

APPLICANT’S REBUTTAL TO ANC REPORT

Pursuant to Subtitle Y § 300.16, homeowners David Hunter Smith and Zorka Milin (“Applicant”) submit the following rebuttal to the ANC’s report:

1. The ANC’s concerns about parking are legally irrelevant and factually unfounded. Parking concerns are legally irrelevant because the scope of a hearing for a modification of significance “shall be limited to the impact of the modification on the subject of the original application, and shall not permit the Board to revisit its original decision.” Subtitle Y § 704.7. The Board has already granted a special exception for an accessory dwelling unit. While adding an accessory dwelling unit may have an impact on parking, the subject of this hearing is solely the number of stories in the proposed accessory building. Parking is irrelevant to that issue.¹

2. The relief requested by the applicant would not “result in a detriment to the public good and the integrity of the R-20 Zone Plan.” (ANC Resolution para. 2). The R-20 Zone Plan explicitly allows for accessory dwelling units and encourages—in fact, requires—they to be on the second story of detached accessory buildings. *See* Subtitle U § 253.9.² Thus, “the requested variance[] [is] born from [the applicant’s] considerations of ‘the zone plan.’” which the Court of Appeals has held is a reason to *grant* a variance. *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 563 (D.C. 2011).

3. Further, the ANC is also wrong to claim that the project is “in derogation of [an] explicit and unambiguous provision” of the Zoning Code. (ANC Resolution para. 2). Several experienced

¹ In any event, the ANC’s parking concerns are factually unfounded. DDOT’s report in the special exception proceeding concluded that the proposed project would have at most “a minor potential impact.” DDOT Report, Case No. 19521, Exhibit 48 at p. 1. Moreover, a recent survey by the Burleith Citizens’ Association found that only 8% of respondents think that finding parking near their homes is difficult. *See* Case No. 19521A, Exhibit 40.

² Within two blocks of the project, there are—in addition to several multi-unit apartment buildings—~~three~~ other two-story detached accessory garages, two of which with apparent living space on the second floor. *See* Appendix to this rebuttal.

reviewers did not consider the project to violate an explicit zoning requirement: the ANC did not raise any zoning objections to the project in 2017,³ DCRA approved the zoning review of the project on September 25, 2017, and the Office of Planning did not identify the need for zoning relief in addition to the special exception in its 2017 report (Case No. 19521, Exhibit 45).⁴ If the Zoning Code’s requirements were “explicit and unambiguous,” all these experienced reviewers would not have missed them. Instead, Applicant’s reliance on the special exception as sufficient relief for the project was, at the very least, reasonable.

4. Finally, the ANC’s contention that the condition affecting the applicant’s property is “not unique” (para. 1) because the lot has a standard shape misses the point. “There is no requirement that the uniqueness ‘inheres in the land at issue.’” *Fleischman v. D.C. Bd. of Zoning Adjustment*, 27 A.3d 554, 561 (D.C. 2011) (quoting *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1168 (D.C. 1990)). And, as set forth in the burden of proof, there are several unique conditions that would cause Applicant hardship if the variance were not granted: *First*, Applicant has incurred significant expenses in reliance on a reasonable interpretation of the Zoning Code and on the reasonable actions of DCRA and the Office of Planning in approving the project (before revoking approval). *Second*, the mere fact that a special exception has been granted makes the premises unique. *Third*, homeowner Zorka Milin’s sister has recently been diagnosed with cancer⁵ and has moved to Washington, DC from San Francisco for treatment and needs live to close to family in an affordable apartment.

/s/ David Hunter Smith

³ Applicants’ architect held two in-person meetings to discuss the project with the ANC 2E-1 Commissioner Ed Solomon prior to the special exception hearing in 2017.

⁴ In fact, in a July 20, 2017 email, the Office of Planning told a public commenter—with a copy to Applicant’s architect—that additional zoning relief was *not* required for the second story.

⁵ Ms. Milin’s sister had not been diagnosed when the burden of proof was submitted.

APPENDIX TO APPLICANT'S REBUTTAL

Two-story detached garages within two blocks of 3520 S St NW



3522 S St NW (alley)



1800 35th St NW (facing S St; apparent second-story living space)



1912 Whitehaven Parkway (alley facing 36th St; apparent second-story living space)