BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Application of Nezahat and Paul Harrison, for a Special Exception for a Theoretical Lot Subdivision and Variance To Raze an Existing Principal Dwelling Unit, and Subdivide the Lot to Construct Two New, Detached, Principal Dwelling Units in the R-8 Zone at Premises 3007 Albemarle St NW (Square 2041, Lot 818) ("Application")	)))))))

Closing Statement of Opposition Parties Deborah Hernandez and Mary Lee

Deborah Hernandez and Mary Lee, parties in opposition to this application, submit this joint closing statement through their undersigned counsel, in accordance with the July 21, 2022 Memo issued by Board Secretary Moy in this case (BZA Ex. No. 167)

I. The Lack of A Record Lot Is An Absolute Bar to Seeking A Special Exception for a Theoretical Lot Subdivision

The Application seeks a special exception to permit more than one building on a record lot. The Zoning Regulations permit this exception from the matter of right requirement of a single record lot for each building in a residential zone. 11 DCMR Subtitle C, § 305.4(a)(1). In lieu thereof , the special exception regulation permits a subdivision of a record lot into theoretical lots subject to zoning compliance of the theoretical lots and the houses on them as well as an assessment of impact on neighboring properties. As a result, the basis of the special exception is an underlying record lot and a record lot is clearly a prerequisite to BZA consideration of a theoretical subdivision special exception.

The Harrison property does not satisfy this threshold requirement because they do not have a record lot. In fact , the Zoning Regulations governing theoretical lot subdivisions unequivocally require applicants to submit, as part of their application: "A plat of the record lots proposed for

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subdivision." 11 DCMR Subtitle C, § 305.4(a)(1). No such plat was submitted by the Applicant, and, indeed, the Applicant does not have a record lot.

The Applicant contends that they will promptly apply for a record lot or do so as part of the permitting process but that is speculative, outside the scope of the BZA's review and inconsistent with the Zoning Regulations which require it as part of the special exception application. Nothing in the Zoning Regulations permit such conditional applications, much less conditional approval by this Board of applications not satisfying a threshold requirement.

II. The Applicant Does Not Satisfy the Standard for Either A Special Exception for a Theoretical Lot Subdivision Or A Variance

A. The Theoretical Lot Subdivision Regulation Does Not Waive the Zoning Development Standards Related to Lot Width

As set forth in the letter from counsel for Ms. Hernandez (BZA Exhibit 132), the special exception process for theoretical lot subdivisions under C-305 does not operate as an implicit waiver of or exemption from the development standards applicable to lot width. Accordingly, a variance from the lot width requirements is also necessary to accommodate the proposed development. As discussed below, the Application does not satisfy the standard for a variance.

Numerous cases cited by the opposing parties demonstrate that even in the context of theoretical lot subdivisions, variance relief is necessary where the lots do not conform to otherwise applicable development standards, including Floor Area Ratio ("FAR") and lot occupancy. Indeed, at the hearing on July 20, 2022, the Office of Planning staff person specifically confirmed that applications for theoretical lot subdivisions must demonstrate compliance with generally applicable development standards such as lot occupancy, not simply the development standards set forth in Section C-305.3. It is wholly illogical to suggest that C-305.3 implicitly waives the minimum lot width requirements simply because they are not specifically identified in C-305.3,

while admitting that maximum lot occupancy requirements, which are similarly not referenced in C-305.3, remain fully applicable.

The notion that C-305.3 operates as an implicit repeal or exemption for any development standards not specifically enumerated in that section also lacks support in general principles of regulatory interpretation. The D.C. Court of Appeals has adhered strongly to the "cardinal principle of statutory construction that repeals by implication are not favored, and whenever possible statutes should be read consistently." *Speyer v. Barry*, 588 A.2d 1147, 1164 (D.C. 1991); *Leonard v. District of Columbia*, 794 A.2d 618, 626 (D.C. 2002) ("implied repeals are not favored"). Only when there is an "irreconcilable conflict" between the two provisions will "the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Speyer v. Barry*, 588 A.2d at 1164. These principles apply equally to the interpretation of regulatory provisions. *Mazanderan v. D.C. Dep't of Pub. Works*, 94 A.3d 770, 774 (D.C. 2014)

Nothing in the general provisions of the zoning regulations suggests or states that minimum lot width requirements are waived in the context of theoretical lot subdivisions. 11 DCMR Subtitle C, § 304.

B. The Applicant Has Failed to Satisfy Its Heavy Burden of Meeting the Requirements for A Variance from the Minimum Lot Width Requirements.

To receive a zoning variance, the Applicants must demonstrate that, "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the original adoption of the regulations, or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition of a specific piece of property, the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of such property, . . . provided such relief can be granted without substantial detriment to the public good and without substantially impairing

the intent, purpose, and integrity of the zone plan. . . ." D.C. Code § 6-641.07(g)(3) and 11-X DCMR § 1000.1. "[A]n applicant has the burden to meet three criteria before a variance can be granted." *Capitol Hill Restoration Society, Inc. v. D.C. Board of Zoning Adjustment*, 534 A.2d 939, 941(1987).

