LAW OFFICES OF

KNOPF & BROWN

DAVID W. BROWN
SOLE PRACTITIONER
ADMITTED IN D.C. & MD

503 WOODLAND TERRACE
ALEXANDRIA, VIRGINIA 22302
(301) 335-5646

EMAIL: BROWN@KNOPF-BROWN.COM

July 19, 2022

Board of Zoning Adjustment for the
District of Columbia
441 4th Street, N.W.
Washington, D. C. 20001

Re: Special Exception Application No. 20594,
Nezahat and Paul Harrison

Dear Chairman Hill and Members of the Board:

On behalf of John F. Baringer, a party to this case and his wife, Michela Perrone, I am objecting to the submission for the record of a letter sent to the Board late today by the applicant, Paul Harrison, less than 18 hours before the scheduled public hearing in this case. He responds to a point I made in the legal memorandum I submitted for my client to the Board and served on Mr. Harrison more than **two months ago** -- Ex. 107. Mr. Harrison has had ample time to respond without waiting until the last minute. The letter should be excluded from the record as untimely. If it is allowed into the record, I will ask during the hearing that this response, necessarily prepared at the 11.9th hour, also be included in the record.

Late this morning, Mr. Harrison presented a legal argument to the Zoning Administrator that did not reference or discuss my Ex. 107, which, at pages 1-4, explains why the theoretical lot subdivision he is seeking would also need minimum lot width variance approval. He nevertheless sought the opposite conclusion from the Zoning Administrator, Mr. LeGrant, who obligingly provided it two hours later. Mr. LeGrant did so with what amounts to a word-for-word adoption of Mr. Harrison's legal argument. The Board should not countenance and reward this sort of abuse of its orderly procedures by considering this last-minute legal argument, which the Zoning Administrator, in a fine-print footnote, qualifies as not an appealable "final writing," in that it is based on the documents and information supplied by Mr. Harrison.

If the Board nevertheless decides to consider the newly presented legal arguments, they should be rejected for all the reasons set forth in Ex. 107. In essence, Mr. LeGrant argues that for any development standards not listed in C § 305.3, it can be waived by the Board under C § 305.1 by mere approval of the theoretical lot subdivision application. This is a severe misinterpretation

of C § 305.1. That section provides a waiver from only one requirement for properties such as this in an R zone: that only one primary building is allowed on a single record lot. D § 201.1. Properly understood, the special exception sought by Mr. Harrison is relief from that requirement, nothing else. That follows from how C § 305.1 is worded: it plainly states that the Board "may grant, through special exception, a waiver of Subtitle C § 302.1 to allow multiple primary buildings on a single record lot . . ." By its express terms, special exception relief from the single primary building requirement is the only relief available under C § 305.1 in the R zones, including the applicable zone here – R 8.

In addition, that relief is not available unless the proviso following this language is met. That proviso states that the theoretical lot subdivision must meet "the requirements of this section." Those requirements include compliance by each theoretical lot with the side and rear yard requirements of the zone (C § 305.3(a)) and, for each building on a theoretical lot, compliance with the height requirement for the zone, using the height measurement methodology set out in C § 305.3(c). In short, special exception relief, i.e., theoretical lot subdivision approval, is available only if these requirements are met. And as extensively detailed in my legal memorandum, theoretical lot subdivision applications that do not meet the side and rear setback requirements have been approved, but only upon a Board finding that the proposed departures from the setback requirements merited **variance** approval, not **special exception** approval.

Mr. LeGrant does not limit the scope of special exception approval in keeping with the limitation on that scope expressly written into C § 305.1. Instead, he says, in effect, all other development standards are waivable under this provision as part of the theoretical lot special exception. Apart from side and rear setbacks, this effectively takes all of the other listed standards in C § 302.1 out of the ordinary, specific context of compliance/departure evaluation, one by one, in favor of a generalized overall evaluation of the project. There is no support for this interpretation in the text of the Zoning Regulations, as already detailed. Nor is their support in actual practice. As noted, there have been cases where OP recommended, and the Board approved, variances for development standards other than setbacks, as detailed in Ex. 107 at 3 n.3, such as lot occupancy. Mr. LeGrant, in his haste, has not cited a single instance before now where OP has taken the position that all the development standards other that side and rear setbacks need not satisfy the standards for a variance, or even a special exception, in favor of some "project as a whole" evaluation under C § 302.1 (which is directed generally at subdivision criteria, not theoretical lots). If Mr. LeGrant's indiscriminate, global evaluation is what was intended by C § 305.1, it could have so provided; it did not.

In fact, as discussed in Ex. 107 at 2-3, C § 305.1 is the successor to § 2516.4 of the 1958 Zoning Regulatons, which states (emphasis added) as follows:

> The number of principal buildings permitted by this section shall not be limited; provided, that the applicant for a permit to build submits satisfactory evidence that **all the requirements of this chapter . . .and §§ 3202.2 amd3202.3 are met.**

In his quick response to Mr. Harrison, Mr. LeGrant did not likely have the time to fully evaluate the question presented, including providing any history of the intention in the recodification process to significantly change the limited scope of special exception approval in the process, to

say nothing of the standard practice both under the 1958 and 2016 Zoning Regulations. Indeed, Ex. 107 at 7-8 discusses the legislative history of the movement of theoretical lot subdivisons from by-right into the special exception category for greater control of the process—quite contrary to this hasty interpretation from Mr. LeGrant. His late interjection into this case should not deter the Board from finding that, no matter how it may regard the merit of the theoretical lot subdivision application in other respects, it cannot be approved without a minimum lot width variance being sought and approved. As I have detailed for the Board, my clients' position is in agreement with OP that a lot width variance is not justificable in this case. Without an application before the Board making the case for such a variance, there is no reason to evaluate the details of the application; it should be summarily rejected.

Sincerely,

David W. Brown
Knopf & Brown

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19, 2022, a copy of the attached letter was served on the following by email:

Elisa Vitale, D.C. Office of Planning, via email: Elisa.Vitale@dc.gov

Nezahat and Paul Harrison, Applicants, via email: paul@3lobos.com

ANC3F and Chair Claudette David, via email: commissioners@anc3f.com & 3f05@anc.dc.gov

ANC3F03 SMD Commissioner Dipa Mehta, via email: 3f03@anc.dc.gov

Party Deborah Hernandez via attorney Cynthia Giordano by email: Cynthia.Giordano@saul.com

Party Mary Lee via attorney Andrea Ferster by email: aferster@railstotrails.org

Party John F. Baringer via email: jfbaringer@gmail.com

David W. Brown

David W. Brown