DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application of Nezahat & Paul Harrison BZA No. 20594

OPPOSITION MEMORANDUM OF JOHN F. BARINGER

John F. Baringer, a party in opposition to the Application, submits through his undersigned counsel, this Opposition Memorandum setting forth grounds for denial of the Application.

1. Aggrievement of Mr. Baringer

Mr. Baringer sought party status on December 8, 2021, alleging that, along with his wife, Michela Perrone, he owns and lives at 4516 30th Street, N.W., a home abutting the lot that is the subject of the Application (the "Property"). The Baringer property includes an ADU behind the main home. The Applicant's plan for proposed House Two on proposed Lot Two would put it just 8-13 feet from the Baringer property line and the wall/window of the Baringer ADU. House Two would be a four-story high, 6,500 square feet building that would nearly completely eliminate any view from the ADU, causing a major reduction in its rental value and possibly the market value of the entire Baringer property. Mr. Baringer is also concerned about additional traffic on the Lot Two driveway and around his property. He also claims that the two new houses on the theoretical lots would be twice or three times the size of nearly all the other homes on Albemarle and 30th Streets, resulting in a dramatic change in the character and identity of the Forest Hills neighborhood, which has special low-density and environmental protection in the form of the R-8 Forest Hills Tree and Slope Protection Residential House Zone. The Board granted Mr. Baringer party status on December 22, 2021.

2. Evolution of the Application

When first filed, the Applicant's sole request for zoning relief was a single variance: relief from the lot width requirement for proposed Lot Two that at least one street line have a length equal to or more than 75% of the minimum lot width. C § 303.2; D § 302.1;[1] X § 1001.2. Later the Application was modified to request approval of a theoretical lot

[1] The Applicant cited this provision, which is the minimum lot width for the R-1-A zone, i.e., 75 feet. The Property, however, is in the R-8 zone, which has the same minimum lot width—75feet. D § 502.1. This immaterial error was corrected in the revised request for zoning relief.

Board of Zoning Adjustment
District of Columbia
CASE NO.20594
EXHIBIT NO.107

subdivision under C § 305 with no variances. The Applicant also requested, as alternative relief, the original relief requested, i.e., Lot Two area variance relief from the lot width requirement (corrected to refer to D § 502.1). The alternative nature of the relief is expressed thusly by the Applicant: the variance should be granted "if the Board finds that the Applicant does not meet the standards for the [requested theoretical lot subdivision] special exception." Ex. 95 at 17.

In short, the Application went from exclusive reliance on the minimum lot width variance request to primary reliance on the theoretical lot special exception with no variance, and secondary reliance on the minimum lot width variance. The Applicant did not explain the intended switch from primary reliance on a variance to primary reliance on a variance-free special exception. But the reason is self-evident. A variance cannot be granted unless the applicant demonstrates "an exceptional condition that results in an exceptional practical difficulty." OP Report, Ex. 99, at 7. That onerous requirement does not apply to a special exception if correctly premised on the claim that no variance is needed. In short, this approach is defensible only if the variance relief (previously deemed sufficient by the Applicant for approval of the Application) is no longer necessary if the special exception is granted.

3. **Absent Variances, Theoretical Lot Subdivisions**
   <u>Must Comply With Development Standards</u>

Development standards for a given zone must be complied with for a project to be approved for a building permit. The most straightforward way is to propose construction that actually meets the standard. No prior BZA approval is required in such instances. When one or more development standards is not met, one possible alternative path to approval is to obtain a special exception from the Board if the Zoning Regulations provide for such relief, typically under specified terms and conditions. If special exception relief is not provided for, then the Applicant must meet the standard for an area variance if the Regulations provide for seeking such relief for the unmet development standard.

In the case of theoretical subdivisions, special exception relief is provided, under specified conditions, "to allow multiple primary buildings on a single record lot. . ." C § 305.1. **Compliance with this section, however, only provides relief allowing for building consolidation on one lot; it does not dispense with the need to obtain variance relief with respect to noncompliance with any other development standards for the applicable zone of the property that are not changed by § 305.** If this were not the case, then C § 305 would necessarily have to delineate which development standards are lessened or excused by virtue of the grant of the special exception. There is no such delineation in C § 305, only minor modifications, as set forth in C § 305.3, thus making clear that the only zoning relief provided by the special exception is the allowance of

multiple buildings on one lot.[2] This is most clearly illustrated by C § 305.3(a), which states that "Side and rear yards of a theoretical lot shall be consistent with the requirements of the zone . . ." If one wishes to create a theoretical lot subdivision, the theoretical lots must meet the side and rear yard requirements for the zone, which in this case would be the R-8 zone. If any of the lots fail to do so, the application for a theoretical lot subdivision must be denied unless the applicant demonstrates, as an accompaniment to the subdivision request, the requisites of variance approval relaxing the yard requirements where they are not met.

