

BZA Case No. 21205 – Andria Matrone and Brian Miller

December 9, 2024

Dear Board Members,

We are submitting this testimony to share our concerns with the BZA about Case No. 21205, including our objection to the current application moving forward as drafted. We plan to present a summary of this submission at the public hearing on Wednesday, December 11<sup>th</sup>.

Thank you for considering our concerns,

Sarita Frattaroli and Travis Berge  
3732 Windom Pl NW

### 1) Summary

The existing addition at 3730 Windom Pl is unusually large for the neighborhood and exceeds zoning lot occupancy restrictions. The proposed project would further the noncompliance and negative impact on the use and enjoyment of our home. However, the record does not address why the existing addition is noncompliant, does not establish whether the property previously obtained applicable zoning relief, and does not address the undue negative impacts of the noncompliant structure. Accordingly, the application has not shown that the special exception provision applies, has not met its burden regarding undue negative impacts, and cannot proceed as drafted.

More generally, we are concerned that the proposed project will substantially reduce the use and enjoyment of our home, as the applicant's project would create a 13x24'4"<sup>1</sup> raised, potentially enclosed<sup>2</sup> structure with a deck on top that will rise well above the standard fenceline, extend past the required rear yard setback, and extend towards the far perimeters of the lot, creating a boxed-in feeling to our property and allowing a direct line of sight into the back of our home. We do not believe a privacy screen is responsive to our concerns as it would exacerbate the boxed-in effect.

### 2) Background

Our house, 3732 Windom PL NW, is attached to the applicant's house. Our understanding is that the neighbors are seeking two special exceptions for a project that will add a garage door under their house to accommodate parking for a second car, expand the width and length of the existing elevated deck to allow parking underneath for a third car,<sup>3</sup> increase the elevated deck size to a total of 13' x 24'4", and add a retaining wall directly along our shared property line. The floor, railing, and users of the structure would rise above the standard fenceline of 7'. The current property has an addition that extends approximately 12' from the back of our house, extends approximately 25' wide as it eliminated the dog leg and runs directly along our shared property line, and has a lot occupancy of 44%. This application seeks a lot occupancy of 49.5% and rear yard setback of 15.2'.

### 3) Zoning Law and Burden of Proof Standard for a Special Exception

All buildings and structures in the District must conform with the zoning regulations. *See* Subtitle A-101.5.<sup>4</sup> For the R-2 Zone, the lot occupancy limit is 40% and rear yard setback requirement is 20'.

The applicants' burden of proof for obtaining a special exception from these requirements is provided in Subtitle D- 5201.4, which explains in part that "[a]n application for special exception relief under this section

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<sup>1</sup> The original design indicated that the structure would measure 13x25', including an expanse of 20'4" to the right of the proposed stairs. *See* Exhibit 4, p 2. The updated design appears to have subtracted the calculation for the 4' portion of the deck between the house and proposed stairs and the 8" for the retaining wall; this results in overall dimensions of approximately 13'x24'4". *See* Exhibit 27A, p8.

<sup>2</sup> According to Exhibit 4, pp4-5 and previous communications, we understand that the property would have enclosed siding material that would be visible above the fenceline. However, the enclosure detail was removed from updated Exhibit 27A. If the BZA ultimately decides to approve this application, we request that the order clarify that, consistent with the updated Exhibit 27A and Subtitle D-5201.5, siding material would not be added.

<sup>3</sup> The original design indicated that new structure would accommodate parking for a third car. *See* Exhibit 4, p3 ("Concrete Parking Pad Under Deck."). That detail has been removed from the updated exhibit. *See* Exhibit 27A, p.9 ("Concrete Under Deck.").

<sup>4</sup> "No building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title."

shall demonstrate that the proposed addition, new principal building, or accessory structure shall not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property.”

This provision assumes that the property complies with current zoning restrictions, or was compliant at the time it was built. The special exception procedures are provided in Subtitle X, Chapter 9, including standards for how special exception relief applies to expansions of noncompliant structures that were lawfully built and permitted:

#### X-900.3

In the case of a use that was originally permitted and lawfully established as a matter-of-right and for which the Zoning Regulations now require special exception approval from the Board of Zoning Adjustment, any extension or enlargement of that use shall require special exception approval from the Board of Zoning Adjustment.

