

NEIGHBORS FOR RESPONSIVE GOVERNMENT

1233 20th Street, NW, Suite 703
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January 6, 2019

Frederick L. Hill, Chairperson
Board of Zoning Adjustment
441 4th Street, NW - Suite 200S
Washington DC 20010

RE: BZA Case Nos. 19877, 19895

**APPELLANT'S AMENDED REQUEST FOR RELIEF AND RESPONSE TO
PREHEARING STATEMENTS FILED BY RESPONDENT AND INTERVENOR**

Dear Chairperson Hill and Members of the Board:

Appellant Neighbors for Responsive Government (hereafter "NRG") provides this brief response to the Prehearing Statements filed by Respondent Department of Consumer and Regulatory Affairs ("DCRA") and Intervenor Department of General Services ("DGS"). In addition, NRG respectfully amends its request for relief in BZA Case No. 19895 to seek, as an alternative, an amendment to the Order issued by the Board in BZA Case No. 19450, which is the predicate for the two pending appeals referenced above.

A settlement of the two pending appeals was negotiated in early December with facilitation by Councilwoman Mary Cheh, through three of the Commissioners of ANC 3C (including its Chair) and the Executive Office of the Mayor. That settlement is reflected in an email from John J. Falcicchio, Chief of Staff of the Executive Office of the Mayor, a copy of which is attached here as Exhibit A. As reflected in the subsequent ANC Resolution adopting the settlement, attached here as Exhibit B, it contemplated that the parties would work together to ensure that its terms are incorporated into an amended Order in BZA Case No. 19450. The Prehearing Statement filed by counsel on behalf of DCRA ignores this settlement entirely. The Prehearing Statement filed by the same counsel, acting on behalf of DGS, misrepresents its nature and its terms.

Background

The Board is aware that Appellant NRG, as well as ANC 3C, participated as intervenors in BZA Case No. 19450. That case involved various zoning special exceptions and variances that were needed for the City to construct a temporary homeless shelter for families on the lot currently occupied by the District 2 Police Station and portions of a community garden. All exceptions and variances requested by the City were granted in the Board's Order in that case, expressly "subject to the approved plans" provided to the Board by the City, and with the proviso that the Applicant "shall" be required to carry out construction of the shelter "only in accordance with the plans approved by the Board, unless the Board orders otherwise." Order in BZA Case No. 19450 (hereafter "Order") at 36-37.

The modified plans that are the subject of the two pending appeals differ in material respects from those that were presented by the City to the Board, and approved by the Board, in BZA Case No. 19450. Despite Intervenor's creative arguments, the Zoning Administrator *does not have authority* to countermand, overrule, or amend the express conditions included in the Board's Order. See Subtitle A § 304.10(a).

NRG appealed the Board's ruling in BZA Case No. 19450; the appeal was denied by the District of Columbia Court of Appeals. NRG accepts that result and asks only that this Board now take steps necessary to ensure that the terms of its previous Order are honored by the City, and that the Zoning Administrator complies with applicable mandatory regulations.

Issues in these appeals

NRG begins by incorporating here the entirety of its initial submission in BZA Case No. 19895, including its Discussion/Statement of Issues as well as all exhibits.

The only issue before the Board, based on Appellant's claims, is whether the Zoning Administrator erred in concluding that the changes to plans for the Shelter proposed by the City did not contravene any condition of the Board's Order in BZA Case No. 19450, and that the changes did not otherwise "increase, expand, or extend any area of relief granted by the Order, create any need for new relief, or change a principal use from that approved in the Order." Subtitle A § 304.10(a)-(d). For all of the reasons stated in Appellant's initial submission, the Zoning Administrator acted without authority and

in violation of Subtitle A § 304.10(a)-(d) when he granted the City's request for the additional modifications. In addition, because the proposed modifications were either "modifications of consequence" under Subtitle Y § 703.4 or "modifications of substance" under Subtitle Y § 704, both the Zoning Administrator and Intervenors erred in failing to submit them to the Board as required by Subtitle Y §§ 703.6 and 704.

The principal issue

The principal issue in Appellant's case (No. 19895), and the only issue in the ANC's case (No. 19877), pertains to a 1000 square foot deck for 62 people that the City now proposes to add to the south side of the Shelter, in clear violation of the conditions of the Order in BZA Case No. 19450 and in direct contradiction to specific affirmative representations that the City made – repeatedly – to the Board in that case. *See* NRG's Appeal Statement/Discussion of Issues at 5-6; *see also* various statements from the Record in BZA Case No. 19450, attached here as the Appendix.

