GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16935 of Southeast Citizens for Smart Development, pursuant to 11 DCMR §§ 3100 and 3101, from administrative decisions of the Zoning Administrator, allowing the construction of four single family dwellings allegedly in violation of the side yard requirements, the location parking space requirements, and the parking space accessibility requirements of the Zoning Regulations (§§ 405.9, 775.2, 2116.1 and 2117.4) in the C-2-B zone at premises 1308, 1310, 1312 and 1314 Potomac Avenue, S.E.

HEARING DATES: **January 21, 2003, April 1, 2003, and April 15, 2003**

DECISION DATE: **January 28, 2003 and May 6, 2003**

DECISION AND ORDER

Southeast Citizens for Smart Development (SCSD) filed an appeal with the Board of Zoning Adjustment (BZA) on August 1, 2002 alleging that the Zoning Administrator erred in approving the issuance of building permits on July 8, 2002 to Father Flanagan's Boys Home (the property owner or the owner) for 4 single family dwellings at 1308, 1310, 1312, and 1314 Potomac Avenue, S.E.

Advisory Neighborhood Commission (ANC) 6B joined the SCSD in its appeal following a duly noticed meeting held on September 12, 2002.

The appellant was represented initially by Andrea Ferster, Esq., then by Mary Withum, Esq., and was supported by ANC Executive Director Candace Avery. The property owner was represented by Phil Feola, Esq. and Martin Sullivan, Esq. of Shaw Pittman, LLP, and the Department of Consumer and Regulatory Affairs (DCRA) of the District of Columbia was represented by Arthur Parker, Esq., Office of the Corporation Counsel.

Preliminary and Procedural Matters

The Office of Zoning scheduled a hearing on the appeal for January 21, 2003. Pursuant to 11 DCMR § 3113.4, the Office of Zoning mailed notice of hearing to the appellant, the ANC, the property owner and DCRA.

On or about January 15, 2003, the owner's counsel filed a motion to dismiss the appeal on the ground that challenges to the parking and setback requirements were untimely filed. SCSD opposed the motion and the BZA heard argument from the parties at the

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hearing on January 21, 2003.[1] At a special public meeting on January 28, 2003, the BZA voted to grant the motion to dismiss with respect to the alleged parking requirements violation. However, the BZA denied the motion to dismiss with respect to the alleged setback requirements violation and continued the case to April 1, 2003 for a hearing on the alleged setback violation. The owner renewed his full motion to dismiss at the April 1 hearing, but the BZA reaffirmed its prior ruling and held the scheduled hearing on the setback issue.

The Positions of the Parties

SCSD maintains that the 3 buildings at lots 134, 135 and 136 require two side yards under
§ 405.3 of the Zoning Regulations and under BZA Case #16811, *Appeal of David and Janet Pritchard* (the *Pritchard* case). Their expert witness, Lyle Schauer [2], proffered that these 3 buildings did not meet the side yard requirements for semi-detached buildings in a commercial zone because they have only one side yard instead of two. Mr. Schauer reasoned that side yards were required on the west side of the buildings where there are lot line walls, but no common division walls. He interprets the *Pritchard* case to require side yards where there are "free-standing" walls such as the lot line walls here. The ANC concurred with SCSD's position.

DCRA and the owner maintain that the 3 semi-detached buildings on lots 134, 135 and 136 do not require side yards to the west of the buildings where there are lot line walls, that each building requires only one 8 feet side yard to the east.

The BZA Decision

At the conclusion of the public hearing, the BZA voted to deny the appeal with respect to lots 134 and 135 and to grant the appeal with respect to lot 136.

FINDINGS OF FACT

1. The subject properties are located in the C-2-B zone at 1308, 1310, 1312 and 1314 Potomac Avenue, SE, in Ward 6 of the District of Columbia. The four structures at issue sit on four separate lots of record: lots 134, 135, 136 and 137 within Square 1045.

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[1] Initially, DCRA took no position on the motion to dismiss. But ultimately DCRA supported the owner's position, arguing that both the side yard setbacks and the parking requirements were determined before the first appeal, resulting in an untimely challenge during the second appeal.

[2] The BZA concluded that Mr. Schauer was an expert witness in zoning regulations of the District of Columbia, based in part on his 8 years of experience as chair for the zoning committee of the Capitol Hill Restoration Society. His professional resume is part of the administrative record in this case.

2. Appellant SCSD is a non-profit corporation organized to facilitate community involvement and education in planning neighborhood development in Ward 6. Its membership includes persons who reside and/or own property within 200 feet of the subject properties.

3. On September 6, 2001, DCRA issued building permits to the owner to construct 4 two-story residences to be used as a community based residential facility. (CBRF).

4. On September 12, 2001, SCSD appealed the issuance of the permits to the BZA challenging the proposed CBRF use of the properties. SCSD did not challenge the issuance of the permits based upon non-compliance with the parking and setback requirements applicable to a CBRF use.

5. On June 21, 2002, the BZA issued an order and decision finding that DCRA erred in issuing the permits to operate as a CBRF as a matter of right. The BZA found that since the 4 properties were to be used as a single CBRF, the number of residents in the combined facility exceeded the number permitted in a CBRF as of right and resulted in a use that required special exception review. The BZA made no findings of fact or conclusions of law as to whether the proposed facility met applicable parking or setback requirements.

6. In early July 2002, the owner applied again for building permits for the proposed project, this time seeking approval of the 4 structures as 4 single-family dwellings. While the proposed CBRF use had changed to a single family dwelling use, the proposed parking configuration and side yard setbacks were no different than those proposed in the original application. The proposed parking and setbacks were also based upon the same plans and drawings submitted with the original application.

7. On July 8, 2002, DCRA issued new permits for 4 single family dwellings at 1308, 1310, 1312, and 314 Potomac Avenue. The permits were identified with new permit numbers, but each new permit was described as a "revision" to one of the 4 initial permits.

8. On August 1, 2002, SCSD appealed the issuance of the 4 revised permits, alleging that the revised permits violated both the parking requirements and the side yard setback requirements in the Zoning Regulations.

9. The 3 buildings on lots 134, 135 and 136 each have west side walls sitting directly on the lot lines; therefore, they have no side yards to the west.

10. None of the 3 buildings share a common division wall with an adjacent structure.

11. Each of the 3 buildings have side yards to the east.

12. The east side yards for lots 135 and 136 are both 8 feet wide.

13. The east side yard for lot 137 is only 2 feet in width, due to a 6 feet wide mudroom, which encroaches into the side yard.

14. The building at lot 137 has 8 feet side yards on both the east and west.[3]

CONCLUSIONS OF LAW

The Motion to Dismiss

If the BZA determines this appeal is untimely, it must be dismissed as a matter of law. The timely filing of an appeal to the BZA is mandatory and jurisdictional *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994). If an appeal is not timely filed, the BZA is without power to consider it. *Sisson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 964 (D.C. 2002); *Woodley Park Comty. Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). "Because the rules of the BZA [as of the date of the filing of this appeal] adopt no specific time limit on appeals, a standard of reasonableness is applied in determining whether an appeal is timely." *Waste Management of Maryland v. District of Columbia Bd. of Zoning Adjustment*, 775 A. 2d 1117 (D.C. 2001). The District of Columbia Court of Appeals has held that two months between notice of a decision and an appeal therefrom is the limit of timeliness. *Id.*

The gravamen of the owner's argument is that SCSD could have challenged the parking and side yard requirements during its first appeal in September 2001. Instead, it waited nearly 11 months to challenge these requirements during its second appeal in July 2002. The owner relies in particular on the *Woodley Park* case for the proposition that a revised building permit is only appealable as to those aspects of the permit that were revised. Since the owner maintains that only the "use" was revised during the revised permit application process, only the "use" allowed by the revised permit may be appealed from, not the parking requirements and not the side yard requirements. For reasons explained below, the BZA agrees that the appeal of the parking requirements is untimely under the *Woodley Park* doctrine; however, it disagrees that the appeal of the side yard requirements is untimely.

That portion of the appeal challenging the parking requirements must be dismissed as untimely. The proposed parking under both the initial permits and the revised permits was identical and could have been challenged by SCSD at the time of its first appeal.

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[3] The parties do not dispute that the construction conformed to the plans submitted with the permit applications.

The owner was required to provide 1 space for each building whether it was used as a single family dwelling or a CBRF. See "Residential Uses" section under 11 DCMR § 2101.1. Thus, whether the subject properties were used as 4 single-family dwellings or 4 CBRFs, the parking requirements were the same and the SCSD was on notice as to the parking approval when the first permit was issued in September, 2001.

The request to dismiss that portion of the appeal challenging the side yard requirements is denied. Unlike the parking requirement, the change in use from CBRFs to single-family dwellings did trigger different legal requirements with respect to the side yard requirements. As a proposed single family semi-detached dwelling in a commercial district, the setbacks were evaluated under §775.3 of the Zoning Regulations, which references requirements of the R-2 District. As a proposed CBRF, however, the building setbacks were first evaluated under §775.5, which contains a different standard for side yards.[4] Thus, while the proposed side yard characteristics may not have changed as a result of the revised permits, the legal criteria under which they were reviewed did change.

SCSD could not possibly have known that the buildings would later be subject to differing side yard requirements when, in September, 2001, the initial permits were issued. It can only reasonably be charged with notice of DCRA's determination on July 8, 2002 when the owner obtained the revised permits as single family semi-detached buildings subject to the more stringent side yard requirements. Accordingly, SCSD's appeal of the revised permits-- filed on August 1, 2002—was filed less than 30 days from the decision appealed from and was timely filed under the decisional law of the District of Columbia.

Appeal of the Side Yard Requirements

Under the Zoning Regulations, the buildings at lots 134, 135 and 136 are each a "one-family semi-detached dwelling" with one lot line wall. The Zoning Regulations defines the terms "one family dwelling" and "one family semi-detached dwelling". A one-family dwelling is "a dwelling used exclusively as a residence for one (1) family" 11 DCMR§ 199.1. A "one family semi-detached dwelling is "a one-family dwelling, the wall on one (1) side of which is either a party wall, or lot line wall, having one (1) side yard" 11 DCMR §199.1. A "lot line wall" is defined as "an enclosing wall constructed immediately adjacent to a side lot line, but not a party wall. 11 DCMR § 199.1. As stated in the Findings of Fact, and as acknowledged by the parties, the 3 buildings have lot line walls on the west side of each building and side yards to the east. Therefore, by definition the 3 buildings are one family semi-detached dwellings.

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[4] Section 775.3 states: "A one-family semi-detached dwelling shall be subject to the side yard requirements of an R-2 District". Section 775.3 states: "No sideyard shall be required for any other [other than one-family detached and semi-detached dwellings, and hotels] building or structure; but if a side yard is provided, it shall be at least two inches (2 in.) wide for each foot of height of building, but not less than six feet (6 ft.).

Under the Zoning Regulations, a one family semi-detached dwelling is explicitly permitted as a matter of right beginning in the R-2 District, continuing through and including the C-2-B District where the subject dwellings are located. 11 DCMR § 300.3(c).

Under the Zoning Regulations, a one family semi-detached dwelling must have one side yard, with a minimum required width of 8 feet. As previously discussed in paragraph , §775.3 of the Regulations provides that a one family semi-detached dwelling is subject to the side yard requirements of an R-2 District. Turning to §405.3 of the Regulations, a one family dwelling in the R-2 District that does not share a common division wall with another building must have a side yard on "each resulting free-standing side". Under § 405.9 of the Regulations the minimum width of the side yard must be 8 feet.

SCSD claims that under the *Pritchard* case, a lot line wall is a freestanding wall; thus, a side yard is required under § 405.3 above at the lot line (west) side of the buildings and at the east side of the buildings. The BZA disagrees. Neither *Pritchard* nor § 405 can be interpreted in the manner suggested by SCSD and the ANC. As will be explained below, following SCSD's interpretation of § 405 would lead to an absurd result in that it would render meaningless those provisions of the Regulations which permit semi-detached dwellings as a matter of right use. By definition, a semi-detached dwelling is required to have only one side yard, not two. SCSD's interpretation of § 405 would, in effect, require two side yards instead of one whenever a semi-detached dwelling has a lot line wall instead of a common division wall. As pointed out by DCRA, this interpretation would also foster the development of row dwellings-- which have no side yards-- instead of semi-detached dwellings. This outcome is not logical if the underlying policy favoring side yards is to assure light, access, air and safety. In sum, §405.3 of the Zoning Regulations must not be interpreted in a vacuum. Rather, it must be interpreted in harmony with other sections of the Regulations. See, for instance, *The Matter of T.L.J.*, 413 A.2d 154 (D.C. 1980). As such, the BZA reads §405.3 of the Zoning Regulations to require only one side yard for one family semi-detached dwellings. To the extent *Pritchard* suggests otherwise, it is overruled.

The Board concludes that the 3 semi-detached dwellings require one side yard of a minimum width of 8 feet. Therefore, the buildings at lots 135 and 136 comply with the side yard requirements. But the building at lot 134 has only a 2 foot side yard (Findings of Fact No. 9). Therefore, it does not comply with the side yard requirements.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected

ANC's recommendations. To give great weight, the BZA must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this appeal, the ANC concurred with the views advanced by the appellant, SCDC. For the reasons stated above, the BZA finds this advice unpersuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. the motion to dismiss the appeal as untimely is **GRANTED** as to the parking requirements and **DENIED** as to the side yard requirements.

Vote taken on January 28, 2003

VOTE; 3-1-1 (Anne M. Renshaw, David A. Zaidain, and Peter G. May in favor of the motion; Geoffrey H. Griffis, opposed, and Curtis L. Etherly, Jr., being necessarily absent)

b. the appeal is **DENIED** with respect to lots 135 and 136

Vote taken on May 6, 2003

VOTE; 3-1-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain in favor of denying the appeal as to lots 135 and 136; Peter G. May opposed to denying the appeal and Anne M. Renshaw being necessarily absent.

c. The appeal is **GRANTED** with respect to lot 134.

VOTE; 4-0-1 (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Peter G. May, and David A. Zaidain in favor of granting the appeal and Anne M. Renshaw being necessarily absent.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 0 8 2003

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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As Director of the Office of Zoning, I hereby certify and attest that on SEP - 8 2003 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

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