ARCHITEXTUAL

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

April 25, 2018

To: DC Office of Planning

Office of Zoning - BZA

441 4th Street, NW, Suite 200S
Washington, DC 20001

BURDEN OF PROOF

Applicants David Hunter Smith and Zorka Milin, who own and reside at 3520 S St NW (the "Premises"), submit this statement in support of their application for area variance to build a two-story accessory building in a R-20 Zone.

On July 24, 2017, in Case No. 19521, the BZA approved a special exception pursuant to Subtitle U § 253 allowing the construction of an accessory apartment on the second story of an accessory building at the Premises. That section provides that in an R-20 zone, an accessory apartment "shall only be permitted on the second story of a detached accessory building." Subtitle U § 253.9. The DCRA issued Applicants a permit for the construction of the accessory building, but later revoked the permit, stating that further zoning relief was required. While Applicants do not believe an area variance is required, they are proceeding with this application out of an abundance of caution and out of deference to the Zoning Administrator's decisions.

PROCEDURAL HISTORY

The Premises are located in an R-20 zone, but outside the Georgetown historic district. As a result of the extensive revisions to the Zoning Code in 2016, accessory apartments are allowed

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

in almost all R-Zones as of right. *See* Subtitle U § 253.2. In an R-20 Zone, however, an accessory apartment "shall be permitted as a special exception" if approved by the BZA and provided it meets certain requirements. *See* Subtitle U § 253.4. Among those requirements, Subtitle U provides that "[a]n accessory apartment proposed in the R-19 and R-20 zones . . . *shall only be permitted on the second story of a detached accessory building*." Subtitle U § 253.9 (emphasis added).[1] Accordingly, Applicants proposed an accessory apartment to be built on the second story of a detached accessory building. On July 24, 2017, in Case No. 19521, the BZA approved a special exception allowing the construction of the accessory apartment at the Premises.

Appellants applied for a building permit on August 14, 2017. DCRA notified Applicants that zoning review was completed (and approved) on September 25, 2017 (Exhibit A--Zoning Review Approval) and DCRA ultimately issued the permit on January 3, 2017. On January 9, 2018, DCRA summarily revoked the building permit, stating the permit was issued in error because it "authorized the construction of an accessory building that exceeds the allowable height in violation of Section D-1209.4." (Exhibit B--Revocation Notice). Section D-1209.4, the section on which the Revocation Notice relied, provides:

> In the R-20 zone, an accessory building . . . may have a maximum height of fifteen feet (15 ft.) . . . and a maximum number of one (1) story.

The Revocation Notice cited only the proposed height of the accessory building; it made

[1] An accessory apartment may also be permitted in a principal dwelling in a R-20 Zone. Subtitle U § 253.4 provides that in an R-20 Zone "an accessory apartment shall be permitted as a special exception in either *a principal dwelling* or an accessory building . . . *subject to the provisions of this section*." Subtitle U § 253.4 (emphases added). As noted in the main text, "the provisions of" § 253 then provide that if located in an accessory structure "[a]n accessory apartment proposed in the R-19 and R-20 zones . . . *shall only be permitted on the second story of a detached accessory building*," Subtitle U § 253.9.

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

no mention of the proposed number of stories. Therefore, on January 17, 2017, Applicants emailed the Zoning Administrator with plans reflecting revised plans that brought the proposed structure's height under 15 feet. Those revised plans resolved all concerns cited in the Revocation Notice.

The Zoning Administrator replied nearly two months later on March 7, 2017, stating—for the first time—that Section D-1209.4's two-*story* limitation required additional relief from the BZA (in spite of the fact that Subtitle U § 253.9 *requires* accessory apartments in accessory strucures to be built on the second story of such structures in an R-20 zone). Applicants have requested guidance from the Zoning Administrator as to the form of additional relief he believes is required but have received no response. They therefore are pursuing this request for an area variance.

ARGUMENT

Though Applicants disagree that further relief from the BZA is required, to the extent such relief is required, there is reason to believe the necessary relief is an area variance.[2]

An area variance is less demanding than a use variance. *See Fleischman v. D.C. Bd. of Zoning Adjustmen*t, 27 A.3d 554, 559 (D.C. 2011). To obtain an area variance, "an applicant must show that (1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief

[2] While special exceptions to the requirements of Subtitle D may be obtained, Subtitle D § 5201.6 provides that it does not permit changes to the "number of stories as a special exception." Thus, Applicants are applying for an area variance. *See* Subtitle D § 5200.2 ("Requested relief that does not comply with specific conditions or limitations of a special exception shall be processed as a variance.").

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." *Id.* We address each factor in turn.

1. Exceptional Condition/"Uniqueness"

The first factor—sometimes called the "uniqueness" test—requires "difficulties or hardships be due to unique circumstances peculiar to the applicant's property and not to the general conditions in the neighborhood." *Id.* at 560. "There is no requirement that the uniqueness inheres in the land at issue." *Id.* at 560. (quotation marks omitted). Instead, "uniqueness" may "arise[] from a confluence of factors." *Id.* 561 (D.C. 2011). "The critical point" is that the conditions justifying the variance "affect a single property." *Id.* at 561.

Here the hardship experienced by Applicants is indisputably unique to them for at least two related reasons: (1) Applicants had a permit issued to them, and then revoked, circumstances which are highly unlikely to be repeated in the future; (2) there was no precedent on accessory apartments in an R-20 Zone, when Applicants went forward with their project, but there will be for any future property owners.

