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Via IZIS

Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210S
Washington, DC 20001

Re: BZA Case No. 20065 – 1818 Rhode Island Ave, NW

Dear Chairman Hill and Board Members:

This is the Applicant's response to the Board's "Memo to File" dated June 25, 2021, wherein the Board requests: "a separate explanation . . .as to how the Application is eligible for the . . .requested relief:"

Before answering that question, the Applicant wishes to make several requests of the Board. In light of the extraordinary action of the Board in rescinding an approval granted sixteen (16) months ago, we think such requests are fair.

(1) The Applicant requests an opportunity for oral argument in a continued hearing on July 28th. The action by the Board to rescind an approval granted sixteen months ago is an extraordinary and possibly unprecedented action, and the unfairness of such an action is exacerbated by the failure to provide any opportunity to object before rescission and before another decision.

(2) The Applicant requests the ability to submit an amended application, to be considered in the event that the Board takes any action other than approving the Application as it was originally approved. Relief of the same type as what the Applicant requested in this Application was approved in at least two other BZA cases. One was approved in May of this year (No. 20424). The other (No. 19919) was approved in February, 2019. In Case No. 19919, the Board raised an issue about the type of relief just prior to approving. In that case, the Board accepted alterations to the plans which changed the designation of a potential parking space from "parking space" to "open space." This change satisfied the Board. No such change was required in Case No. 20424. The Applicant is hereby submitting revised plans which remove

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the non-required parking space and the outdoor non-required bicycle spaces from the plans, and would request that the Board consider accepting this revision should it not re-approve the Application as originally approved.

(3) The Applicant requests the expeditious completion of this case, including issuance of the Order, to prevent further harm to the Applicant. The Applicant proceeded in this case with a self-certification based in good faith on previous BZA approvals; and has waited more than sixteen months at this point. The Applicant requests that the written Order be issued within thirty (30) days after the Board's vote.

The Applicant is confused by this action, and not certain what type of response has been requested. We are not aware of any requirement to prove to the BZA that an application is "eligible" for the relief requested. There is nothing in the Zoning Regulations providing for this requirement. We have assumed for purposes of this submission that saying the Application is not "eligible" for a certain relief is the same thing as saying that the Application does not ask for the correct relief. If that is the case, then the Board's action here is contrary to long-established and consistently articulated precedent involving self-certification, and the role of the Board vis-à-vis that of the Zoning Administrator in determining whether or not an applicant is seeking the necessary relief.

Self-Certification

The Board's interpretation of self-certification is explained in detail brilliantly by the Board in BZA Order No. 18263-B. In Case 18263, the Capitol Hill Restoration Society asserted that the use of a trellis to connect the principal building and accessory building would not result in the creation of one large building. The applicant did not seek relief on that point. The Board stated: "As will be explained, the Board has consistently held that arguments asserting the need for additional zoning relief are irrelevant to its consideration of an application for special exception relief."

The Board continued:

"Thus, the Board's grant of this or any other self-certified application does not prevent the Zoning Administrator from denying a building permit because more relief is needed, or the Board from affirming the denial. **It is for this reason the Board has consistently held that assertions of an erroneous certification are irrelevant to its review of applications**. For example, in *Application No. 16974 of*

Tudor Place Foundation (2004), the Board responded to such an assertion by stating: Assuming that the opposition is correct . . .the most that can be said is that the applicant will need variance relief. That fact alone does not require the Board to deny a special exception. . . **Our inquiry is limited to the narrow question of whether the applicant met its burden under the general and specific special exception criteria**."

In Order No. 18263, the Board discussed BZA Order No. 18250. In that case, on the issue of self-certification, the Board found that "It would defeat the entire purpose of the self-certification process if the Board were obliged to analyze the need for zoning relief whenever an opposition party questioned it. The Board's decision to dismiss under these circumstances is solely within its discretion and is based upon principles of judicial efficiency."

In 18263, the Board continued:
These holdings are consistent with the Court of Appeal's admonition that "[i]n evaluating requests for special exceptions, the BZA is limited to a determination of whether the applicant meets the requirements of the exception sought." Georgetown Residents Alliance v. District of Columbia Bd. Of Zoning Adjustment, 802A.2d 359,363 (D.C., 2002). **It would defeat the entire purpose of the self-certification process if one of the requirements of the exception sought is to prove the exception alone will suffice the sufficiency of the self-certified relief *must be proven in the first instance to the zoning administrator and not the Board***. [emphasis added.]

And then, in Order No. 18263-B, the Board explained *when* it was appropriate for the Board to intervene and dismiss a case based on a flawed self-certification:

"This is not to say that the Board may not, on its own motion, dismiss an application when there is no plausible basis to conclude that the relief requested is sufficient. The board has the right not to waste time."

This statement from the Board, sums up in two concise sentences, both the why and when the Board may appropriately insert itself into the self-certification process. *Why*? If there is "no plausible basis to conclude

that the relief requested is sufficient." [1] *When*? As also stated in Order No. 18250, when principles of judicial efficiency call for it; *i.e.*, so as to not waste the Board's time.

Neither one of those principles is present in this case, in the slightest. In this case, it is impossible for the Board to find *no plausible basis*, when in fact the Board just approved nearly identical relief on May 26 of this year in Order No. 20424 for 927 N Street, NW.[2] Moreover, the Zoning Administrator provided a detailed email determination to the applicant in #20424, which illustrates the easy plausibility of the correctness of this relief request (see attached email). Regarding judicial efficiency, the hearing is already completed, so there is no time to be saved. In fact, this action by the Board is the opposite of judicial efficiency.

Order No. 18263-B and Order No. 18250 are not the only times the Board has discussed these self-certification principles.[3]

In BZA Order No. 17537, the Board stated:

The question of whether an applicant should be requesting variance relief is not germane to the question of whether a special exception should be granted. [Emphasis added.] As the Board previously stated in Application No 16974 of Tudor Place Foundation, Inc, 51 DCR 8885 (2004):

> Assuming that the opposition is correct … the most that can be said is that the applicant will need variance relief. That fact alone does not require the Board to deny a special exception. … Our inquiry is limited to the narrow question of whether the Applicant met its burden under the general and specific special exception criteria that apply to the

[1] When illustrating an example of *no plausible basis*, the Board used the example of an undisputed computation showing a building height exceeding the maximum height permitted. "For example, if an applicant's own undisputed computation showed that a proposed building would exceed the maximum height permitted, the board could dismiss the application if the applicant refused to add the needed variance. But where, as here, the issue is not one of computation, but interpretation, the Board should at this stage allow the Zoning Administrator to carry out the function of 'administratively interpreting . . . The Zoning Regulations' vested in him by part 3(F) of Reorganization Order No. 55 (1953).

[2] To be clear, we are not saying that the Board must approve this Application just because it approved 20424, but the Board surely cannot find that there is "no plausible basis" here when they just approved such a case.

[3] "It is for this reason the Board has consistently held that assertions of an erroneous certification are irrelevant to its review of applications." BZA Order No. 18263-B, page 10.

requested use. Having concluded that it has done so, the Board must grant the application.

Based on the Board's well-established and consistent interpretation on self-certification, the Applicant in this case is not required to prove that the application is eligible for relief. The Application is self-certified. There is a plausible basis for the Zoning Administrator to agree with such self-certification, as detailed in the attached email, as well as in the approvals under Orders No. 20424 and 19919. There is also no concern for judicial efficiency, as the case was already heard and decided.

Response to the Memo's Questions.

The Board's memo requested that Applicant explain how the Application is eligible for the following requested relief:

- A special exception pursuant to Subtitle C § 703.2 – since the Applicant proposes to still physically provide the one required space but cannot meet the required access dimensions; and
- A special exception pursuant to Subtitle C § 807.2 - since the Applicant proposes to physically provide six long term bike spaces but the spaces do not meet the locational requirements

Regarding vehicle parking, C § 711 governs access to required parking spaces. Subtitle C § 711.3 states that required parking spaces shall be accessible at all times from a driveway accessing… an improved street. And finally, C §§ 711.5-6 governs driveway width (minimum of 8 feet). The existing driveway on the easement provides access to two (2) parking spaces in the rear. However, the driveway is only 7.5 feet and therefore does not meet C § 711.5.

Regarding bicycle parking, C § 805 provides rules for required long term bicycle parking spaces. Pursuant to C §§ 805.3, 7-9, long-term bicycle parking must be provided in racks or lockers. If in racks, they must be in a garage or storage room. If in lockers, there are spacing requirements. The Application proposed three (3) bicycle parking spaces at the rear of the property and three (3) in a corridor in the lowest level. None of these bicycle spaces meet the locational requirements of C § 805.

The access requirements of C § 711 and the long-term bike storage provisions of C § 805 only apply to required vehicle parking and bicycle parking spaces, respectively. Requesting special exception relief from the minimum number of vehicle parking spaces pursuant to C § 703.2 eliminates the need for relief from the access requirements of C-711. Similarly, requesting relief from the minimum bicycle parking requirements pursuant to C § 807.2 eliminates the need for relief from the requirements of C §

805. Those sections only apply to required spaces and if the spaces are no longer required, pursuant to the respective relief from the minimum vehicle and bicycle parking requirements, then those sections no longer apply to the proposed bike and vehicle parking spaces. Accordingly, the only relief required for the proposed parking area and 6 bicycle spaces is special exception relief pursuant to C § 703.2 and C § 807.2, respectively.

While every case is decided on its own merits, the interpretation and application of the zoning regulations and relief is governed by precedent, both in decisions by the Board which guide future BZA filings, and via the zoning administrator. For example, in previous cases (19919 and 20424) where the access requirements are not met, the Office of Planning has recommended approval of, and Board has granted approval for special exception relief pursuant from the minimum number of required vehicle parking spaces, in lieu of relief from the access requirements.

Zoning Administrator Determination.

Also included with this submission is an email from the Zoning Administrator regarding BZA Case No. 20424 (927 N Street). The email confirms that relief from the minimum parking requirements of C § 703.2 is appropriate in lieu of variance relief from the access requirements of C § 711, as relief from C § 703.2 eliminates the need for variance relief from C § 711, as the spaces are no longer "required" spaces. The Zoning Administrator states: "You have asked the BZA for special exception relief from the parking space *requirement*, and if that is granted, C-711.7 will not apply to the subject parking spaces because they are no longer required spaces. The parking spaces and rear building wall will remain as proposed, on the rear (alley) property line…I agree that the result of these provisions, under Section C § 711, is that if the spaces are no longer required, then they are no longer subject to the C § 711.7 requirement. So, if the Board approves the special exception request, the spaces can remain as proposed, with no need for variance relief from C-711.7."

The BZA's Memo specifically states that the Applicant must explain why the Application is eligible for approval, not whether it meets the standards for approval. As noted above, none of the facts upon which the Board based its initial approval have changed, so if the Board finds that the project is eligible for relief, the Board must re-approve the requested relief. The attached email from the Zoning Administrator regarding the identical relief for car parking (and analogous to the bicycle parking relief) explains why it is plausible for the Zoning Administrator to agree that this Application requested the

correct relief (*i.e.*, it is eligible for the relief).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2021, an electronic copy of this submission was served on the following:

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Respectfully Submitted,

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