As the Board is aware, the City initially proposed a playground of approximately 3600 square feet on the south side of the shelter. *See*, Exhibit C (Page L1.01, "Landscape Plan" from Exhibit 7 in BZA Case No. 19450). As a result of community feedback concerning the potential for noise from the playground, the 3600 square foot playground area was moved from the south side of the building (where it would have faced the adjacent single-family houses) to the west side of the building, facing the community gardens. *See* Exhibit D (Page 7 of Exhibit 237 in BZA Case No. 19450, "Applicant's Updated Plans for the Record"; also included in this appeal as part of Attachment 1 to Applicant's initial submission dated 10/5/2018). As shown on Exhibit D, the entire south yard was then to be planted with trees and bushes as a noise buffer. Nowhere in Exhibit D, nor anywhere else in the entire Record, did the City mention, identify or depict a 1000 square foot deck on the south side of the shelter, big enough to accommodate 62 adults.¹

¹ Any restaurant, apartment building, or hotel in the District of Columbia that proposed a 1000-square-foot (or 800-square foot) outside seating area on a lot next door to a single family home would be required to apply to the BZA, and there would be a hearing where all nearby residents and businesses would be entitled to submit comments. The City's suggestion that the present situation requires less is both unfair and dishonest.

Based on the City's representations at the hearing and in various documents in the Record including the approved plans at Exhibit 237, the Board in BZA Case No. 19450 concluded as follows:

The emergency shelter use is not likely to generate any adverse impacts relating to noise or operations.... **All** operations will be *contained within the building with the exception of the small play area, which is to be located on the western edge of the property adjacent to an area of community gardens.*

Order at 22 (emphasis added). The Order then went on to approve all of the relief requested by the City, *subject to the approved Plans at Exhibit 237. Id.* at 36. Those plans showed the entire south side of the shelter as including plantings and trees – not a deck capable of seating 62 adults at one time.

The City's explanation as to the purpose of this previously undisclosed deck has been a moving target. In 2017 in BZA Case No. 19450, of course, the entire south yard of the property was to be a buffer with plantings. In its application to the Zoning Administrator one year later in 2018, the south yard was to be a "gathering area" for adults – a concept and statement that appears nowhere in the Record in BZA Case No. 19450. In its Prehearing Statement in 2019, DGS now claims that the south yard will have a deck to be used "for parents to monitor their children, and approximately 200 square feet of trees and shrubs." ² Prehearing Statement of Intervenor DGS at 5-6. The Board can take judicial notice of the fact that parents of toddlers typically monitor their toddlers on a playground by standing directly with them, not by sitting on a deck that is physically separate, three feet lower than the playground and down a set of five steps. See Large Format Construction Drawings for the Shelter, available on the ANC 3C website, <https://anc3c.org/documentation-full-text/?searchvar=construction&engine=default>.

Addition of this deck is not a "minor modification" to be approved by the Zoning Administrator. It directly contradicts specific findings and conditions in the previous Order, it expands an area of relief granted by the Order, it creates a need for new relief, and it changes a principal use from that approved in the Order. NRG respectfully

² The question of whether there will continue to be trees and shrubs as a buffer throughout the rest of the south yard – approximately 6000 square feet of area – is not addressed and in fact is made ambiguous by the language in both of the Prehearing Statements.

submits that the Board must either overrule the Zoning Administrator's approval of this modification or require that notice of the proposed modification be given in accordance with Subtitle Y § 704 so that a proper hearing can be held here.

Other issues

NRG's positions with respect to the other issues identified in its appeal are adequately addressed in its initial submission, with the exception of that pertaining to underground water and runoff. NRG appreciates the City's allegation that it is installing stormwater containment systems in excess of regulatory minimums, assuming that is true. However, given the obvious groundwater issues in the immediate neighborhood, which were even acknowledged in testimony by the City's architect at the hearing in BZA Case No. 19450, and particularly in light of the unusually wet weather the District has experienced over the past year, adequate analysis of this issue is imperative and regulatory minimums are clearly not sufficient.

The photos attached here as Exhibit E attest to the effects of heavy rains, which residents immediately adjacent to the shelter are faced with on a regular basis.³ To the extent that construction of this shelter exacerbates the creation of what the neighbors refer to as "Lake Macomb," the City must recognize its obligation to take corrective action.

The settlement agreement

NRG is not litigating this appeal as a stalling tactic, despite the assertions of some members of the community. NRG has acknowledged that the shelter is going forward as requested by the City and as approved by the Board. Rather, in the hope of avoiding unnecessary use of resources by NRG, the ANC, and this Board, NRG suggested and ANC3C agreed to approach the Mayor's office with a request to negotiate a settlement of both appeals. Through the efforts of Councilwoman Mary Cheh and three ANC3C commissioners, those negotiations were successful. ANC3C adopted and approved the settlement, and NRG has also agreed to it. Pleadings filed by the Intervenors here either ignore or misrepresent the terms of that settlement. DGS' Prehearing Statement also mischaracterizes this settlement as a mere "voluntary proffer" by the City, rather than the result of a process initiated by NRG and ANC3C.

