Summary

The issuance of the permit for the proposed addition without a special exception was improper because the addition would lack a minimum eight-foot side yard setback as required by sections 405.9 and 2001.3(b)(2) of the Zoning Regulations.

A substandard side yard for an addition to an existing nonconforming structure is not authorized by section 405.8. As indicated by the text of that section and by this Board's decision in *Appeal No. 16811 of David and Janet Pritchard*, section 405.8 has no such effect.

Background

1. The subject property is a single-family dwelling located at 4624 Brandywine St., N.W. (square 1548, lot 21), in an R-1-B zone district, in American University Park. The property is owned by John Walsh and Linda Jewell (the "Walsh-Jewells").

2. The appellants are the owners of the homes adjacent to this property. Judy and Clarke Brinckerhoff own 4628 Brandywine St., to the immediate west of the property. Susan Buck and David Price own 4620 Brandywine St., to the immediate east. All three properties are of a similar lot size and dwelling size and were built in the 1940's.

3. On June 26, 2003, the Walsh-Jewells received permit no. B452591, approving construction of an addition to the rear of their house. The addition is to have a footprint of 24' by 22', increasing the footprint of the existing structure by more than 50 percent. The addition is to be three stories tall plus a pitched roof. The addition is entirely above grade. The room identified as a "family room" on the permit is to be a two-story great room with a balcony at the second floor. Above this will be a master bedroom with 11' ceilings. Above this will be a large enclosed area under the roof framing.

4. The western wall of existing structure and the western wall of the addition are 5'1" from the lot line with the Brinckerhoffs, according to the Walsh-Jewells' submitted plans.

5. The houses on this block are closely sited. By virtue of the scale and placement of the addition, it will, if constructed, block out the sun to the Brinckerhoffs' home and yard for much of the day. Although the addition is more distant from the Buck and Price property to the east, it would also be invasive of the light to the Buck and Price home. The addition, as it reaches far into the back yard of the property, will also interfere with the privacy that has been enjoyed by appellants in their back yards.

6. In a meeting on Tuesday, July 8, 2003, prior to the start of significant construction, appellants told the Walsh-Jewells of their concerns regarding the scale of the addition and its effects on their light and privacy. Appellants also advised the Walsh-Jewells of several legal concerns, including the lack of an eight-foot setback. The Walsh-Jewells indicated that they would proceed with construction.

7. On July 9, appellants wrote a letter to Mr. Lennox E. Douglas, Chief, Building and Land Regulation Administration, Department of Consumer & Regulatory Affairs, describing their legal concerns and requesting cancellation of the permit. Appellants provided the Walsh-Jewells with a copy of the letter that day. Mr. Douglas referred this correspondence to Ms. Faye Ogunneye of the Zoning Division.

BZA
Case No. 17066
Exhibit No. 2

Board of Zoning Adjustment
District of Columbia
CASE NO. 17066
EXHIBIT NO. 2

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8. On July 22, Ms. Ogunneye responded to appellants by e-mail. With respect to the side yard setback, the only issue relevant to this appeal, Ms. Ogunneye stated:

> DCMR 11, 405.8 notes that "In the case of a building existing on or before May 12 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building: provided, that . . . the width of the existing side yard shall be a minimum of five (5 ft.). . . . DCMR 11, 2001.3 allows an addition to be made to a nonconforming structure as long as the total lot occupancy is not over the maximum allowed for the zone in question, and the addition itself conforms to use and structure requirement and does not increase an existing nonconformity. The proposed addition aligns with both existing side yard.

Nonconformity of the Proposed Addition

9. Section 405.9 of the Zoning Regulations requires a minimum side yard setback of eight feet in an R-1-B zone district. The subject property, with its 5'1" setback on the western border, is a nonconforming structure. It is assumed that the existing dwelling is grandfathered under section 2000.4.

10. Under Section 2001.3, a nonconforming structure such as the subject property may have enlargements or additions, subject to certain conditions. Among these are the condition that "[t]he enlargement or addition itself shall . . . (2) Neither increase or extend any existing, nonconforming aspect of the structure. . . ." Section 2001.3(b)(2).

