BOARD OF ZONING ADJUSTMENT

Applicant's Response to Party Opponent December 18th Filing

BZA Application No. 20290

I. Order No. 19-21 and the Light and Air Condition.

The Party Opponents begin their December 18th response by labeling a duly adopted Zoning Commission text amendment as "the so-called 'text amendment" ZC Case No. 19-21.'" The Applicant wishes to clarify that there is absolutely no question about the legitimacy, effective date, or the language, of Zoning Commission Order No. 19-21. It became effective when it was published in the D.C. Register on November 13, 2020. It clearly made the Board's analysis in this case a shorter path, although the Applicant safely met all the requirements prior to the adoption of Order No. 19-21, as well, after amending the Application to withdraw two requests for relief.

The Opponents rely heavily on the use of the word "duplicative" in their attempt to question the legitimacy of Order No. 19-21, claiming that there was really no "intent" on the part of the Zoning Commission to remove the light & air/privacy/character, scale, pattern requirement from Subtitle U § 320.2, because that provision is not duplicative. First, the clearest evidence of the intent of the full Zoning Commission is the actual language of the text amendment and of the remaining Zoning Regulations. The requirement was removed. There is zero confusion about that. The intent of the Zoning Commission, based on its adoption of the text amendment, was to remove that section, the effect of which was to effectively remove matter-of-right additions from review under the Subtitle U § 320.2 conversion conditions.

The Opponents' reliance on the word "duplicative" is misplaced, as the light & air test was also a "duplicative" provision. It was considered by the Board only when an applicant was asking for relief from the matter-of-right structural provisions, such as rear yard, lot occupancy, or the ten-foot rule. When Order No. 19-21 removed the duplicative provisions relating to the ten-foot rule, it logically removed the attendant duplicative criteria for relief therefrom. Previously, when an applicant requesting relief pursuant to Subtitle U § 320.2 for a conversion was proposing a matter-of-right addition, a shadow study was not necessary, since the Board, in this context, requested that shadow studies focus on the delta between the matter-of-right massing limits vs.

any additional massing requested. This is how the Board determined whether or not the impact of any addition was "***undue***" or not and whether or not *granting relief* caused such impact.[1]

For this reason, the analysis is the same for this case whether there is a light & air test or not. When the Applicant lowered the building height and withdrew its request for height relief (and its request for minimum lot area relief) there was no longer any undue impact from the granting of relief, as the Applicant is entitled to build the proposed structure. It is only the additional dwelling units therein which are not permitted as a matter-of-right. The Applicant could build the same structure, with two large dwelling units therein. Therefore, what the Board approval would allow is the provision of additional dwelling units within that matter-of-right massing, not the addition's massing itself.

II. ANC Resolution – More so-called "Confusion".

Opponents argue that the ANC's twice-advanced near-unanimous support for the Application is not legitimate. Opponents claim that the ANC was misled by the Applicant's claim that the light and air test no longer applied. This not only ignores the fact that the Applicant did not speak at the ANC meeting, it also completely ignores the fact that the ANC also supported the Application at its April 6, 2020 meeting, which was months before Order No. 19-21 was even adopted.[2] At that first meeting, the ANC voted to support an Application which, at that time, was proposing a larger structure with four more dwelling units and two additional requests for relief. So, it is not believable that the ANC supported a larger building with more units and more relief, but then only supported a smaller structure with fewer units only because of some confusion based on statements about light & air from the Applicant (which as noted were not even made at this meeting). In arguing that the BZA should not give the ANC's opinions great weight, Opponents

[1] *Any* sized addition, no matter how small, could potentially be said to "affect" neighboring properties. The question for the Board with the light & air test is whether that addition *unduly* affects a neighboring property. The Board, over the past five (5) or more years of jurisprudence on U-320.2 conversion cases, has started with the analysis of comparing the massing permitted by right with the proposed massing. This Application has a much smaller massing than that permitted by right and as such does not unduly affect neighboring properties.

[2] It also ignores the fact that the Applicant would have been accurate in saying that the light and air test was removed from U-320.2

imply that this ANC is not sophisticated enough to understand the nuances of the Zoning Regulations as well as the Opponent does.[3]

As to the representations about the opinion of the ANC zoning committee, the members of these committees are not elected, and in the case of ANC 1B, are made up wholly of non-commissioner volunteers. In fact, Jason Bello, a neighbor to the Subject Property (across the street), who testified at the hearing as if he spoke on behalf of the ANC 1B's Zoning Committee, implied that he had considerable experience on the Zoning Committee prior to this Application when in fact he did not even join that Committee until sometime *after* this Application had first been considered at ANC 1B's April meeting. At any rate, these committees, while very helpful to their elected ANC Commissioners, do not have authority to speak for the ANC in BZA hearings and are not accorded the great weight as is the ANC. The ANC represents the larger community and their interests, which in this case may include an interest in preserving large historic buildings and creating Inclusionary Zoning units; interests which may in some cases outweigh the subjective concerns of the more immediate neighbors.

