NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: Board of Supervisors of Fairfax County, Virginia, and Leslie B. Johnson, Fairfax County Zoning Administrator v. Ryan Hoover and Karalee Werning (In Re: May 26, 2021, Hearing of the Board of Zoning Appeals of Fairfax County, Virginia), Case No. CL-2021-0009367

Dear Counsel:

This matter is before the Court on the Writ of Certiorari filed by the Board of Supervisors of Fairfax County, Virginia, and Leslie B. Johnson, Zoning Administrator, seeking review of the May 26, 2021, decision rendered by the Board of Zoning Appeals of Fairfax County, Virginia ("the BZA") in which the BZA unanimously found "plainly wrong" the Zoning Administrator's determination that the proposed structure does not meet the definition of an accessory structure which is the subject of this appeal.

OPINION LETTER

The Petitioners', Board of Supervisors of Fairfax County and Leslie B. Johnson, (collectively the "County") raise three alternative grounds for their appeal of the BZA's decision. First, the County claims that the BZA erred when it accepted the Landowners' appeal because it was time barred under Va. Code § 15.2-2311. Second, the County claims that the BZA erred when it considered the Landowners' second appeal before the first appeal was resolved. Lastly, the County claims that the BZA failed to afford the Zoning Administrator great weight regarding the interpretation of the ordinance she is charged with administering.

In accordance with Va. Code § 15.2-2314 and upon consideration of the memoranda submitted, the record of the BZA proceedings, and oral argument presented by counsel, the Court took the matter under advisement. For the reasons set forth below, the Court finds that the BZA did not err in its determination that the Zoning Administrator's interpretation was plainly wrong in its denial of the building permits under the Zoning Ordinances.

BACKGROUND

I. Facts and Procedural Overview

The facts are taken from review of the hearing transcripts and those presented at the hearing on January 26, 2022. Ryan Hoover and Karalee Werning (collectively "Landowners" or the "Respondents") are the record owners of the property located at 8616 McHenry Street, Vienna, Virginia ("the Property").[1] The Property contains 22,000 square feet and is zoned to the R-l District and includes a single-family home with a total above-grade living area of 2,516 square feet.

On July 26, 2018, the Landowners obtained Building Permit #181770071 for the construction of a two-story, two-bay garage with an open room above, all as an accessory structure to the single-family dwelling on the Property. On March 14, 2019, a Notice of Violation was issued for exceeding the scope of the approved permit in violation of the Zoning Ordinance. [2]

The First Appeal

On April 11, 2019, the Landowners appealed the Notice of Violation to the BZA, designated as Appeal No. A 2019-PR-006 ("the First Appeal"). On July 31, 2019, the BZA

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[1] The parcel is also identified on the Fairfax County Real Property Identification Map as Tax Map No. 39-3 ((5))(5) parcel 43).

[2] The Notice of Violation stated: "As constructed by the Landowners, the Unapproved Structure and its associated improvements were not done in accordance with the approved Building Permit, and the resulting structure and its use are not subordinate to that of the principal structure on the Property, a 2,516-square-foot single-family dwelling."

heard the First Appeal. At the conclusion of the appeal hearing, BZA Member John Cowherd moved the BZA to uphold the Zoning Administrator's Determination.

The Landowners, by counsel, filed a Petition for Writ of Certiorari in this Court on August 29, 2019, in a case styled: *In Re: July 31, 2019, Decision of the Board of Zoning Appeals of Fairfax County, Virginia,* CL-2019-0012058 ("the First Litigation"). The First Litigation was ostensibly resolved by an Agreed Order dated April 20, 2020. The Agreed Order included the following relevant provisions:

> *2. The Petitioners' must obtain a demolition permit for the partially constructed detached garage on the Property whereupon that freestanding detached accessory structure ("Garage") will be reduced in size to measure no larger than 30 feet by 25 feet, with a ridge height of 25 feet and 10 inches. The proposed size and location of the Garage is depicted on the annotated plan attached hereto as Exhibit A.*
> *3. All plumbing fixtures in the Garage, including but not limited to toilets, sinks, faucets, washers, showers must be removed, except that a utility sink may be located on the main level. All other pipes and drains must be capped.*
> *4. The second floor of the Garage may be used for storage, studio or office only. Any partition walls located on the second floor must be removed, but any existing interior framing may remain, only if required for structural (load bearing) purposes*
> *8. The Petitioners' must bring the Property into compliance with the Zoning Ordinance according to the following schedule: Withing 60 days after entry of this Agreed Order, The Petitioners' must make a complete application for any required demolition/building permits and associated building and grading plans necessary to bring the Garage and the Property into compliance with Exhibit A and this Agreed Order, or otherwise in compliance with the Zoning Ordinance. The Petitioners' must respond (and re-submit) to all plan review comments within 45 days until such plans are approved.*
> ***14. Nothing herein shall be construed to prohibit the Petitioners' from pursuing alternative plans to Exhibit A that comply with the Zoning Ordinance so long as the Petitioners maintain the schedule set forth in.*** (emphasis added). [3]

The Current Appeals

The Landowners elected to pursue an alternative design that complied with the Zoning Ordinance and the schedule in Paragraph 8 of the Agreed Order. The First Appeal was never dismissed and remained pending on the Court's docket. The matter was continued to June 26, 2020, for review and for the parties to issue a report on progress

[3] *See* Agreed Order in CL-2019-0012058, R. at 7-12.

and compliance with the Agreed Order. However, due to the pandemic, no review took place.[4] Additionally, to date, the County has not requested that the Court hear motions for compliance with the Agreed Order.

The Landowners submitted two plans: a "Workshop Addition plan" (Permit #201780129) and the Living Room plan (Permit # 201780132). The subject building permit applications were filed by the Landowners to bring the existing detached structure, which was the subject of the First Appeal, into compliance with the zoning ordinance.

On August 20, 2020, the Zoning Administrator rejected the Landowners plan submission, because it did not comply with the Zoning Ordinance. At the request of the Landowners' counsel, on September 1, 2020, the Zoning Administrator provided the Landowners with prior allegedly consistent zoning determinations addressing the basis for approval or rejection of similar proposed building connections between principal and accessory structures in Fairfax County.

On October 4, 2020, the Landowners submitted a list of their proposed resolutions to the Zoning Permits review comments, along with changes to the plans previously submitted. On December 15, 2020, Assistant Zoning Administrator Andrew Hushour, once more, failed the revised plans. On December 30, 2020, the Respondents noted their appeal of the Zoning Administrator's determinations and on February 24, 2021, the Board of Zoning Appeals considered and voted unanimously, to consider the Respondents' Appeals.

On May 5, 2021, the BZA conducted a public hearing on the Landowners' appeals of the Zoning Administrator's determinations at issue in Appeals A 2020-PR-030 and A 2020-PR-031 to deny zoning approval of Building Permit #201780124, and to deny the zoning approval of Building Permit #181770071. The matter was continued so that both parties could submit additional information relating to the proposed plans and on May 26, 2021, the BZA reconvened its appeal hearing. After reviewing the additional submissions by both the Board and the Landowners, BZA Member James R. Hart moved the BZA to overturn the Zoning Administrator's determination that the proposed structure does not meet the definition of an accessory structure.

The BZA unanimously approved this motion and Mr. Hart went on to explain his conclusions of law and findings of fact by "the five reasons given in the ProjectDox comments for the denial of the permit".[5] Specifically, the BZA upheld in part and

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[4] R. 671. At footnote 3 of the County's memorandum states that instant dispute would not be evident as of the June 26, 2020, date in the Agreed Order for a status report. However, the Landowners applied for the Workshop Addition building permit in June of 2020. Therefore, the alleged violations were evident by June 26, 2020, allowing the County to seek court review under the Court's emergency Pandemic orders.
[5] R. 1263-1264, 26 May 2021. Such reasons were not a reason based in the language of the Zoning Ordinance.

overturned in part the Zoning Administrator's Determination. BZA unanimously determined as "plainly wrong": (a) the Zoning Administrator's determination that violation of this Court's April 24, 2020 Agreed Order in CL-2019-001258 was a valid reason for denying the building permit[6]; (b) the Zoning Administrator's determination that the building permit application plans proposed a second dwelling unit on the same lot[7]; and (c) the Zoning Administrator's determination that the plans proposed a "breezeway" instead of a single, albeit oddly-shaped, Dwelling Unit that included a living room addition. [8]

ANALYSIS

I. Standard of Review

Va. Code § 15.2-2314 gives this Court jurisdiction to review final decisions of the BZA. When the BZA hears an administrative appeal, the challenged determination is presumed to be correct. Va. Code § 15.2-2309(1).

Once the administrative officer explains the basis for the determination at the hearing, "the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence." *Id.* The BZA's factual findings are presumed correct. Va. Code § 15.2-2314. The decision of a BZA can be reversed or modified only if the trial court determines that the BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the Zoning Ordinance and the Petitioners have the burden of proof on these issues. *Patton* v. *City of Galax,* 269 Va. 219, 229 (2005).

II. Arguments

The County raises three alternative grounds for its appeal of the BZA's decision. First, the Petitioner claims that the BZA erred when it considered the Landowners' appeals because they are time barred. This court finds that the BZA correctly entertained the appeals because they were filed within 30 days of the decisions rejecting the respective plan sets as required by Va. Code § 15.2-2311(A).

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[6] R. 1264, 26 May 2021 Tr. 50-51. Mr. Hart opined that Paragraph 14 "contemplates that it isn't' necessarily a violation of the order to do something other than the- demolition scenario or try to apply for something that's in conformance with the zoning ordinance."

[7] R. 1264, 26 May 2021 Tr. 48-56. The plans did not propose a second cooking unit, as required by the Zoning Ordinance definition of "Dwelling Unit".

[8] R. 1265, 26 May 2021 Tr. 54-56.4. The BZA's unanimous ruling also adopted Commissioner Hart's ruling upholding the Zoning Administrator's determination that the outside stairs are in violation of a setback requirement. That ruling was not appealed. The BZA also unanimously adopted Commissioner Hart's motion that the "fourth paragraph" issue, namely that of rear lot coverage was moot as having been "overtaken by events". The Board did not make this ruling part of its Petition.

A. The Landowners' appeal is not time barred under Va. Code § 15.2-2311.

Va. Code § 15.2–2311 governs appeals to a board of zoning appeals. The County argues that the BZA erroneously considered the appeals because they are time barred under Va. Code § 15.2-2311. The focus of this argument is upon Va. Code § 15.2–2311(A). As pertinent, that statute provides that an appeal to the board of zoning appeals:

> "may be taken by any person aggrieved ... by any decision of the zoning administrator...[t]he appeal shall be taken within thirty days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof."

Va. Code § 15.2–2311(A).

The County states that the Landowners had, as a right, but failed, to appeal the August 20, 2020, denial of the proposed plans within 30 days. As a result, the Landowners' failed to exhaust their adequate and available administrative remedies in a timely fashion and consequently, the Zoning Administrator's determination became a "thing decided." *Lilly* v. *Caroline Cnty,*526 S.E.2d 743, 745 (Va. 2000) *citing Dick Kelly Enter,* v. *City of Norfolk,* 416 S.E.2d 680, 683 (Va. 1992). [9]

On February 24, 2021, the first appearance before the BZA, a "Consideration of Acceptance" of the Landowners' appeals, the Zoning Administrator raised the issue of timeliness and attempted to dispose of the appeals. R. 1203-04, 1214. The BZA considered the Zoning Administrator's objection but ultimately determined that the appeals were "timely on its face" and therefore, nothing in Va. Code § 15.2-2309 allows for a "threshold prescreening" without the required, advertised, public hearing on the appeal.[10]

BZA Member James R. Hart moved that the two appeals be accepted. Member Hart explained his rationale that under the narrow circumstances of the agreed order entered by the parties and given the breadth of the of Paragraph 14 of that Order, "nothing in the order would preclude [Landowners] from pursuing an alternative," and the logical

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[9] The County alleges that the Landowners argument that the appeal was timely erroneously conjoins the timing of their parallel building permit application to modify the garage. However, joining of the timing is applied incorrectly. Even if the Agreed Order allowed for alternate plans at the Landowners election, the running of the 30-day period for filing review is not tolled. This argument is contradictory as applied, because the ability to provide an alternate plan, would naturally allow for an appeal to a different plan rejected at a different date.

[10] Member Hart supported this decision stating, "...unless the General Assembly is giving us the power to screen things out beforehand....-I don't' know that we can assume that authority to do that sort of screening upfront without advertising and have a public hearing." R. 1213-1214.

pursuit of the alternate scheme contemplates that an appeal of an unfavorable staff determination would follow.

Citing the authority under §15.2-2309, the dates of the failures identified in the appeal were December 2, 2020, and December 15, 2020, making the Landowners December 30, 2020, appeal timely on its face. Member Hart further drew a distinction in this appeal and a prior untimely appeal, stating that this case, there is official governmental action on given dates, and given the broad scope of §15.2-2309, "any order or determination" may be appealed. [11] The BZA unanimously voted to consider the Appeals.

The BZA correctly entertained the appeals because they were filed within 30 days of the decision rejecting the respective plans as set forth in Va. Code § 15.2-2311. The Workshop Addition plan (Permit # 201780129) suffered a rejection on August 20, 2020; however, the Landowners responded to the reasons for rejection by making changes to the plans, as contemplated by the Agreed Order, and resubmitted on December 5, 2021. R. 18, 671. The County failed to meet their burden that the BZA was "plainly wrong" in considering the appeals.

At the May 5, 2021, hearing [12], Assistant Zoning Administrator, Mr. Andrew Hushour, confirmed that the decision at issue for the Workshop Addition plan *was* in December, not August. In response to Member Hart's question, he testified under oath that

> "I mean, there was once the original revision, we gave them comments, they made changes based on that, and then we made a decision based on that. And so that was what we, you know, when we denied it in December that was it."

R. 1227, 5 May 2021 Tr. 43.

Mr. Hushour failed the revised plans for the Workshop on December 15, 2020. The Living Room addition (Permit #201780132) was rejected once, on December 2, 2020.

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[11] Mr. Hart differentiated the present case with the "Davis Store" case, because this appeal cites a specific action by the County, with a specific date, December 15, 2020. The Record on page 85 shows that Ryan Hoover received an email on December 2, which states, "This notice is to inform you that the ZONING review number 3008856 for permit number 201780132 was completed on 02-DEC-20 with a status of 'Failed'." R. 1214, 24 Feb. 2021.

[12] The timeliness issue was addressed at the May 5, 2021, hearing. Notably, no argument was made by the Zoning Administrator or Board. In fact, Member Hart was the first to initiate the issue of timeliness and conflicting appeals. The only response by the Petitioners, came from counsel, Mr. Paul Emerick stating "I would just say that the Zoning Administrator reserves any objections based on the timeliness of this appeal but were beyond that right now." R. 1238-9, 5 May 2021.

Therefore, the Landowners appeal, as required under Va. Code § 15.2-2311, was filed on December 30, 2020, and within the 30 days of the respective determinations. [13]

B. The Terms of the Agreed Order Expressly Allowed the Landowners to Pursue Alternative Plans in Compliance with the Zoning Ordinance.

The County argues that the BZA erred by considering a "second appeal" by the Landowners before the "first appeal" was resolved. The First Appeal was ostensibly resolved by the party's agreement on April 20, 2020. The Board asserts that the Agreed Order required the Landowners to obtain a demolition permit as depicted in Exhibit A of the Order. The Board, however, neglects to address portions of the agreement, specifically, Paragraph 14 of the Order which explicitly states that the Landowners were not limited to demolition, stating in pertinent part:

> Nothing herein shall be construed to prohibit the Petitioners from pursuing alternative plans to Exhibit A that comply with the Zoning Ordinance so long as the Petitioners maintain the schedule set forth in Paragraph 8, such that abatement and remediation of the current conditions/violations are not delayed.

Paragraph 8, consistent with Paragraph 14 discusses the schedule:

> The Petitioners must bring the Property into compliance with the Zoning Ordinance according to the following schedule: Within 60 days after entry of this Agreed Order, the Petitioners must make a complete application for any required demolition/building permits and associated building and grading plans necessary to bring the Garage and the Property into compliance with Exhibit A and this Agreed Order, *or* otherwise in compliance with the Zoning Ordinance. The Petitioners must respond (and re-submit) to all plan review comments within 45 days until such plans are approved.

The proper remedy for an alleged violation of the Agreed Order, would be for the Appellants to file a Rule to Show Cause to enforce compliance with the Order. This recourse was discussed in the BZA appeal hearings, in fact, Member Hart suggested this form of relief to the County at the February 24, 2021, After Agenda Action Item. [14]

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[13] The Landowners presented, as part of their presentation at the May 5, 2021, hearing, timelines illustrating the submission and rejection dates for the two appeals that were not contradicted. R. 671, 672.
[14] R. 1203-04, 1214. Member Hart also raised this concern at the 5 May 2021 hearing 1238-39.

Moreover, Deputy Zoning Administrator Cathy Belgin testified under oath at the May 5, 2021, hearing that alternative plans were allowed for in the Agreed Order stating:

> And yes, the agreed order did include the option to simply rather than, you know, meeting the agreed plat that had been come up with that they could pursue an alternative option that was in compliance with the Zoning Ordinance, and it is staff's position that this proposed solution very clearly does not meet the zoning ordinance[15]

C. The BZA Correctly Determined that the *Zoning* Administrator's determination that the building permit application plans proposed a second "dwelling unit" was plainly wrong.

On May 26, 2021, the BZA reconvened its appeal hearing after reviewing the additional submissions by both the Board and the Landowners. BZA Member James R. Hart moved the BZA to overturn the Zoning Administrator's determination that the proposed structure does not meet the definition of an accessory structure. The procedural issue before the BZA was whether the denials of the two permits were in accordance with the zoning ordinance.

Member Hart correctly prefaced the findings by restating the limited statutory function of the BZA – to limit the focus of the review on the zoning ordinance at issue. Mr. Hart did note in his opinion that Paragraphs 8 and 14 of the Agreed Order allowed the Landowners to apply for permits based on alternative plans that were in compliance with the Zoning Ordinance, but further recognized that the BZA's authority does not "extend to determining whether there is a violation of a court order in a pending case." [16]

The BZA Correctly Determined that the Living Room Addition did not Create a Second "Dwelling Unit", although the plans were "a strange configuration of rooms... or components" it is not within the definition of "dwelling unit" as set forth in the zoning ordinance.

When, as in the present case, the issue before the circuit court is a question of law, i.e. the meaning of certain terms used in the zoning ordinance, the County has the burden of proving that the board either applied erroneous principles of law or that its decision was plainly wrong and in violation of the purpose and intent of the zoning ordinance. [17] The County erroneously argues that the zoning ordinance is ambiguous, therefore the Zoning Administrator's interpretation of the zoning ordinance should be given deference

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[15] R. 1244, 5 May 2021 Tr. 95.
[16] R. 1264, 26 May 2021 Tr. 50-51.
[17] *Adams Outdoor Advertising, L.P. v. Board of Zoning Appeals of City of Virginia Beach*, 2007, 645 S.E.2d 271, 274 Va. 189.

over the definition in the ordinance. The BZA unanimously found that the Zoning Ordinance contains an unambiguous definition of "dwelling unit." The BZA's decision was well-grounded in the Zoning Ordinance definition of "Dwelling Unit"

> A residential building or portion of a building that is arranged, designed, used, or intended for residential occupancy with provisions for living, sleeping, *eating, cooking* (emphasis added), and sanitation. These terms do not include a unit in a continuing care facility, a hotel or motel, residence hall, hospital, or other accommodation used for transient occupancy, except a dwelling may be used for short-term lodging.[18]

When construing a zoning ordinance that is plain and unambiguous, there is no room for interpretation or construction; the plain meaning and intent of the ordinance must be given it. *Donovan v. Board of Zoning Appeals,* 251 Va. 271, 274, 467 S.E.2d 808, 810 (1996); *McClung v. County of Henrico,* 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959)). Although consideration to the purpose and intent of the ordinance, and the officials charged with its enforcement is given great weight, they are not permitted to extend the ordinance provisions by interpretation or construction beyond such intent and purpose." *Id.* (citing *Donovan,* 251 Va. at 274, 467 S.E.2d at 810; *Gough v. Shaner,* 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955)). Moreover, if the administrative interpretation of a portion of an ordinance is at odds with the plain language used in the ordinance, such interpretation is plainly wrong, and must be reversed." *Cook v. Board of Zoning Appeals,* 244 Va. 107, 111, 418 S.E.2d 879, 881 (1992).

The BZA's conclusion of law was that no second "Dwelling Unit" was proposed, rather, a single Dwelling Unit was demonstrated in the Landowners plans. During the BZA proceedings, the Zoning Administrator failed to demonstrate that the plans contained a component for cooking. While there was space that could eventually be used as a kitchen, the role of the BZA was limited to looking at what exactly the application was for, not anticipatory enforcement of what one might do. The comments in the Zoning Administrators Determination refer to a "wet bar" or "kitchenette", the BZA concluded this was plainly wrong and the Landowners had rebutted those rejection comments. R. 1265, May 26, 2021, Tr. 52-53.

The BZA correctly noted at the public hearing, that the language of the ordinance is clear. The ordinance provides that a dwelling unit contains provisions for *cooking*. In addition, the evidence supported this observation, that the submissions at issue did not include cooking, and therefore was "not within the four corners of the definitions of a

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[18] Fairfax County Zoning Ordinance, Article 20, Definitions. The County adopted a new Zoning Ordinance after the BZA decision. The new information still requires provisions for cooking. Fairfax County Zoning Ordinance § 9102 (Effective July 1, 2021).

dwelling unit." To the extent that the denial of the building permit rests on anticipatory violations, the BZA's conclusion that it was "plainly wrong" stands.

The issue of a "breezeway" arises in the denial comments rather than the application. The County's argument instead focuses on the Zoning Administrator's "consistent administrative interpretation" about allowable "breezeway" connections. The County argues that it was plain error for the BZA to ignore the Zoning Administrators' consistent interpretation, illustrated by the numerous examples to support the position taken. Notably, the County does not address the BZA's findings that the plans did not propose such mere connection but, rather, a single Dwelling Unit:

> So, again, I don't think that the- by calling this space a breezeway, that that somehow gives rise to violation of the Zoning Ordinance to connect the two structures...I've looked at the other examples. I'm not sure in either way in either direction they are particularly persuasive. I think we have to go by objective standards. There are a lot of oddly shaped houses. It would be very difficult to legislate shape or dimensions of rooms, but again, I don't think that Paragraph 2 of the denial comments is a reason. If they had applied for a breezeway, it would be different. And I think there were some preliminary discussions about a breezeway. But that breezeway did not show up ultimately on what was applied for, and again, I think what was applied for contemplated Paragraph 14 of the order, some alternate scenario.

R. 1265, 26 May 2021 Tr. 55-56.

While it is correct that a Zoning Administrator's administration, interpretation, and enforcement of the Ordinance should be given "great weight", the County does not address why the BZA was plainly wrong in its findings.

In this case, the BZA determined that the Zoning Administrators' interpretation of the proposed structures were plainly wrong. Specifically, the BZA stated that the Zoning Administrators' function must be determined on a contemporary, present basis and not looking prospectively as to what could be done with a particular space or room.

This decision must be given great weight and the Court can find for the County only if "the BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the zoning ordinance. *Patton v. City of Galax*, 269 Va. 219, 229 (2005). The County argues that the BZA did not give the proper weight to the Zoning Administrators decision, however they did not meet the burden of proof on these issues.

CONCLUSION

For the reasons stated above, we find that the BZA did not err in its unanimous determination as "plainly wrong" and affirm that (a) the Zoning Administrator's determination that violation of this Court's April 24, 2020 Agreed Order in CL-2019-001258 was not a reason based in the Zoning Ordinance (b) the Zoning Administrator's determination that the building permit application plans proposed a second dwelling unit on the same lot and (c) the Zoning Administrator's determination that the plans proposed a "breezeway" instead of a single, albeit oddly-shaped, Dwelling Unit that included a narrow living room addition.

The Court directs Mr. Hampshire to draft an Order reflecting the Courts' Ruling and circulate it to Mr. Emerick for submission to the Court forthwith.

Very truly yours,

[redacted]

Grace Burke Carroll

OPINION LETTER