11. The Zoning Division stated that the 5'1" setback of the addition "does not increase an existing nonconformity" because it "aligns with both existing side yard[s]." It may be true that the addition does not "increase" the nonconformity of the side yard, in the sense that the planned side yard of the addition is not smaller than the side yard of the existing structure. The Zoning Division improperly failed to consider, however, that the addition would very substantially "extend" the nonconformity. The Zoning Division has effectively omitted from the regulatory condition the word "extend" in "neither increase or extend."

12. The addition would extend the nonconformity of the side yard setback by 24 feet (the depth of the addition). Given that the existing length of the nonconforming side yard is approximately 34 feet, the addition would extend the nonconformity by more than 70 percent. This is precisely the type of extension of a nonconformity that is barred by the plain language of Section 2001.3.

13. The Zoning Division also erred in relying on section 405.8 to validate the inadequate setback of the addition. Section 405.8 provides, "In the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building; provided, that the width of the *existing side yard* shall not be decreased; and provided further, that the width of the *existing side yard* shall be a minimum of five feet (5 ft.)." (Emphasis added.) This provision sets conditions on the size of the side yard for the existing structure. On its face, however, it does not authorize a substandard setback for an addition. Indeed, it says nothing about the side yard of the addition one way or the other.

14. The limited scope of section 405.8 is underscored by the language of its counterpart provision concerning rear yards. Under that provision, section 404.4, "an extension or addition

may be made to the building *into the required rear yard*" of pre-1958 buildings. (Emphasis added.) Thus, unlike section 405.8, section 404.4 explicitly allows a substandard setback for new construction. (Even then, the "extension or addition" is restricted to "that portion of the rear yard included in the building area on May 12, 1958.") In contrast, section 405.8 refers only to allowing nonconformity with respect to the "existing side yard." If the drafters of the Zoning Regulations meant for section 405.8 to authorize a new intrusion into the required eight-foot side yard, they knew how to say so.

15. To the extent that there is any ambiguity in sections 405.8 or 2001.3 – and appellants submit there is none – these ambiguities must be resolved in favor of protecting the light and air of neighboring properties. Section 101.1 sets out the following overall principle of interpretation for the Zoning Regulations (emphasis added):

> In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to:
>
> (a) *Provide adequate light and air*;
> (b) Prevent undue concentration of population and *overcrowding of land*;
> (c) Provide distribution of population, business and industry, and use of land that will tend to create conditions favorable to transportation, protection of property, civic activity, and recreational, educational, and economic opportunities; and that will tend to further economy and efficiency in the supply of public services.

16. It is thus unsurprising that this Board, in its unanimous recent decision in *Appeal No. 16811 of David and Janet Pritchard* (Oct. 15, 2002), rejected the argument that the Zoning Regulations authorize a substandard side yard setback for an addition to a nonconforming structure. (A copy of this decision is attached.) The Board noted, "Section 405.8 is plainly intended to preserve side yards in existence prior to the effective date of the Zoning Regulations." In the *Pritchard* case, a two-story addition was proposed for the rear of a semi-detached house that had a nonconforming seven-foot side yard alongside its front portion. The Board held that section 405.8 "requires the maintenance of the seven-foot side yard at the front portion of the dwelling, while section 405.9 "requires the provision of an eight-foot side yard (where the side yard prior to the addition was 12.33 feet wide)." *Pritchard*, p. 9. The Board therefore granted the appeal of the neighboring property owners and reversed the Zoning Administrator's decision to approve the permit. *Pritchard*, p. 11.[1]

17. In this case, as in the *Pritchard* case, sections 405.9 and 2001.3(b)(2) of the Zoning Regulations mandate that the side yard must be preserved at a minimum of eight feet.

Impropriety of a Special Exception

18. To the extent that a special exception is considered during this appeal, appellants submit that a special exception is inappropriate for the addition in its currently proposed form. The addition at its planned height would unduly affect the light available to neighboring properties and would unduly compromise the privacy and enjoyment of neighboring properties. Consequently, a special exception would violate section 223.2. Appellants will give testimony on these matters if the issue of a special exception arises.

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[1] See also the Board's discussion of the purposes of the side yard requirement in *Pritchard*, p. 10.

Conclusion

Appellants request that the Board grant this appeal and reverse the Zoning Administrator's decision to approve the permit.

