

June 25, 2021

Via JZIS

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

Re: 3rd Prehearing Submission - BZA Case No. 20380 – 4457 MacArthur Ave., NW

Dear Members of the Board:

I am writing on behalf of the Applicant in the above-referenced case. At the public hearing on April 28, 2021, the Board requested that the Applicant provide certain additional information. The Applicant responds to these requests below. However, due to new information received today, both from the Office of Planning and from the Zoning Administrator, the Applicant will request one additional day to provide revised architectural plans, shadow study, and requested perspectives, as discussed hereinbelow.

1. Light and Shadow Study.

The design of the third story, and the degree of side yard relief, is being revised, and updated shadow study will be included with the architectural plans to be filed by Monday, June 28th.

2. Results and Status of Negotiations with Opposing Parties.

Shortly after the hearing on April 28th, ANC Single Member District Commissioner J.P. Szymkowicz approached the parties and suggested a mediation process and connected the parties with a potential mediator. The parties expected such mediation to take place sometime in June, but we have not received any word back from the mediator on potential meetings or times.

The Applicant was not relying entirely on the possibility of such mediation, and so Applicant's counsel did reach out to both parties in opposition. On May 11th, the Applicant's counsel emailed Dr. Lea and suggested direct interaction in addition to the mediation; but received no response. Applicant's counsel has had several phone discussions with counsel for Foxhall Terrace and has provided him some additional documentation of the driveway easement situation.

In response to the parking and driveway usage/circulation concerns from Dr. Lea and Foxhall Terrace, LLC, the Applicant has removed two parking spaces from the plans. This removes all parking spaces from what Foxhall Terrace's counsel claimed (incorrectly) was a "reciprocal" easement at the rear of the Subject Property. This change also provides ample circulation space so that these two cars can enter and exit the Subject Property, and proceed across the existing easements out to MacArthur Blvd., without encroaching on any other non-easement property. In addition to resolving this concern of encroachment by the Opponents, the reduction in the number

of parking spaces down to the required two spaces ensures that the use of this easement area will effectively be no different than the previous or current use, since there is currently room for two cars there now.¹

3. Clarification of the 12-foot or 10-foot right of way or easement, including turning radius at the parking area through drawings and/or plans

- a. From the street, the easement established in a 1929 subdivision is 10 feet wide from MacArthur Blvd. to a point at the rear of the street-fronting lots. See attached Plat showing the Easement Area.
- b. At the rear of the 4457 and 4459 properties, there is a second easement, 12-feet in width. 4457 has access rights across this easement area on the 4459 property. This easement was established in 1929 as well, originally to provide access across this area for the benefit of the property adjacent to the north of 4457 and 4459. This easement was modified in 1959 to also provide rights of vehicle access to 4457 across the easement area on 4459.

The Subject Property and the properties owned by the opposing parties as well as one lot just north of the Subject Property were subdivided from the same property in 1929. Beginning at the western edge of the Plan, today's 4465 MacArthur (Foxhall Terrace) was devised as three lots to Ida Dupree and her husband David Dupree. Ida Dupree received two of the three lots, one fronting MacArthur, and an interior lot directly inland of her and David's lots. These lots contained two single-family dwellings that fronted MacArthur boulevard. The description of these lots includes language granting a 10-foot easement along the eastern edge of David Dupree's lot, for the benefit of all other properties in the subdivision (See Dupree Deed, 1928). Moving east across the easement, the lot at 4459 MacArthur was devised to Zaidee Gardner. Next to the east, the lot at 4457 MacArthur was devised to Zaidee's son, Edward Gardner. These two lots contained one single-family home, and the internal boundary between the two lots bisected the house along its present axis (See Gardner Deed, 1929).

