception. And it appears that the

ZA determination reflects a continuation of special treatment being granted this for this property and this development group.

As further evidence of preferential treatment, the amended plan was approved by the ZA *before* the submission of a modification application. The former BZA Chairperson Attorney submitted a request for a modification on behalf of her clients June 30, 2017, two (2) months after the ZA had already approved the revised plans, and one (1) month after DCRA had already approved a new permit, which included the modification that the ZA belatedly attempted to dub a "minor modification."

In the after-the-fact "request" letter and modification application, the Intervenors, with Moldenhauer's guidance, falsely state that pursuant to Subtitle A 304.10, "a) The modifications do not violate any condition of approval included in the Order" and "c) The modification will not create any need for new relief" from the BZA.

Yet not only did the modification violate a condition of approval in the order as explained above, but due to the privacy issues created by the double-door opening to the adjacent owner Appellant's roof and interior windows, the modification creates a need for new relief.

More broadly, Subtitle A 304.10 states that "For building permits that are authorized by an order of the Board of Zoning Adjustment (the Order), the Zoning Administrator…is authorized to permit modifications to approved plans in addition to those modifications specifically authorized pursuant to flexibility granted by the Order if the Zoning Administrator determines that the proposed modifications are ***consistent with the intent of the Board of Zoning Adjustment***..." Yet as the intent of the BZA is to protect and enforce the rights of adjacency, the ZA could not have properly concluded that this affront to a neighbor's privacy upholds the intent of the BZA.

Throughout the zoning code, numerous Titles state some version of the following as off-limits: "substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, in particular: … The light and air available to neighboring properties shall not be unduly affected; …The privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and …the applicant shall use graphical representations such as plans, photographs, or elevation and section drawings sufficient to represent the relationship of the conversion… The Board of Zoning Adjustment may require special treatment in the way of design, screening, exterior or interior lighting, building materials, or other features for the protection of adjacent or nearby properties…"

Subtitle A, 304.3 further states that: "The Zoning Administrator shall consider the following issues, in determining whether *any deviation* will impair the purpose of the applicable regulations pursuant to Subtitle A 304.2: (a) The privacy of neighboring properties shall not be unduly

compromised… (d) The use and enjoyment of neighboring properties shall not be unduly compromised."

ZA discretion does not allow them to flout the intent and purpose of the BZA. Yet in approving the side roof deck with the doorway, which it knew would adversely aggrieve and deprive the neighbor of the privacy of use and enjoyment of her property and as a result also deprive her of the light and air available to her, the ZA did just that.

To do so, the ZA elected to ignore other zoning codes as well and to redefine very clearly defined terms.

The ZA is attempting to term this side roof deck a "balcony," instead of a roof deck. And if successful, this maneuver would allow the ZA to exempt the side roof deck from the required setback and solidify an assault on basic decency standards related to adjacency.

Yet this cannot be a balcony. Though the zoning regulations do not define "balcony," Title 11, Subtitle B, 100.1g, states that "*Words not defined in this section shall have the meanings given in Webster's Unabridged Dictionary."*

Webster's Dictionary defines a balcony as a "platform projecting from the wall of an upper floor of a building..."jutting out" over a main floor. Yet this development is not a "platform projecting" and is not "jutting out."

Zoning describes two types of balconies: an interior and an exterior balcony. An exterior balcony is one that is cantilevered from the exterior wall of the building and open to the sky, except that another cantilevered balcony on an upper floor projects above it. Whereas, an interior balcony is enclosed in the sides and has a floor above, thereby creating an alcove effect thus the only opening is where the railing is. Yet this design is not cantilevered and does not have a floor above creating an alcove. As such, it is neither an interior balcony or an exterior balcony; It is a rooftop deck.

According to Webster's, a "rooftop" is the roof of a building on any floor once it is unimpeded above by an intervening floor or roof and open to the sky. This side roof deck is both open to the sky and on the roof of the 2nd floor of the building. Further, the same roof membrane material currently on the 3rd floor roof is also on the 2nd floor side roof.

If the ZA followed the zoning code in determining whether this was a roof deck or a balcony, they would have had to refer to Webster's dictionary as required. Yet there is nothing in the ZA's December 11, 2017 determination email that would make a reasonable person believe that the ZA referred to Webster's dictionary.

The ZA email states that they decided that any side deck, which is less than 10-feet wide is a balcony deck. (In this scenario, our row houses are 18-feet wide and this side deck is approximately 7-

feet deep.) Yet nowhere in the zoning code or in Webster's is "10-feet" referred to as a decisive factor between a balcony and a roof deck. As such, to the extent that ZA approval of the plan amendment, which adversely aggrieves the Appellant, was predicated on the 10-foot measurement, the ZA decision was arbitrary and capricious. The ZA erred in its interpretation, which led to its approval of the amended plan, as there is no provision in the zoning code that gives the ZA any authority to make arbitrary interpretations.

The ZA also provided a related diagram to the Appellant on July 12, 2017 during the hearing for related BZA case 19510. But in the diagram, purportedly depicting the difference between a side balcony deck and a side roof deck, both images are identical. Moreover, the diagram provided does not depict attached row houses, and it does not illustrate attached row houses with the architectural feature of adjacent windows on a neighbor's property, as on the Appellant's. As such, no reasonable person can deduce that this relatively recent ZA interpretation is equitably applied to the scenario at issue here.