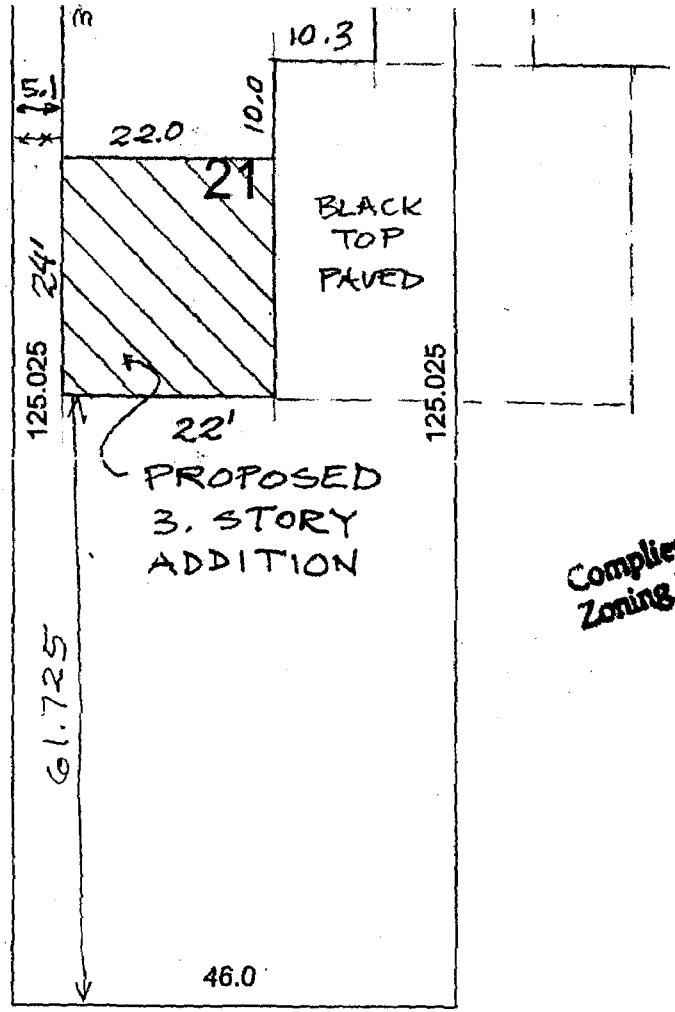
Respectfully submitted,

Judy Brinckerhoff

Clarke Brinckerhoff

Susan Buck

David Price



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Complies with requirements of Zoning Regulations

Initial

6/25/03

(addition)

CONTRACT AGREEMENT

Contractor/Owner JOHN WALSH (OWNER) Contractor's License No.

f Contractor/ Owner 4624 BRANDYWINE ST, N.W Date: 5-1-0

OF PROPOSED WORK 4624 BRANDYWINE ST, N.W. LOT: 21
SQUARE: 154

F BUILDING OR BUSINESS: JOHN WALSH PHONE No: 20
249-10

TION OF PROPOSED WORK:
ADDITION TO EXISTING BUILDING

COST ESTIMATE	ADDITION	ALT/R
RUCTION e.g drywall, ceilings, framing, carpentry etc	$ 135,300	6,50
ICAL	$ 6,000	50
NICAL	$ 11,000	2,50
ING	$ 12,000	50
ROTECTION e.g sprinkler system, fire alarm system, generator etc.	$	
LITION	$ 1,400	30
OTHER (please specify)	$ 7,000	1,0
L	$ 172,700	11,3

bor and material costs of counter tops, kitchen cabinets, floor coverings, tile work, caulking, patching and plaster repair, painting other than fire retardan and downspouts, not more than 160 square feet of gypsum board shall not be included in the cost estimate for permitting purposes. The entire list can b 99 D.C Building Supplement Chapter 1 Section 107.3.

foregoing terms, specifications and conditions are satisfactory and hereby agreed to. You are authorized to work as specified and payment will be made in nt as outlined. Upon signing this agreement, the owner represents and warrants that he or she is the owner or the authorized agent of the owner of the afo ises and that he or she has read this agreement.

NTRACTOR Date:
Signature & print

WNER OF
ILDING/BUSINESS Date: 5-1-0
Signature & print

on signing this document, the owner and contractor declare that the cost of construction as specified above for the referenced project is true and correct t ir knowledge

lease fill out this agreement form in accordance with D.C Construction Code Supplement 1999, Chapter 1 Section 112.1.

BRICK
JOINT
DRIVE