The final lot relevant to this matter is 4461 MacArthur. This landlocked lot was devised to Zaidee Gardner and is only accessible via the 12-foot easement across the rear of 4459 and 4457 MacArthur that itself connects to the 10-foot easement which provides access to MacArthur. After this initial subdivision, it was not clear whether the right of way located at the rear of 4459 and 4457 Mac Arthur could be used to provide vehicle access to 4457 MacArthur, across 4459 MacArthur. However, in 1959, the owners of 4459 and 4457 MacArthur executed and recorded an agreement allowing the vehicle access to 4457 MacArthur across 4459 MacArthur. (See 1959 Johnson Covenant).

¹ The Applicant's architect is still revising the Plans and the Applicant expects to file revised plans no later than Monday June 28. Late plan revisions were required due to comments from Office of Planning staff in a meeting this morning, and due to a determination from the Zoning Administrator, delivered via email to the Applicant this afternoon, that penthouse habitable space is not permitted as a matter-of-right in the RA-1 Zone. This was the first definitive determination from the Zoning Administrator that Section C-1500.3(b) prohibits habitable penthouse space here.

None of these recorded instruments limit easement use to a particular land use category or intensity. This is clear not only due to the lack of any restricting language, but because certain lots within the subdivision have since seen their use intensity increase many times over. As originally devised, the Dupree lots contained two single-family dwellings. Today, they have 36 dwellings in a multi-unit apartment building. Access for these units is through the same 10-foot easement carved out in the original subdivision to connect the interior areas with MacArthur Boulevard.

As established in the recorded instruments, two easements exist to serve the properties within the original subdivision plan. These easements provide the only vehicle access to the properties. The easement language places no restrictions on use type or intensity.

These documents are provided for clarity, but the existence of the easements and any dispute of their use is not before the Board in this case. These easements do provide legal access to legal parking spaces for the Subject Property, such that the Applicant is not asking for parking space relief. The Applicant previously provided, also for clarity, an email determination from the Zoning Administrator for a different property with a similar situation. This determination clarified that an easement over private property is akin to a public alley for purposes of meeting required width for access to legal parking spaces; *i.e.*, the 10-foot easement and 12-foot easement provide sufficient access for these two parking spaces to meet the requirements of required parking spaces.²

4. Clarification of the status of the storm drain located in the driveway.

Because the use of the easement area will see no increase in the number of cars from 4457 using the driveway, there is no impact on the storm drain. The Applicant suggests that this storm drain situation, whatever it may be, is not relevant to the relief requested.

5. Clarification of the adverse impact of the “deck” (as opposed to a patio which is typically located at grade) on the adjacent neighbor (Ms. Lea)

The deck is proposed to be at grade, and is not materially above the grade, and has no undue impact on the neighboring property. Moreover, the deck structure is a matter-of-right.

6. Perspective drawings to clarify and provide context of the driveway, the subject site and other building’s setback in proximity – comparative study.

The Applicant will request leave to file the revised plans, shadow study, and perspectives one day late, and will serve opponents these documents as soon as possible. As noted above, some late-breaking comments from the Office of Planning and the Zoning Administrator have triggered certain changes to the plans, including removing the habitable penthouse space and reducing the unit count by one unit.

² This Application is self-certified.

Respectfully Submitted,
Martin P. Sullivan, Esq.

Martin P Sullivan

Sullivan & Barros, LLP

Andrew Justus

Andrew Justus, Esq.
Sullivan & Barros, LLP

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, an electronic copy of this submission was provided to the following:

D.C. Office of Planning

Jonathan Kirschenbaum
jonathan.kirschenbaum@dc.gov

Advisory Neighborhood Commission 3D

ANC Office
3D@anc.dc.gov

Chuck Elkins, Chairperson
Chuck.Elkins@ANC.dc.gov
3D01@ANC.dc.gov

J.P. Szymkowicz, SMD
3D09@anc.dc.gov

John Patrick Brown, Jr., Esq.
Counsel for Party Opponent, Foxhall Terrace, LLC
JPB@gdllaw.com

Dawn Lea, Party Opponent, 4459 MacArthur Blvd.
Lea.washingtondc@gmail.com

Respectfully submitted,

Martin P Sullivan

Martin Sullivan
Sullivan & Barros, LLP
Date: June 25, 2021