As the Office of Planning has determined, the Property does not meet the first prong of the variance test and that the creation of two new nonconforming record lots with the variance approval "would not be consistent with the purpose and intent of the Zoning Regulations." OP Report, Exhibit 99 at 7. As the evidence provided by the opposition demonstrates, neither unusually large lots nor pipestem lots are an "extraordinary or exceptional" condition in the vicinity of the Property. BZA Exhibits 137 and 138.

Moreover, as demonstrated by the expert testimony of Guillermo Rueda, the lot creates no practical difficulties for the owner. To the contrary, alternatives are available that would have allowed Applicants to profitably develop their large lot without the necessity of a variance, including the construction of an accessory dwelling unit ("ADU").

III. ANC Is Not Entitled To "Great Weight" with respect to the Special Exception

Regarding the ANC position, the ANC's consideration and vote occurred prior to the modification of the Application pivoting to theoretical subdivision relief. As conceded by the Single Member District ("SMD") Commissioner at the hearing, the ANC did not consider or vote on the special exception. The ANC Commissioner also conceded that she was unaware of the Parties' attempts to negotiate modifications in the project as part of the special exception process for a potential support for the project. Within this context, the Commissioner's lengthy speech and the ANC's vote is only entitled to great weight with respect to the variance, and is entirely irrelevant to the special exception.

Neither the ANC Commission nor the SMD Commissioner addressed the variance standards. In fact , the ANC position is in direct conflict with the recommendation of the Office of Planning that the application does not satisfy the requirements for variance relief. The vast majority of the comments by the ANC Commissioner were largely irrelevant to the requested relief, and indicated a lack of understanding about the legal criteria for, and the effect of, variance relief. The stormwater and landscape aspects which so impressed the Commissioner are not enforceable with a variance. Rather, the variance relief imposes no requirement on the applicant to implement any of the stormwater or landscape improvements shown to the ANC.

Finally, we note that the ANC position does not reflect the views of the majority of Forest Hills residents. While a few Forest Hills residents, all of whom reside a significant distance from the property, testified or wrote in support of the application, the record demonstrates that a much larger number (i.e. 45) Forest Hills households, located nearby the Applicant's property, oppose the application. *See* BZA Exhibit 90-96, 98, 116, 117, 122, 123, 124, 126-130, 135,140-146, 149-150, 159-160.

IV. The Special Exception Will Unduly Impact Adjacent Landowners

As demonstrated by the testimony of the opposing parties and of Guillermo Rueda (see attached written testimony), the special exception will unduly impact the privacy, light and air of adjacent properties, and have other impacts that the Applicants have failed to mitigate, including stormwater management issues that unduly burden the neighbors' property and inadequate tree planting.

Ms. Hernandez and Dr. Lee negotiated in good faith for modifications that would mitigate impacts on their properties while preserving the Applicant's ability to develop a speculative second house on the Property to subsize the cost of a house for themselves. They commissioned Mr. Rueda to design modifications and present them to the Applicants. However, the Applicants

abruptly cut off negotiations as soon as it became apparent that the Baringers would not join the negotiations. The Applicants have failed to even offer the most basic protections to the adjoining landowners of a construction management agreement. As a result, Dr. Lee and Ms. Hernandez will be unduly burdened and their property potentially damaged by unmitigated construction, including heavy construction vehicles accessing the site through the narrow-shared pipestem.

Ms. Hernandez and Dr. Lee will also be unduly impacted by the proposed use of the pipestem driveway to access the speculative House 2. The 16.3 foot wide by 180 foot long pipestem portion of the Property is functionally closer in nature to a private alley than a driveway due to longstanding easements over the pipestem that provide access to Ms. Hernandez's and Dr. Lee's garages. As the means of vehicular ingress and egress to proposed House 2 , this access is required to be 24 feet in width. Subtitle C, Section 305.3(b). However, irrespective of the 24 foot width requirement, the existing 16 foot width is inadequate for fire, emergency and trash and delivery truck access especially given the very limited area in front of House 2 to park or turn around. As shown by Mr. Rueda, the pipestem terminates on the subject property with a 12' x 24' concrete pad which continues to the west as a ramp flanked on both sides by retaining walls down to the basement level garage of House 2. This pad and ramp are inadequate for visitor or delivery parking and the retaining walls leave no room for any overhang for emergency or truck turning movements. This design is deeply flawed and will undoubtedly impact Ms. Hernandez and Dr. Lee with back up parking and traffic congestion in the pipestem area that they rely on for access to their homes.

V. Conclusion

In conclusion the Applicant has not met its burden of proof for approval of either the requested theoretical subdivision special exception or the lot width/lot frontage variance. The Application should be denied.

Respectfully submitted

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Certificate of Service

I hereby certify that, on July 25, 2022, a copy of the foregoing Closing Statement was served by email on the following:

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