Applicants have incurred considerable expense in reliance on a reading of the Zoning Code that was at the very least reasonable (reasonable enough that the Office of Zoning, the Office of Planning, the Board of Zoning Adjustments, and DCRA, at least at one point, agreed with it. Furthermore, after completing the permit application review, DCRA stated that it had completed zoning review, and subsequently issued a permit). The provisions of the 2016 Zoning Code concerning accessory apartments are new and the Zoning Code gives reason to believe that a

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

special exception alone is all that is required to construct an accessory apartment in an R-20 Zone.[3] Before this case, there was little reason to believe that the Zoning Code would both *require* an accessory apartment to be built on a second story (Subtitle U § 253.9), yet at the same time prohibit the construction of such a second story (Subtitle D § 1209.4).

Now, after Applicants have incurred considerable expense—and even had a building permit issued to them—they would suffer substantial hardship if prohibited from constructing the project they have designed. These circumstances are unique and highly unlikely to be repeated.

2. Practical Difficulties

Applicants would face substantial practical difficulties if the variance is not approved. Applicants have (1) spent over $20,000 on design and permitting fees; (2) signed a contract with a general contractor, with an over $30,000 deposit; (3) obtained a raze permit for removal of the existing garage structure. In addition, after DCRA approved zoning review, Applicants (4) signed a $7,845.59 contract for kitchen cabinets for the proposed accessory apartment. Finally, Applicants (5) have signed a $20,900.00 contract, and received a permit, for solar panels to be placed on both their main residence and the proposed accessory building.[4] Almost all these substantial expenses—a significant portion of which were incurred *after* DCRA notified Applicants on September 25, 2017 that zoning review was approved—would have been a waste if

[3] *See, e.g.*, Subtitle U § 253.4 ("In the R-19 or R-20 zone, an accessory apartment *shall be permitted* as a special exception . . . if approved by the Board of Zoning Adjustment, subject to the provisions of this section." (emphasis added)).

[4] DCRA has approved the permit for the solar installation. *See* Permit Application SOL1800123. But because the permit is for one system, on both the accessory building and the main building, no work can be completed until the accessory building is built. Repermitting would likely be required if the accessory building is not constructed.

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

the variance is not approved.

Further, denying the variance would essentially nullify the special exception and prohibit construction of the accessory apartment. That may ultimately require Applicants to sell the Premises and move to a new house; Applicants sought the special exception because they had one young child and were expecting another. They intended—and still intend—to use the accessory apartment as a residence for childcare helper in the short term and, in the longer term, a residence for one of their (increasingly elderly) parents. Without a variance, it appears to be infeasible to construct an accessory apartment on the Premises without significant and more costly alterations to the principal dwelling, as underpinning of the entire structure would be required.

"The BZA may . . . consider a wide range of factors in determining whether there is 'practical difficulty.'" *Gilmartin v. D.C. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1171 (D.C. 1990). These factors include "expense and inconvenience to applicants for a variance and the severity of the variance(s) requested." *St. Mary's Episcopal Church v. D.C. Zoning Comm'n*, 174 A.3d 260, 271 (D.C. 2017) (internal quotation marks omitted). An applicant's awareness of the Zoning Code and good-faith attempts to comply with it are also "factors that BZA might consider in reaching its decision." *Gilmartin*, 579 A.2d at 1171.

Here, denying the variance would cause significant expense and inconvenience to the Applicants, including in particular the significant funds Applicants spent designing—and preparing for construction on—an accessory building that they reasonably believed in good faith complied with the Zoning Code (an understanding of the Zoning Code that the DCRA once shared). While the hardship they face is significant, the variance they seek is far from "severe," *St. Mary's Episcopal Church*, 174 A.3d 27; it is instead quite minor—it is only to divide an

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

accessory building into two stories; the accessory building would be the same height (15 feet) as indisputably allowed as of right anyhow.

(3) No substantial detriment to the public good or integrity of the zone plan.

The variance Applicants seek would not cause a substantial detriment to the public good or the integrity of the zone plan. As just discussed, the variance is in fact quite minor: it would not affect the building height—it is undisputed that a 15-foot accessory building may be built as of right. *See* Subtitle D § 1209.4. Also, the issue is not whether an accessory apartment should be permitted: a special exception for the accessory apartment has already been granted. Therefore, the only question is whether the *interior* of the 15-foot accessory building will have two stories or one.

Permitting the second story would not cause any substantial detriment to the public good. Even if the second story might have some minor effect on the external appearance of the accessory building, the accessory building is visible only from the alley (not the main street) and would be located between two adjacent accessory buildings, one of which is roughly the same height as the proposed structure.

Permitting the second story would also not cause substantial detriment to the zone plan. In fact, the zone plan expresses a *preference* for accessory apartments on the second story of accessory buildings by requiring them to be built there. *See* Subtitle U § 253.9. What's more, the R-20 Zone regulates primarily historic Georgetown, but the Premises are not in Georgetown. They are instead in the Burleith neighborhood, which also falls within the R-20 Zone. The Burleith neighborhood is not subject to any historical district, its buildings are almost all less than 100 years old, and are of less interest from a preservation standpoint. The fact that the Premises are located

3421 1/2 M Street NW, Suite A
Washington DC 20007
www.architextual.com

outside the core historic district whose preservation motivates most of the restrictions of the R-20 Zone is further evidence that a variance would not significantly disrupt the integrity of the zone plan.

Catarina Ferreira

Digitally signed by Catarina Ferreira
Date: 2018.05.05 11:08:16 -04'00'

Catarina Ferreira, AIA
Principal, ARCHI-TEXTUAL, PLLC

t. 202-295-9001
a. 3421 1/2 M St NW, Ste. A, Washington DC 20007
e. cferreira@architextual.com