

**DISTRICT OF COLUMBIA**  
**BOARD OF ZONING ADJUSTMENT**

**Applicant's Statement of PENGUIN, LLC**  
**4509 Foxhall Crescent, NW (Square 1397, Lot 960).**

**I. INTRODUCTION.**

This Statement is submitted on behalf of Penguin, LLC (the “**Applicant**”), owner of the property located at 4509 Foxhall Crescent, NW (Square 1397, Lot 960) (the “**Property**”). This Application requests special exception relief pursuant to C-305.1 for a theoretical subdivision, as well as area variance relief from the vehicular ingress/egress minimum width of twenty-four feet (24 ft.), where sixteen feet (16 ft.) is provided. The Property is the one remaining undeveloped lot in this section of the Foxhall Crescents development. This phase of Foxhall Crescents was approved by the District pursuant to a 1979 Master Plan, and originally included the development of twenty-eight (28) one-family dwellings and a network of crescent-shaped theoretical streets ranging from twenty-five (25) to sixteen (16) feet wide.<sup>1</sup> One of those lots, which had sufficient street frontage on Foxhall Road, was eventually separated from this subdivision and developed outside of the Master Plan. Twenty-six (26) lots were developed with single-family dwellings. The Property is the only remaining undeveloped lot from the 1979 Master Plan.

In addition to that original Master Plan approval, the Board also approved an application for this same relief for the Property in both 1994 (BZA #15882) and in 2014 (BZA #18708), under Section 2516 of the 1958 Zoning Regulations. While the past BZA approvals are no longer in effect, the effective subdivision has been approved and has been executed. All that is left is approval for the remaining home to be constructed on the remaining lot.

**II. JURISDICTION OF THE BOARD**

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<sup>1</sup> BZA Order No. 15882

The Board has jurisdiction to grant the requested special exception relief requested pursuant to Subtitles X-901 and C-305 for a theoretical subdivision, as well as area variance relief from the vehicular ingress/egress minimum width of twenty-four feet (24 ft.), where sixteen feet (16 ft.) is provided pursuant to X-1002.1.

### **III. SPECIAL EXCEPTION UNDER C § 305.**

#### **A. Special Exception Standards.**

The Board is authorized to grant special exception relief where, in the judgment of the Board, the special exception will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property; subject also, in this case, to the specific requirements for relief under C-305 of the Zoning Regulations.

In reviewing applications for a special exception under the Zoning Regulations, the Board's discretion is limited to determining whether the proposed exception satisfies the relevant zoning requirements. If the prerequisites are satisfied, the Board ordinarily must grant the application. See, e.g., *Nat'l Cathedral Neighborhood Ass'n. v. D.C. Board of Zoning Adjustment*, 753 A.2d 984, 986 (D.C. 2000). As described herein, this application satisfies the requirements of X § 901.2 and C § 305.

#### **B. The Application Satisfies X § 901.2**

The granting of a special exception in this case “will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps” and “will not tend to affect adversely, the use of neighboring property in accordance with the Zoning Regulations and Zoning Maps ...” (11 DCMR Subtitle X § 901.2).

The R-1-A Zone provides for areas predominately developed with detached houses on large lots. The Application seeks approval for a detached single-family home on a lot with a land area of 13,629 square feet; close to double the minimum lot area for the R-1-A zone, and significantly larger than most of the other Foxhall Terrace lots. The area is made up of almost exclusively detached single family homes. The construction of a new detached single-family home and addition of one (1) more, which was originally included in the 1979 Master Plan, is unlikely to adversely affect the use of the neighboring residential properties. The additional single-family home is also unlikely to adversely affect the use of the neighboring dwellings, the Property will be set back from the neighboring properties, and the Project is otherwise conforming with the development standards of the R-1-A Zone, except for the areas for which additional relief is specifically requested herein.