In addition to all of the aforestated reasons, this ZA interpretation should be rejected by the BZA because this new, unpublished ZA determination is not reasonably in the public domain. When the Appellant asked the ZA, via email, to direct her to where this "interpretation" was "catalogued," ie. made publicly available, no response was received.

Yet this interpretation is major enough that it seems to the Appellant that the BZA (and the Office of Planning) are charged with requiring it to be broadly published and subjected to sufficiently broad public scrutiny prior to actual adoption.

In terming this side roof deck a "balcony", instead of the side roof deck that it is, the ZA has overstepped its authority and unilaterally waived the required setback. Not only is this side roof deck required to have a guardrail pursuant to the building code, but it is also required to have a handrail set back at a 1 to 1 ratio from the height of the railing.

Subtitle C Chapter 15, 1502.1c1A states: "Penthouses, screening around unenclosed mechanical equipment, rooftop platforms for swimming pools, *roof decks,* trellises, *and any guard rail on a roof shall be setback from the edge of the roof* upon which it is located as follows: …(c) A distance equal to its height from the side building wall of the roof upon which it is located if: (1) … it is on a building used as a … *rowhouse or flat*, that is: (A) Adjacent to a property that has a lower or equal permitted matter-of-right building height…"

Pursuant to 1502.1c1A, when this side roof deck is properly deemed such, a 3'6 or 42" guardrail is required and the side roof deck is required to be set back 3'6" or more away from the property line and the parapet wall.

The parapet wall, designed for fire protection purposes between adjoined properties, is not a guardrail and here it cannot be a guardrail. This parapet wall slopes to the back, like the adjoining roof, and is 2-feet high at west edge of the side roof deck and 4-feet high at the east edge of the side roof deck. As such, it does not meet the guardrail height requirement.

Further, as this property has been used in a highly transient manner, catering to hundreds of AirBnB guests for approximately four (4) years, the necessary corrective action is far more than just adding a 42" railing at the mid-way point on the flat floor surface side roof deck. If affixed, that railing could easily be climbed over and the bedroom windows of the adjoining neighbor Appellant peered into by hundreds of strangers from around the country and the globe each year.

The 1958 Zoning Regulations, which stood the test of time and were in effect in the District until 2016, formed the basis of the December 2016 BZA special exception approval for the subject property. But at less than 10-feet, pursuant to Section 406.1 under those regulations, this ZA approved side roof deck, was simply illegal.

Though the side roof deck is not outright illegal under the relatively new ZR16 regulations, which have not yet withstood any test of time, the ZA interpretation, which erroneously led the ZA to approve the side roof deck with an opening impacting the neighbor's privacy and no guardrail as a minor modification, was not only arbitrary and capricious, but sufficiently damaging enough that the BZA should require that this ZA decision be reversed and subjected to the level of public scrutiny required in the context of this adjoined rowhouse scenario, which is a special exception application.

Based on all of the foregoing, the ZA was to have denied the modification application and sent the Intervenors back to the BZA for a special exception. Barring that and special exception approval, requiring that the Intervenors close off the means of ingress and egress to the side roof (peeping tom) deck is the only responsive and responsible corrective action.

The applicants were granted a special exception under pursuant to Subtitle X, Chapter 9, Section 901.2, which states "The Board of Zoning Adjustment is authorized … to grant special exceptions, as provided in this title, where, in the judgment of the Board of Zoning Adjustment, the special exceptions: … **(b) Will not tend to affect adversely, the use of neighboring property** [and] (c) Will meet such special conditions as may be specified in this title."

This Chapter further states: "**901.3 The applicant for a special exception shall have the full burden to prove no undue adverse impact** and shall demonstrate such through evidence in the public record. If no evidence is presented in opposition to the case, **the applicant shall not be relieved of this responsibility**.

901.4 The Board of Zoning Adjustment **may impose requirements pertaining to design,**

appearance, size, signs, screening, landscaping, lighting, building materials, or other requirements it deems necessary **to protect adjacent or nearby property, or to ensure compliance with the intent of the Zoning Regulations.**

901.5 The Board of Zoning Adjustment may impose a term limit on a special exception use **when it determines that a subsequent evaluation** of the **actual impact of the use on neighboring properties is appropriate**, but shall consider the reasonable impacts and expectations of the applicant in doing so."

Here, a subsequent evaluation of the actual impact of the use on the neighboring property that rises to the level of a special exception application is clearly appropriate. Pursuant to case 19510, and all of the evidence uploaded therein, the ZA erred in approving the first permit for this property in February 2017 as the required permission to extend the Appellant neighbor's chimney pursuant to Subtitle E 206.1 had not been granted and this amended permit, which flows out of that erroneous permit release under the umbrella of the original BZA special exception order, with a required plan that ultimately could not be achieved, should also not have been granted without the Applicants' being required by the ZA to return to the BZA as required.

In the interest of justice and fairness and the cessation of the pattern of preferential treatment that ignores the requirements, intent and purpose of the zoning codes and the BZA, the May 2, 2017 ZA decision should be overturned and the permit revoked along with such other actions that the BZA deems appropriate.

The BZA has broad power to correct this wrong. As Subtitle X, 1101.1 states "In exercising its zoning appeal powers, the Board of Zoning Adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, determination, or refusal appealed from, or may make such order as may be necessary to carry out its decision or authorization."

Respectfully submitted,
Nefretiti Makenta
3618 11th St NW
Appellant Adjoining Neighbor