Consistent with the foregoing, the Board has on many occasions, when considering theoretical lot subdivision requests, reviewed and granted variance requests submitted in conjunction with the special exception request to allow multiple buildings on one lot. These variance requests and approvals have not been limited to side or rear yard variances; they include a number of other development standards as well.[3] Nor is the need for variance relief a new development under the 2016 Zoning Regulations; variance relief was often an essential ingredient in theoretical lot special exceptions under Section 2516 of the 1958 Regulations.[4]

4. The Office of Planning Improperly Accepted the Applicant's Variance Avoidance Strategy

As explained above, the Applicant is seeking to obtain approval for theoretical lots while avoiding the obligation to demonstrate entitlement to a variance for lack of the minimum lot width on proposed Lot Two. The avoidance strategy is understandable. The Applicant, obviously uncertain of the outcome, relegated variance approval to alternative grounds for relief. That uncertainty is well-founded, especially since OP, assessing the variance request apart from the subdivision request, concluded that the existing lot presents

---

[2] In the predecessor to C § 305, i.e. § 2516 of the 1958 Zoning Regulations, the narrowness of the special exception relief was stated more explicitly: the special exception was for multiple principal buildings on one lot, "provided, that the applicant for a permit to build submits satisfactory evidence that **all the requirements of this chapter** (such as use, height, bulk, open spaces around each building, and limitations on structures on alley lots pursuant to § 2507), and §§ 3202.2 and 3202.3 are met." § 2016.4 (emphasis added). The absence of this language in C § 305 is of no significance; it states the obvious and there is no evidence that a major change in the scope of special exception relief was intended upon adoption of the 2016 Zoning Regulations.

[3] E.g., BZA No. 20665 (lot occupancy and FAR variances granted); BZA No. 20078 (front setback, building line and height variances granted); BZA No. 20034 (side and rear yard variances granted); BZA No. 19849 (lot occupancy and side and rear yard variances granted); BZA No. 19841 (side and rear yard variances granted); BZA No. 19819 (height variance granted); BZA No. 19377 (lot occupancy, rear and side yard variances granted).

[4] E.g., BZA No. 17192 (FAR variances granted for 114 of 209 theoretical lots).

no exceptional condition or practical difficulty, and that the "creation of a new substandard record lot that does not meet the minimum lot width requirements of the R-8 zone would not be consistent with the purpose and intent of the Zoning Regulations." OP Report, Ex. 99 at 7.

Despite this finding, OP deemed it of no consequence: "The Applicant has the ability to accomplish the desired outcome through a theoretical lot subdivision, which is reviewed as a special exception rather than as a variance." *Id.* OP cites no Zoning provision for this assertion, nor Board precedent for dispensing with variance approvals wherever a development standard is not met. Indeed, in all the theoretical lot special exception cases determined by the Board that are cited in footnotes 2 and 3, each case included (a) an OP Report noting what variances were required in conjunction with the special exception approval, and (b) a recommendation by OP that, unlike here, the standard for variance approval was met in every one. OP cites no prior case where it recommended, and the Board approved, variance denial and theoretical subdivision approval in one fell swoop. In short, OP has improperly accepted the Applicant's variance avoidance strategy, even though it is inconsistent with both the specific terms of C § 305 as well as past practice, both at OP and before the Board. Its unsubstantiated, undocumented endorsement of this avoidance scheme is not only not entitled to "great weight;" it is entitled to no weight at all.

5. Both the Theoretical Subdivision and Variance <u>Approvals Are Necessary In This Case</u>

As noted, the Applicant first sought to subdivide the Property into two lots with only a variance approving the substandard second lot's lack of minimum lot width for the R-8 zone; no theoretical lot special exception approval was sought. This remains the Applicant's chosen basis for subdivision approval if the new primary relief, the theoretical lot special exception, is denied. But the notion that variance approval, all by itself, is an alternative form of relief is incorrect. Without the theoretical subdivision, the subdivision must meet the requirement that, apart from campus plans, PUD's and theoretical subdivisions, "each new primary building . . . shall be erected on a separate lot of record in all R zones. . ." C § 302.2 In order to obtain a second record lot on the Property, both lots have to meet, among several other criteria, the minimum lot width requirement for the R-8 zoned Property. C § 302.1. Variance approval to subdivide a zoning-compliant lot into two lots, one of which will be substandard as to the minimum lot width requirement, is simply not an available option under the Subdivision Regulations, i.e., C § 302.