The relief is being requested to allow for the development of the Property as contemplated and approved in the original Master Plan, and two previous BZA Applications. The proposed home will be in character with the rest of the Foxhall Crescents neighborhood, in design as well as relative density and footprint. The home will meet all the applicable zoning requirements including minimum lot area and width, lot occupancy, and required yards, and asks area variance relief only for the theoretical street width requirement. The Applicant will undertake development in a way that optimizes tree protection and successfully manages storm water and erosion concerns, as discussed below.

C. The Application Satisfies C §305

The Applicant meets the specific requirements of C §305, as follows:

***C §305.1 In the R, RF, and RA zones, the Board of Zoning Adjustment may grant, through special exception, a waiver of Subtitle C § 302.1 to allow multiple primary buildings on a single record lot provided that, in addition to the general special exception criteria of Subtitle X, Chapter 9, the requirements of this section are met.***

The Property is located within the R-1-A zone district, according to the Zoning Map of the District of Columbia.

***C §305.2 The number of buildings permitted by this section shall not be limited; provided, satisfactory evidence is submitted that all the requirements of this section are met based on a plan of theoretical subdivision where individual theoretical lots serve as boundaries for assessment of compliance with the Zoning Regulations.***

Development as proposed will add one principal building to this phase of Foxhall Crescents, totaling twenty-seven (27) one-family dwellings. The proposed structure meets the requirements of the Zoning Regulations regarding use, height, bulk, and open spaces.

***C §305.3 The following development standards shall apply to theoretical lots:***

***(a) Side and rear yards of a theoretical lot shall be consistent with the requirements of the zone;***

In the R-1-A zone, two (2) eight (8)-foot side yards are required. The proposed project would provide an eight (8)-foot side yard to the west, and a fifty-six (56) foot, eight (8) inch side-yard to the east. The zone also requires a twenty-five (25) foot rear yard. The proposed project would provide a twenty-five (25) foot rear yard.

***(b) Each means of vehicular ingress and egress to any principal building shall be at least twenty-four feet (24 ft.) in width, exclusive of driveways;***

The proposed project includes a driveway width of sixteen (16) feet. While most of the Foxhall Crescents Master Plan includes theoretical streets of twenty-five (25) feet in width, as it approaches the Property, the width narrows to sixteen (16) feet curb-to-curb. This pattern is consistent with other later phases of Foxhall Crescents approved under the 1958 regulations pursuant to the § 2516 process. Accordingly, as the 2016 Zoning Regulations no longer allow the Board to waive this requirement, as was done in the 2014 approval, the Applicant is requesting

variance relief to maintain the sixteen (16) foot driveway width established by the original development. This relief is addressed later in this statement.

- (c) The height of a building governed by the provisions of this section shall be measured from the finished grade at the middle of the building façade facing the nearest street lot line; and***

As measured from the above-referenced measuring point, the proposed project, complies with the maximum height restrictions of the R-1-A zone, with a building height of thirty-six feet, eight in. (36 ft. 8 in.).

- (d) The rule of height measurement in Subtitle C § 305.3(c) shall supersede any other rules of height measurement that apply to a zone, but shall not be followed if it conflicts with the Height Act.***

The height of the proposed project is in compliance with the requirements of C-305.3(c).

***C §305.4 For a theoretical subdivision application, the following information is required to be submitted to the Board of Zoning Adjustment, in addition to other filing requirements pursuant to Subtitle Y § 300:***

- (a) Site plans including the following information:***
- (1) A plat of the record lots proposed for subdivision;***
  - (2) The location of proposed streets and designated fire apparatus roads;***
  - (3) Location of proposed easements;***
  - (4) Lot lines of proposed theoretical lots, and the delineation of the lot lines shared by theoretical lots that will serve as private drives or easements;***
  - (5) Existing grading and proposed grading plans;***
  - (6) Existing landscaping and proposed landscaping plans, including the sizes and locations of all trees on or adjacent to the property on public or private lands;***
  - (7) Plans for the location of building footprints on theoretical lots; and***
  - (8) Required yards (rear, side and front) based on the regulations applicable to a zone or any modifications to regulations provided through this section;***

The plans and plat for the proposed project will meet the requirements of this section, as applicable. The overall subdivision has been approved and executed, and this approval is for construction of a home on a previously approved lot.

- (b) Typical or individual floor plans and elevations for the proposed buildings and structures; and**

The plans for the proposed project will meet the requirements of this section.

- (c) A table of zoning information including required and proposed development standards.**

The plans for the proposed project will include zoning information and development standards, as required by this section.

***C §305.5 Before taking final action on an application under this section, the Board of Zoning Adjustment shall refer the application to the Office of Planning for coordination, review, and report, including:***

***(a) The relationship of the proposed development to the overall purpose and intent of the Zoning Regulations, and other planning considerations for the area and the District of Columbia as a whole, including the plans, programs, and policies of other departments and agencies of the District government; provided, that the planning considerations that are addressed shall include, but not be limited to:***

- (1) Public safety relating to police and fire concerns including emergency vehicle access;***
- (2) The environment relating to water supply, water pollution, soil erosion, and solid waste management;***
- (3) Public education;***
- (4) Recreation;***
- (5) Parking, loading, and traffic;***
- (6) Urban design; and***
- (7) As appropriate, historic preservation and visual impacts on adjacent parkland;***

***(b) Considerations of site planning; the size, location, and bearing capacity of driveways; deliveries to be made to the site; side and rear setbacks; density and open space; and the location, design, and screening of structures;***

***(c) Considerations of traffic to be generated and parking spaces to be provided, and their impacts;***

***(d) The impact of the proposed development on neighboring properties; and***

***(e) The findings, considerations, and recommendations of other District government agencies.***

***C §305.6 The proposed development shall comply with the substantive intent and purpose of this title and shall not be likely to have an adverse effect on the present character and future development of the neighborhood.***

The proposed project will comply with the substantive intent and purpose of the title, will be consistent with the original, 1979 plans for the Foxhall Crescent development, and will not have an adverse effect on the present character or future development of the neighborhood.

***C §305.7 The Board of Zoning Adjustment may impose conditions with respect to the size and location of driveways; floor area ratio; height, design, screening, and location of structures; and any other matter that the Board determines to be required to protect the overall purpose and intent of the Zoning Regulations.***

***C §305.8 Any modification to a theoretical subdivision application resulting from an addition to a one (1) dwelling unit building may be reviewed as an expedited review, pursuant to Subtitle Y, Chapter 4.***

The proposed project is not an addition to an existing building, and therefore the Applicant is not seeking expedited review.

#### **IV. VARIANCE FROM C § 305.3(b)**

The Applicant is requesting area variance relief from the theoretical street width requirements of C-305.3(b). Section C-305.3(b) requires that each means of vehicular ingress and egress to any principal building be at least twenty-four (24) feet in width. While most of the Foxhall Crescents Master Plan includes theoretical streets of twenty-five (25) feet in width, as it approaches the Property the width narrows to sixteen (16) feet curb-to-curb. This street width requirement was waived by the Board in the 2014 BZA case; however, such waiver is no longer provided for in the 2016 Regulations.

The burden of proof for an area variance is well established. The Applicant must demonstrate three elements: (1) unique physical aspect or other extraordinary or exceptional

situation or condition of the property; (2) resulting in practical difficulty in complying with a strict application of the Zoning Regulations; and (3) no harm to the public good or the zone plan. *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990). As set forth below, the Applicant meets the three-part test for the requested area variance.

A. The Property is Subject to Exceptional Conditions and Situations.

In order to prove an extraordinary or exceptional condition, or uniqueness, the Applicant must show that the property has a peculiar physical aspect or other extraordinary situation or condition. *Monaco v. D.C. Board of Zoning Adjustment*, 407 A.25 1091, 1096 (D.C. 1979). A property's uniqueness is not limited to physical aspects of the land and may be determined by "some difficulty not shared by the entire neighborhood." *Id.* at 1098.

Furthermore, the Court of Appeals held in *Gilmartin v. D.C. Board of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990), that it is not necessary that the exceptional situation or condition arise from a single situation or condition of the property. Rather, it may arise from a "confluence of factors." In *Monaco*, the Court of Appeals also held that the zoning history of a property could be considered in making the determination of uniqueness.

Among the exceptional conditions causing practical difficulty to the Applicant, as it relates to compliance with C-305.3(b), is that the Property is the only remaining lot in a fully approved and constructed theoretical lot master planned community. The proposed width of the vehicular ingress and egress was established when originally approved in 1979, and is essentially a function of the development design, considering the available space and topography, and other land planning concerns. This requirement was waived by the Board in 2014. As such, development on this Property was approved by District officials three times, once in the 1979 Master Plan and in the two subsequent BZA approvals.



B. Strict Application of the Zoning Regulations would Result in a Practical Difficulty.

The second prong of the variance test is whether a strict application of the Zoning Regulations would result in a practical difficulty. In reviewing the standard for practical difficulty, the Court of Appeals stated in *Palmer v. Board of Zoning Adjustment*, 287 A.2d 535, 542 (D.C. App. 1972), that “[g]enerally it must be shown that compliance with the area restriction would be unnecessarily burdensome. The nature and extent of the burden which will warrant an area variance is best left to the facts and circumstances of each particular case.” In area variances, applicants are not required to show “undue hardship” but must satisfy only “the lower ‘practical difficulty’ standards.” *Tyler v. D.C. Bd. of Zoning Adjustment*, 606 A.2w 1362, 1365 (D.C. 1992) (citing *Gilmartin v. Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990)).

It is well settled that the BZA may consider “a wide range of factors in determining whether there is an ‘unnecessary burden’ or ‘practical difficulty.’” *Gilmartin*, 579 A.2d at 1711. Other factors to be considered by the BZA include: “the severity of the variance(s) requested”; “the weight of the burden of strict compliance”; and “the effect the proposed variance(s) would have on the overall zone plan.”

The proposed width of the theoretical street where it approaches and meets the Property cannot be modified because its width is established in the plans for this section of the Foxhall Crescents development; and widening the theoretical street to the required twenty-four (24) foot width would interfere with the adjacent properties. If the Applicant were to expand the ingress/egress path along the theoretical street from its current width of sixteen (16) feet on the two neighbors’ lots, it would require demolishing and reconstructing the street and sidewalk in front of the adjacent properties, and the area where the street dead-ends, and the increased paved area would unnecessarily increase impervious surface area on the Property and in the vicinity.

C. Relief Can be Granted without Substantial Detriment to the Public Good

The vehicular ingress and egress, or the “theoretical street,” dead ends into the Property, with only one existing home on each side of this leg of the Foxhall Crescents Street system. Therefore, granting the specific relief requested here affects no adjacent properties, as the theoretical street in front of the house serves only this lot and one other driveway, to one of the two houses adjacent to this street section. Furthermore, the primary effects of granting this relief will be to make the proposed house compatible with the design of the neighborhood as well as to minimize impervious surface area and optimize tree protection.

D. Relief Can Be Granted Without Impairing the Intent, Purpose, and Integrity of the zone plan as embodied in the Zoning Regulations and Map.

The extraordinary condition, and the practical difficult resulting therefrom, are extremely unique and as such, not likely to be found in any other situation in the District. This above all protects the integrity of the zone plan. Beyond that, the relief requested, relative to its purpose, has little impact on the surrounding community, due to its location on a dead end street, serving only two houses. The use and structure were approved twice before, indicating its consistency with the neighborhood and with the zone plan as embodied in the Zoning Regulations and Zoning Map. Granting the relatively minor variance relief for the theoretical street width merely provides the Applicant the ability to construct the home in accordance with the design standards of the community in which this lot was originally approved.

V. CONCLUSION.

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

Respectfully submitted,

*Martin P Sullivan*

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Date: November 1, 2021

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