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July 7, 2021

Via IZIS

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

Re: BZA Case No. 20143 – 1117 Morse Street, 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 eighteen (18) 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 eighteen 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. A project pursued pursuant to a BZA approval in the District of Columbia "vests" in the Zoning Regulations in effect on the date the BZA vote was taken. That vote was rescinded, and that vesting is therefore lost. One of the areas of special exception relief approved by the Board (building area limit for the accessory building) is no longer available, due to a text amendment adopted last summer. This effectively kills the originally approved project, regardless of the decision on July 28th, and forces the

relocation of the third dwelling unit into the principal building, negating all of the work undertaken over the last two years by the applicant and his team. Unless the Board is now willing to grant variance relief on an estoppel argument, or somehow void its vote to rescind, the original project is no longer possible and the Applicant must amend the Application.

(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 on a determination from the Zoning Administrator (and the Board approved the exact same relief in another case during this 18-month interval). At this point, the Applicant's concerns involve financial survival, and that survival does not require that the third dwelling unit be located in the accessory building (it can be located in the principal building). Financial survival requires the quickest path forward possible, regardless of where that third unit is. The quickest path would be voiding the rescission vote or granting variance relief for building area for the accessory building, so that the Applicant does not need to submit revised plans to DCRA. The Applicant will submit alternative plans by next week, in the event the original approval is not reinstated, and a revision is required. In any event, 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 has since approved an identically situated case with the exact same relief, in Summary Order No. 20240 (in which a third principal dwelling unit was approved in an expanded accessory building). Moreover, the Zoning Administrator has provided multiple determinations on projects with identical relief.[2] 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

[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] See attached a determination letter for 1330 K Street, and a determination email for 1724 Potomac, from the Zoning Administrator.

[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.

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 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, based on the several determinations from him on this point, as well as BZA Order No. 20240. There is also no concern for judicial efficiency, as the case was already heard and decided.

Response to the Memo's Questions.

The attached email from the Zoning Administrator regarding an identical project at 1724 Potomac Avenue, and the attached determination letter regarding a similar project at 1330 K Street, NW (for which the BZA then approved the same special exception relief in BZA Order No. 20240), shall serve as the answer for why the applicant was "eligible" to seek the requested relief. We incorporate by reference the detailed and well-reasoned analysis of the Zoning Administrator in the 1724 Potomac email in response to the Board's specific questions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, an electronic copy of this submission was served on the following:

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Respectfully Submitted,

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