#### X-900.4

In determining whether to approve any extension or enlargement under Subtitle X § 900.3, the Board of Zoning Adjustment shall apply the standards and criteria of the Zoning Regulations to the entire use, rather than to just the proposed extension or enlargement.

Subtitle C discusses requirements for a nonconforming structure, which is defined as a “structure lawfully existing at the time this title or any amendment to this title became effective that does not conform to all provisions of this title or such amendment, other than use, parking, loading, and penthouse or rooftop structure requirements.” Subtitle B, Definitions. Subtitle C explains that “[e]xcept as otherwise permitted in this chapter, nonconforming structures or uses may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same zone district” and “[i]t is necessary and consistent with the establishment of the separate zone districts under this title that all uses and structures incompatible with permitted uses or structures shall be regulated strictly and permitted only under rigid controls, to the extent permitted by the Zoning Act of 1938.” Subtitle C-201.1, 201.3.

#### 4) Application Does Not Meet This Burden

The application has not met its procedural or substantive burden for these two special exceptions under Subtitle D- 5201.4 and Subtitle X, Chapter 9.

- a. As a threshold matter, the application has not met its burden to show that the special exception provision applies because it does not show why the current property exceeds the lot occupancy limit

The current property is not compliant with the zoning restrictions because it exceeds the lot occupancy limit of 40%; the current property has a lot occupancy of at least 44%.<sup>5</sup> There is no information in the record addressing why the existing structure is over the lot occupancy limit, whether or when the existing structure was granted relief from the lot occupancy limit, or otherwise establishing that the special exception provision can apply to the increased lot occupancy introduced by the proposed structure. Accordingly, the application has not met its burden to show that the special exception provision can apply to this property, and the current application cannot proceed as drafted.

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<sup>5</sup> The current property is likely above 44% lot occupancy as it appears that this calculation does not include the existing 5’ elevated deck. We have not been able to verify this because there is no plat on the record that shows the current elevated deck.

Applying the special exception provision to this current application would produce a bad policy outcome as it would more generally incentivize property owners to disregard obtaining necessary BZA approvals. Although there may be a sound reason for the excessive lot occupancy here – we just do not have any information on the record – some structures may have been built in defiance of applicable zoning restrictions. Applying the special exception provision here without information on the existing structure would reward property owners who defy the Zoning Code and BZA.

Applying the special exception provision to this current application is also a mistake of law. The current structure contributes to the excessive lot occupancy, and the proposed structure seeks to further exceed the lot occupancy limit. Without meeting its burden to show that the current property is conforming or otherwise obtained appropriate relief, the application cannot meet the standard for special exceptions in Subtitle X, Chapter 9 or Subtitle Y-300.8<sup>6</sup> as it is unclear whether it applies. Proceeding would also not be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, as considering such an application would conflict with the directive that “no building, structure, or premises shall be used, and no building, structure, or part of a building or structure shall be constructed, extended, moved, structurally altered, or enlarged except in conformity with this title.”<sup>7</sup> Therefore, the current application cannot meet the standard for the requested special exceptions.

- b. The application has not met its burden because the application only addresses the proposed extension of the existing noncompliant structure, rather than the entire noncompliant structure

The current property exceeds the lot occupancy limit, and the proposed structure would further that noncompliance. In deciding whether to approve an extension or enlargement of a lawfully established structure that now violates the Zoning Code, the BZA “shall apply the standards and criteria of the Zoning Regulations to the entire use, rather than to just the proposed extension or enlargement.” Subtitle X-900.4.

It appears that in such a situation where the current structure is noncompliant and the owners seek to expand it in a way that will further contribute to that noncompliance, the special exception provision can apply only if the current structure qualifies as nonconforming or otherwise obtained appropriate zoning relief. In those circumstances, the application would need to address the entire nonconforming use, rather than just the extension or enlargement.<sup>8</sup>

Given that the application does not address the undue adverse impact of the entire noncompliant structure or otherwise explain why the structure is noncompliant, the special exception standard in X-900.4 has not been correctly applied, the application has not met its burden, and as a matter of law the application cannot move forward as drafted.

- c. The application has not met its burden to demonstrate that the proposed structure is consistent with other homes in the neighborhood

The application has not demonstrated that the “proposed addition or accessory structure, together with the original building, or the new principal building, as viewed from the street, alley, and other public way, shall not

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<sup>6</sup> See, e.g., Subtitle Y 300.8, requiring a “detailed statement of how the application meets each element of the review standards for special exceptions specified in Subtitle X § 901, or for variances specified in Subtitle X § 1002.”

<sup>7</sup> See Subtitle A-101.5.

<sup>8</sup> See Subtitle X-900.4

substantially visually intrude upon the character, scale, and pattern of houses along the street or alley frontage.” Subtitle D- 5201.4(c).

The neighboring homes all have similar or identical lots with decks, low patios, or a combination thereof. However, none of these properties have not found it necessary to exceed the zoning requirements in order to enjoy their home, and the lot occupancy and set back of this property would be an outlier.

The image below, generated using the DC Zoning Tool, demonstrates the relationship between the current property,<sup>9</sup> the proposed structure that would extend an additional 13’ from the existing addition, and neighboring properties.

EXHIBIT 1: DC 3D Zoning Tool – Orange line demonstrates an extension of approximately 13’ out from the back of the applicants’ house and shows comparison with neighboring properties



The current property already exceeds the lot occupancy limit. It also is visually different from neighboring homes, as it is the only property that has eliminated the dog leg and instead built directly along the shared property line, and no other property has an addition approaching the height, scale, and size of this one. No other property has a rear setback line or lot occupancy approaching the proposed structure. According to these objective standards established in the Zoning Code, the proposed addition visually intrudes on the character, scale, and pattern of houses along the alley frontage.

The other structures shown in application weaken the applicant’s position as those structures are much smaller, respect the dog leg running along any attached property, and do not exceed the set back and lot occupancy requirements.

Given that the proposed structure would extend an oversized addition that already exceeds the lot occupancy limit, would continue to run directly along the property line rather than preserving any dog leg

<sup>9</sup> Although we do not have the burden of proof for this matter, we thought these images from the DC 3D Zoning Map tool would be helpful to demonstrate our concerns. The map does not show our current screened porch, but we think it’s still helpful as the lot setback and height of the porch floor are similar (our current porch is several feet narrower than what is illustrated). The tool also does not show the applicants’ current deck, which extends 5’.

space, and would be a rear setback and lot occupancy outlier compared to neighboring properties, the structure is *per se* visually intrusive and the application has not met its burden under Subtitle D- 5201.4(c).

- d. The applicants have not met their burden to demonstrate that the structure would not unduly effect our abutting dwelling, including light and air available and privacy of use and enjoyment under D- 5201.4

#### Elevated, Potentially Enclosed Deck Above the Fenceline

The application does not provide a height for the part of the structure that extends into the rear setback; using a calculation of the garage floor from exhibits 4 and 27A, the fact that the yard slopes down towards the rear, and the standard 3' height of railings, we estimate that the outermost portion of the deck is 12' high including the railing, and 9' high without. Our understanding is that the maximum residential yard fence height in DC is 7'. Accordingly, the floor of the deck, a portion of any enclosed siding, and individuals using the deck will be well above the standard fenceline and visible from our property.

#### Light and Air

Because the elevated deck is so high, potentially<sup>10</sup> enclosed on the sides, and extends towards the back and side edges of the lot, it would unduly affect the experience and light and air in our yard in a manner similar to an addition. This boxed-in feel would result from most of the yard being built out with elevated structures; the current property covers 44% of the lot and has an addition that extends approximately 12' past the back of our house; the application states that proposed addition would increase lot coverage to 49.5% with a 15.2' rear setback.

#### Privacy

To address its burden the privacy implications of this project, the application states:

“The proposed Addition is an expansion of what currently exists. Accordingly, the Addition will not unduly compromise the privacy of use and enjoyment of neighboring properties.”  
See Applicant’s Statement, Exhibit 9 p.3.

It is unclear why an expansion of what currently exists cannot unduly compromise privacy. Such reasoning would mean that there is no property expansion that can result in negative privacy impacts.

The law also does not allow such reasoning. Subtitle C explains that “[e]xcept as otherwise permitted in this chapter, nonconforming structures or uses may not be enlarged upon, expanded, or extended, nor may they be used as a basis for adding other structures or uses prohibited elsewhere in the same zone district.” In deciding whether to approve an extension or enlargement of a lawfully establish structure that now violates the Zoning Code, the BZA “shall apply the standards and criteria of the Zoning Regulations to the entire use, rather than to just the proposed extension or enlargement.” Subtitle X-900.4.

The application’s expansion of “what currently exists” would be an expansion of the current addition and elevated deck. The application explains that this project seeks to expand the existing noncompliant structure, stating that “[t]he Addition is in part a reconstruction of the existing deck, which currently extends 5 feet off the rear of the Building.” Exhibit 9, p1. As noted above, the current addition exceeds the lots coverage restrictions at 44% and the application does not provide a reason why. The record also does not address the

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<sup>10</sup> See FN 1, explaining that the updated exhibit no longer includes detail about the siding material.

deviations created by the existing 5' elevated deck, which does not appear to be incorporated into the 44% lot coverage calculation. Similar to the concerns cited with regards to the existing 44% deviation, an application for a special exception cannot rely on a noncompliant structure to justify furthering such noncompliance. To do so here would be a mistake of law and policy.

Given that the elevated deck is so high and protrudes toward the back of the lot, it would provide direct, unobstructed, and close lines of sight into the back of our home, which we consider a substantial adverse effect.<sup>11</sup> Per the estimates in the previous bullet, the estimated 12' high deck structure would hover approximately 5' *above* the max fence line of 7', providing users of the deck with full visibility above any property fences and into our home. These direct sight lines are illustrated below in the DC 3D Zoning Map "line of sight" tool.

The application does not meet its burden regarding privacy of use and enjoyment as it i) incorrectly uses a noncompliant structure to justify further noncompliance and ii) as illustrated below, the proposed structure would provide a direct line of sight into our neighboring home.

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<sup>11</sup> The applicants have added a privacy screen image to the docket. Such a material would not address our concerns, as it would effectively create a wall and exacerbate the boxed-in effect of the enlarged structure, especially since the structure is highly elevated and has at least 9' of deck that run directly along the shared property line. There are also stairs that run directly along the shared property line, which provide users with a view into the house.

EXHIBIT 2: DC 3D Zoning tool – shows a 13x25 foot structure with height to match neighboring deck was used to generate the following two exhibits



EXHIBIT 3: DC 3D Zoning tool – illustration of direct sightlines on back of neighboring home using the “line of sight” feature



d) Other concerns  
Missing information

There is information missing from the record that is relevant to evaluating the application.



- For example, the application does not show the height of the proposed elevated deck, including the height of the portion that would extend past the rear setback line. This is necessary to determine the impact of the proposed project on the light, air, and privacy on neighboring properties.
- There is no plat that shows the existing 5' deck on the property. Our understanding is that this information is required under 300.8(b). We are concerned that the current lot occupancy and setback stated in Form 135 may not incorporate the existing elevated deck, but have not been able to verify this due to the lack of a current plat.

#### Structural impacts

The project will add the load of a second car in the basement and moves an existing retaining wall so that a new one will run directly along our fence.

- Parking cars on the foundation for these Tudor homes on our block is unusual as there are no neighboring homes with garages underneath the house and they were not originally built to accommodate parking in this manner.
- While the applicants have responded that the increased load from the second car will not impact our shared foundation, we have not been able to find any public permits or other documents to explain the structural analysis of the existing addition and how it interacts with the pre-existing home, and such information would be helpful to address these concerns.

#### 5) Conclusion

In conclusion, we are concerned that the existing addition is unusually oversized and imposing on our home, and the proposed structure would further extend and exacerbate these negative impacts on us.

The current application also cannot proceed as drafted because it has not addressed why the current structure exceeds the lot occupancy limit. Allowing this application to move forward as drafted would be a mistake of law and policy as it would reward disregard of the Zoning Code and BZA, permitting property owners to use noncompliant properties to justify further noncompliance and increase negative impacts without proper evaluation.

Thank you for considering this submission.

Sarita Frattaroli and Travis Berge  
3732 Windom Pl NW