6. The Applicant's Claim of Variance Entitlement <u>for Theoretical Lot 2 Is Meritless</u>

Evaluation of the Applicant's claim of entitlement to a variance for proposed Lot Two must begin with reference to black-letter District of Columbia law on area variances. The Court of Appeals

> has adopted a three-prong test for the exercise of the power granted under D.C. Code § 6–641.07(g)(3) ; the District's zoning authorities are authorized to grant an area variance if they find that (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan.

Ait–Ghezala v. BZA, 148 A.3d 1211, 1216 (D.C. 2016); *St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 269 (D.C. 2017).

Under these standards, the Applicant's claim of entitlement of a variance from the minimum lot width for the proposed Lot Two, i.e., the one to be accessed from the pipestem driveway on Albemarle Street, set out in Ex. 76 at 17-22, is without merit. On the first prong, OP was correct in concluding that the Property is not burdened with an exceptional situation or condition, stating as follows:

> The existing tax lot being large is not an extraordinary or exceptional situation or condition of the subject property. The existing tax lot is conforming, satisfies the minimum lot width and area requirements for the R-8 zone, and is currently improved with a detached building intended for single-household residential use.

OP Report, Ex. 99 at 7. The Applicant asserts that the Property "differs from others in the neighborhood," but cites to no difference that could possibly lead to practical difficulty of development of the Property for its intended use, i.e., as the location for a single-family residence. After all, that is exactly how it has been used for decades. **Failure on the first prong alone is fatal to the variance request.**

On the second prong, OP likewise concluded that "no practical difficulty to development has been shown." *Id.* The Applicant argues that the Property has more adjoining properties than most, and that it is an abnormally long walk to the street or the "garbage/recycling point." Ex. 76 at 19. But these are simply not matters of significance amounting to either an "extraordinary or exceptional condition" or a practical difficulty if the variance is denied.

The Applicant also complains that the street grid layout and undisclosed easements constrain street access to the north side of the Property, *id.* at 18-19, but that is no genuine impediment to use of the Property for residential purposes. The subdivision plan of access to proposed Lot One, where the existing house stands, is via a 12-foot private driveway linked to a curb cut to be made on Appleton Street. *Id.* at 10. The only reason the existing house lacks such access now appears to be because the owner has chosen to use the longer driveway connected on the south side to Albemarle Street, which is described as the "sole access" to the Property. *Id.* at 18.[5]

The Applicant also asserts all of these matters to constitute a "confluence of factors" leading to an "exceptional situation or condition." *Id.* But whether singly or in combination, the Applicant recites nothing more than ordinary challenges that arise when one tries to squeeze out--from a lot developed many years ago, within the fabric of the community and its long-settled layout of streets and lots--a second lot on the Property. If there is any difficulty at all therefore, it lies in the fulfillment of the Property owner's desire to newly utilize the Property to achieve a greater level of economic return by turning one detached single-family dwelling location into two. That is not a sufficient basis to find an extraordinary or exceptional situation or condition under the Zoning Regulations. *Palmer v. BZA*, 287 A.2d 535, 542 (D.C. 1972) ("[I]t is certain that a variance cannot be granted where property conforming to the regulations will produce a reasonable income but, if put to another use, will yield a greater return.").

The Applicant also recites in generalized, vague terms, personal financial considerations that are claimed to add to the difficulty of implementing his redevelopment plans for the Property absent the requested variance. Ex. 76 at 20. These considerations are entitled to little or no weight in what should be an appraisal of property-specific, not owner-specific, considerations when evaluating the practical difficulty question. As explained in *Draude v. BZA,* 527 A.2d. 1242, 1255 (D.C. 1987):

> The concept of an "exceptional condition" in the variance context refers to unusual conditions of the property, not merely to unusual circumstances personal to the owner and related to the property only in the sense that the owner's personal situation makes it difficult to develop the land consistently

---

[5] The Applicant claims DDOT will not allow the curb cut on Appleton unless the subdivision is granted. *Id.* at 20. This claim is unsubstantiated, but, if true, is likely due to a policy disfavoring or prohibiting multiple curb cuts for a single lot, given the existing driveway linked to Albemarle Street. The driveway and curb cut would no longer be available to House One if it became the access point for House Two. Hence, if the Property owner wished to switch access to the existing house from Albemarle to Appleton, thus retaining a single curb cut for the Property, there should be no DDOT objection, and there would be no curb cut objection if a conventional subdivision were possible. In short, access is an irrelevant factor in the variance analysis.

with the zoning regulations. *See Capitol Hill Restoration Society*, 398 A.2d at 16. Furthermore, the BZA generally cannot grant a variance just because the property makes it difficult for the owner to construct a particular building or to pursue a particular use without a variance if the owner could use or improve the land in other ways compatible with zoning restrictions.