³ The undersigned personally took these photographs on Sunday, January 6, 2019.

Simply put, and as reflected in both the ANC3C resolution (Exhibit B) and in Mr. Falcicchio's email (Exhibit A), both ANC3C and NRG will withdraw their appeals on the following terms:

1. Reduce the size of the deck from 40' x 25' (1000 square feet) by 20% to 40' x 20' (800 square feet).
2. Create a noise buffer with trees and shrubs all around the deck. There will be a minimum of 20 feet of plantings, consisting of trees and shrubs, measured from the south side of the deck to the wall on the south, as well as six to eight feet of plantings, consisting of trees and shrubs, on the west side of the deck.
3. Limit the hours to 7 a.m. to 9 p.m. on which the deck (and playground) can be used.
4. Prohibit amplified or unreasonably loud music from any device outside of the facility at all times. "Unreasonably loud" means sound that is above 60 decibels, which is the level established by the District of Columbia Parks & Recreation Permit Policies and Regulations.
5. Prohibit flood lights on the deck and playground.

Exhibit A, attached.

ANC 3C Resolution 2018-042 states, *inter alia*, that the BZA supports these conditions and "asks the BZA to accept the settlement and make it part of a revised order to case 19450, and once the BZA does so, ANC3C will withdraw the appeal." Exhibit B, attached. NRG will also withdraw its appeal (including its appeal of all issues, not merely that related to the proposed deck) once the BZA incorporates the settlement into a revised Order so that it is in fact enforceable.⁴ For reasons outlined in its initial submission, NRG believes that all of the issues it has raised have merit and deserve a hearing; but has agreed to this settlement in order to avoid additional burdens on all parties. NRG will not appeal any amended Order in BZA No. 19450, and will not appeal the Board's resolution of this matter. It intends for the settlement to be a final resolution of all issues raised in each of these appeals, and NRG is prepared to provide whatever documentation the City requires to affirm its position.

⁴ Counsel for DGS, referring to the City's alleged "voluntary proffer," provides no evidence that the City intends to be bound.

Accordingly, as an alternative remedy, NRG respectfully requests that the Board enter an amended Order in Case No. 19450, which incorporates the terms of this settlement.

Respectfully submitted,



Patricia H. Wittie
Authorized Representative for
Neighbors for Responsive
Government, Appellant in
BZA Case No. 19895

CERTIFICATE OF SERVICE

I certify that on this 6th day of January 2019 a copy of Appellant's Amended Request for Relief and Response to Prehearing Statements of Intervenors was served via electronic mail to:

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APPENDIX
Examples of the City's Affirmative Representations to the BZA
Concerning the Playground and the South Yard

The City's architect, John McNamara, testified:

[Referring to a schematic] So this is a site plan for our original site plan that we brought to the community and we received feedback from the community about concerns for the playground being to the south of the building and noise concerns with the adjacent neighbors. We took that back and made some changes to our site plan. You can see now our play area is located to the west of the emergency shelter, and we've moved the trash pickup and delivery area to the north side of the building as well. **And so we now have a fairly significant side yard to the south of the building between the emergency shelter and the adjacent neighbors.** It's approximately 63 feet from our building to the property line, which results in a nearly one-to-one ratio of horizontal to vertical with our sixty-nine foot tall building.

Transcript in BZA Case No. 19450 ("Tr.") at 56-57 (emphasis added). He further testified:

We initially looked at the site plan, the south of the building being an opportunity to create the play area to create a greater buffer zone between the building and the adjacent homes. The pushback on that was the noise concern. And to address that, we moved the playground to the west side of the site further away from the neighbors to the south, and maintained that area without moving the building any closer to the side lot.

Id. at 257.

Counsel for the City, Ms. Muldenhauer, then represented that –

The zoning will have a substantial setback from nearby single family homes.... Here, as indicated, we are providing nearly a one-to-one setback providing more than enough distance between single family homes and this proposed site.... The play area was moved and the trash area was moved based on community

dialogue and request, that was moved now to be more insular into the site, taking that away from some of the abutting single family home properties....

Id. at 68.

The City's Closing Statement asserted:

In response to community feedback, the Applicant modified the Project to include a large, southern-facing side yard to buffer the Project from neighboring properties....

BZA Case No. 19450, Applicant's Closing Statement, Ex. 243 at 11.

The clear inference of each of these representations was that the "southern-facing side yard" would be empty except for trees and other plantings, and would not be available to residents as part of the Shelter's "operations."