III. HPRB.

Perhaps at the hearing I used the wrong term in suggesting that the BZA "defer" to HPRB's consideration of the proposed Addition.[4] I did not mean to imply that HPRB approval is determinative here at BZA. It may be more accurate to say that the Board may rely on the expertise of the Historic Preservation Review Board in ascertaining for itself the compatibility of the proposed Addition.

The Opponents claim that HPRB reviewed the Addition for compatibility with the surrounding *historic district*, but not for compatibility with the *surrounding buildings,* as if they were two different things.[5] Opponents then actually changed the wording of a direct quote from

[3] From the Applicant's filing, discussing ANC 1B: "Unfortunately, the ANC is not (nor are they expected to be) an expert on the zoning regulations. They had to take the Applicant's word for it and ultimately considered the Application with the above-noted misperception."
[4] As noted above and in previous filings, the addition, now that it is a matter-of-right structure, is actually not before the Board, pursuant to the current Regulations post-19-21 and the several conversion case decisions since then (which have not discussed proposed matter-of-right additions at all).
[5] Compatibility is not one of the conditions of approval for a U-320.2 conversion.

the HPRB Actions Report for December 3rd to hide the fact that the reduction in size of the Addition was one of *two* critical factors for the HPRB in approving the design. On p. 8 of their filing, Opponents claim that HPRB "only" opined that "the design [was] successful in achieving compatibility with the historic district." This is extremely misleading on this point, as the full quote is: "The Board considered the resolution of ANC 1B raising concerns that the addition was still too big but determined that *the substantial revisions made to reduce its size* and modify its design were successful in achieving compatibility with the historic district" [emphasis added].

IV. CONCLUSION.

The Regulations are clear. There is no confusion as to what they provide. Moreover, if the Board chose in this particular case to consider impact on neighboring light and air as part of the *general* special exception requirements, it would typically review this in the context of the delta between the matter of right massing and any additional requested massing. In this case, not only is there no requested additional massing, but the proposed Addition is substantially *smaller than* the permissible matter of right massing. Using charged labels to say otherwise does not make it larger than it is.

While it is true that every case is decided on its own merits, it must be decided on objective criteria. To be decided on objective criteria, it must be consistent in general with the body of decisions by this Board in relationship to the circumstances involved in each one of those cases. In addition, the Board also considers the views of the Office of Planning, the affected ANC, and any potentially impacted neighbors. And in this case, the Board may consider the views of the HPRB, if it chooses to consider the Addition.

The Party Opponents and other neighbors come before the Board with *subjective* claims of distaste for this Project, including the number of bedrooms provided therein and the type of resident which may be attracted to such a configuration. As the structure is significantly smaller than what is permitted as a matter-of-right, any alleged impact cannot be considered to be "*undue*" impact, according to previous Board conversion decisions. The neighbor objections are ambiguous, couched in hyperbole, and in the latest filing, presented with misrepresented perspectives (such as the red wall to the sky in the photo on page 5 of their filing).[6] There is

[6] At the HPRB hearing, HPO staff told the HPRB that the neighbors' submitted perspectives were not "accurate."

nothing presented by these opponents that provides any objective support for a denial of this Application. The massing of this structure is significantly lower than what is permitted by right; the proposed number of units is one less than permitted by special exception; and the use provides two Inclusionary Zoning units, something not requested even once since the adoption of Section 320 over five years ago.

For these reasons, the Applicant respectfully requests that the Board approve the Application.

Respectfully submitted,

Martin P Sullivan

Martin Sullivan
Sullivan & Barros, LLP
Date: December 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, an electronic copy of this Applicant's Response to Party Opponent was served on the following on behalf of the Applicant, Vitis Investments LLC.

Matthew Jesick
Office of Planning
matthew.jesick@dc.gov

Advisory Neighborhood Commission 1B

ANC 1B Office
1b@anc.dc.gov

James Turner, Chairperson
1B09@anc.dc.gov

Anita Norman, SMD
1B01@anc.dc.gov

ZPD Committee
ZPD@anc1b.org

Chetan Chandra & Meghann Teague
Party Status Opponents
cgchandra3@gmail.com
mteague@cooley.com

Martin P Sullivan

Martin P. Sullivan, Esq.
Sullivan & Barros, LLP
Date: December 21, 2020