Finally, the Applicant claims that "the requested variance can be granted without causing any adverse impact on the neighboring properties or the Zone Plan as compared to either the current situation or an as-of-right build." Ex. 76 at 21. To make this claim, the Applicant ignores the nearly unanimous outpouring of neighborhood opposition to the Application. *See* Exs. 33, 37-56, 58-64, 66-70, 90-96, 98. The tenor of the opposition letters is widespread neighborhood opposition to a second house on the Property, not to redevelopment of the Property with a new, replacement house. Nevertheless, the Applicant relies heavily on the irrelevant notion that the Property might be sold and "another project developer could build a more intensive project," Ex. 76 at 21, than is on the Property currently.

In any case, while the Applicant and his neighbors obviously have differing takes on whether the variance grant will be detrimental to the public good, the third prong test has two parts, the other being whether the variance can be granted "without substantially impairing the intent, purpose, and integrity of the zone plan." *Ait-Ghezala, supra.* On this point, OP concluded without equivocation, citing C § 302.1, which requires new subdivisions to meet the minimum lot width requirement of the zone, that "[t]he creation of a new substandard record lot that does not meet the minimum lot width requirements of the R-8 zone **would not be consistent with the purpose and intent of the Zoning Regulations**." OP Report, Ex. 99 at 7 (emphasis added). On this point, the Applicant has no response, let alone an effective one, to OP's observation that C § 302.1 is "intended to discourage the creation of new non-conforming lots, and to not create new nonconformities for existing buildings." *Id.* Quite plainly, grant of the variance would create a new nonconformity (as to minimum lot width) on the proposed Lot Two.

OP's judgment on this prong that granting the variance would be inconsistent with the purpose and intent of the Zoning Reglations is plainly correct, as confirmed by the evolution of the theoretical lot subdivision special exception requirement in the Zoning Regulations. What the Applicant has proposed -- a pipestem lot interior to the other street-facing homes surrounding it -- is just the sort of infill development tha prompted the Zoning Commission to change in the Zoning Regulations in 1989 to require BZA special exception review of theoretical lot subdivisions in or near residential zones. Specifically, Zoning Commission Order No. 627 (July 31, 1989)(excerpt attached) imposed for the first time BZA review of such proposals, in response to adverse reactions in established communities to developments that were occurring on large parcels resulting in large houses on pipestem lots or other irregularly shaped lots in the interior of blocks. The houses built on these interior, pipestem lots were often out of character with generally smaller houses

built to face public streets. As the Commission Order explained, "the trend to maximize development potential produces as a corollary a greater potential for negative impact on adjacent dwellings." Thus, the Commission concluded, "the response to an increase in the density of residential buildings … must . . . allow for appropriate controls and review." ZC Order 627 at 2 (July 31, 1989). The appropriate "controls and review" in this case should lead to denial of the Application.

CONCLUSION

For the foregoing reasons, the special exception for a theoretical lot subdivision should be denied absent approval of variance relief from the minimum lot width requirement for the proposed Lot Two, and such variance approval should be denied, resulting in a complete denial of the Application.

Respectfully submitted,

David W. Brown

Knopf & Brown

503 Woodland Terr.

Alexandria, VA 22302

(301) 335-5646

brown@knopf-brown.com

Government of the District of Columbia
ZONING COMMISSION

ZONING COMMISSION ORDER NO. 627
Case No. 89-12
(Text - Theoretical Building Site Provision)
July 31, 1989

The Zoning Commission for the District of Columbia initiated this case in response to the petition of Brandywine Community Project, Friends of Springland, and Foxhall Community Citizens Association that the Commission initiate a rulemaking case and set and expedited hearing to consider amendment of 11 DCMR 2516, which allows the construction of two or more principal structures on one lot.

At a meeting on April 17, 1989, having considered the petition, as well as the recommendation of the Director of the Office of Planning ("OP"), dated April 13, 1989, that the Zoning Commission adopt an emergency rule, the Commission decided to adopt emergency rulemaking to be effective immediately on that date and for a period not to exceed 120 days, that is through August 14, 1989.

On June 15, 1989, having furnished the required notice, the Commission held a public hearing to consider the adoption of amendments to become effective on or before the expiration of the emergency order. Based upon the testimony at the hearing, and written submissions received before the record closed at noon on June 19, 1989, the Commission met at 7:00 P.M. on June 19, 1989, to consider proposed action in this case.

The Commission determined to promulgate a revised notice of proposed rulemaking, and that notice appeared in the D.C. Register on June 30, 1989. The final action that is effected by this order is based upon consideration of the entire record, including all comments that were received before 12 noon on July 31, 1989.

The Commission is persuaded that the development of two or more structures on one lot in or near a residential zone presents special issues and problems that require consideration at a public hearing.

The District of Columbia has developed at a pace and to an extent that increases the incentive of developers to maximize the use of land that is either vacant or not as

Attachment to
5-12-22 Opp. Memo

fully developed as the zoning envelope would allow. To a substantial degree, it is in the overall interest of the District of Columbia to increase the opportunity for persons to live in the District.

However, the trend to maximize development potential produces as a corollary a greater potential for negative impact on adjacent dwellings. Thus, the response to an increase in the density of residential buildings cannot reasonably allow only for the increase, but must also allow for appropriate controls and review.

The Commission remains persuaded, after the hearing and upon consideration of the entire record, that the Board of Zoning Adjustment should review multiple building construction on a single lot, that is proposed in or near a residential zone. Thus, as the Commission said in Order No. 617, review by the Board of Zoning Adjustment, pursuant to the special exception process and standards, of the proposed construction of more than one principal structure on a single lot, would provide reasonable protection to the stability of residential neighborhoods; and would not altogether prohibit such construction, but would allow it to proceed, albeit subject to a hearing, rather than as a matter-of-right.

The notice of proposed rulemaking included as an alternative, a proposed rule that would apply the provisions of 11 DCMR 2517 to construction on a site that was subject to a Large Tract Review that was completed before June 15, 1989. The alternative rule would have exempted projects on such sites from the requirement for review by the Board of Zoning Adjustment. Although the Commission had reservations about any such exemption, it proposed the alternative to allow for the submission of comments. Having considered the comments in favor of and in opposition to such an exemption, the Commission has determined not to adopt an exemption for any project in a residential zone district. The Commission believes that the review process adopted by this Order is reasonable, and will have no adverse impact on any reasonable proposed project. The Commission notes that the Board of Zoning Adjustment has procedures that are available to allow for the expedited filing or hearing of applications when there is good cause.

In further response to the comments, the Commission states as follows:

1. The Commission has determined to require a twenty-five foot buffer from a residence zone as the basis for allowing matter of right construction pursuant to 11 DCMR 2517. The requirement of a specific distance provides a desirable level of certainty.

2. The Commission has determined not to provide a general exemption for additions to structures within previously-approved projects. Such an exemption would be too open-ended.

3. Where appropriate, the Commission has clarified and corrected several provisions.

4. The Commission has added an explicit reference to the height of structures as an element that the Board may address pursuant to subsection 2516.11.

5. The Commission has adhered to the decision not to delegate to the Board the obligation that is vested in the Commission to assure that the Zoning Regulations are not inconsistent with the Comprehensive Plan.

Finally, the Commission does not believe that there is a legal barrier to the application of the rule, as originally adopted on April 17, and as amended and finally adopted by this order, to construction for which no building permit had been issued before April 17, 1989.

The Commission transmitted the proposed rules to the National Capital Planning Commission ("NCPC") on April 26, 1989, and again, as revised, on June 23, 1989. By comments transmitted on June 2, 1989 and July 28, 1989, NCPC reported that the amendments would not have an adverse impact on the federal establishment or other federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan.

The Zoning Commission believes that the proposed amendments to the Zoning Regulations are in the best interest of the District of Columbia, are consistent with the intent and purpose of the Zoning Regulations and Zoning Act, are not inconsistent with the Comprehensive Plan for the National Capital, and will appropriately implement and advance the objectives and policies established in the Comprehensive Plan.

In consideration of the reasons set forth herein, the Zoning Commission hereby orders APPROVAL of amendments to the Zoning Regulations to require review by the Board of Zoning Adjustment of construction of more than one building on a single lot in or near a residential zone district. The specific amendments to the Zoning Regulations are as follows:

1. Amend the text of the Zoning Regulations by adopting a revised version of 11 DCMR 2516, to read as follows: