GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh, pursuant to 11 DCMR §§ 3100 and 3101, from various administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA), involving construction of three flats located at 206, 208 and 210 D Street, S.E., Square 763, Lots 26, 27 and 28.

HEARING DATES: February 24, 2004, May 18, 2004, June 22, 2004
DECISION DATE: July 6, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on September 12, 2003 challenging several approvals by the Department of Consumer and Regulatory Affairs (DCRA) and one approval of the DC Office of the Surveyor. All approvals were connected with the construction of three flats at 206, 208 and 210 D Street, SE; i.e. approval of subdivision lots, recordation of a subdivision plat, issuance of a permit to raze an existing structure at the site, issuance of three foundation permits, issuance of three building permits, failure to compel the property owner to remove obstructions at the site, issuance of a public space permit for a dumpster, and a challenge to the lifting of a stop work order at the site. Appellants also alleged that two of the three building permits were issued in violation of applicable side yard requirements. Appellants later withdrew their challenges to the issuance of the razing permit and public space permit, and to DCRA's alleged failure to compel the property owner to remove obstructions. Following the May 18, 2004 public hearing, the Board voted to dismiss the remaining challenges as moot, except for the challenge regarding the alleged side yard violations. At a decision meeting on July 6, 2004, the Board voted to deny that portion of the appeal challenging the side yard violations.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for February 24, 2004. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, the ANC 6B (the ANC for the area concerning the subject property), the property owner, and DCRA.

Parties

The Appellants in this case are Larry and Louise Smith, and Mary Ann Snow and James Marsh (Appellants or the Neighbors), the owners of properties adjoining the subject property. Appellants were represented by Richard Nettler, Esq., and Jeannine Rustad, Esq., of Robins, Kaplan, Miller & Ciresi, LLP. The property owner, Folger Park North, LLC (Folger or the

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Owner), was represented by Richard Aguglia, Esq., of Hunton & Williams, LLP. As the property owner, Folger is automatically a party under 11 DCMR § 3106.2. DCRA was represented by Lisa Bell, Esq., Senior Counsel.

Preliminary Matters

Prior to the public hearing in this appeal, the Owner filed Application No.17108, an application for variances from the lot area and lot width requirements for the subject property. The Appellants (who also opposed the variance) moved to consolidate the variance application with this appeal, and requested that the cases be heard together on February 24, 2004. But on January 27, 2004, when the variance application was first scheduled, the Board denied the Appellant's motion to consolidate the two proceedings and determined that it would hear the variance application first, then the appeal. Since the Appellants and the property owner both requested additional time to prepare for the variance case, the Board continued the variance case and scheduled the two cases for February 24, 2004. The public hearing in the variance case concluded on that date, but the Board did not deliberate or vote on the application until April 6, 2004. On April 6, 2004, the Board voted to grant the variances for lot area and lot width requirements, and set the appeal to be heard on May 18, 2004.

Prior to the May 18 hearing date, the Appellants raised the additional challenge alleging that the building permits violated the side yard requirements of the Zoning Regulations. In response, the Owner moved to dismiss the appeal on all grounds -- including the newly raised side yard challenge -- as either moot or time-barred. The parties submitted extensive filings and argued the motion to dismiss before the Board on May 18, 2004. None of the parties disputed that, except for the side yard issue, the other issues on appeal had become moot as a result of the area variances granted by the Board in April. Thus, on June 22, 2004, the Board granted the motion to dismiss all portions of the appeal except for the side yard issue on grounds of mootness. It also determined that the side yard issue was not time-barred, and denied the Owner's motion to dismiss on that ground. The appeal was continued to July 6, 2004, for a decision on the merits of the side yard issue.

FINDINGS OF FACT

The Property and Surrounding Area

1. The subject property consists of three record lots, numbered 26, 27, and 28, in Square 763, located at 206 D Street, SE, 208 D Street, SE, and 210 D Street, SE, respectively.

2. Although created after the effective date of the applicable Zoning Regulations, the lot size and width of lots 26, 27 and 28 meet none of the minimum requirements under section 401 of the Zoning Regulations. Lots 27 and 28 (208 and 210 D Street, SE) are 271 square feet shy of the 1,800 square feet minimum lot size requirement, and Lot 26 (206 D Street, SE) is 353 square feet shy of the 1,800 square feet minimum lot size requirement. The width of all three lots is 16 feet -- 2 feet shy of the 18 feet minimum width that is required in the zone.

3. The property is zoned R-4 and is in the CAP (Capitol Interest Overlay District[1]). The R-4 zone permits one family dwellings, row houses and flats, such as those constructed by the applicant. Although the CAP Overlay provides for restrictions on use, height and bulk of buildings, the homes constructed by the applicant conform to the Overlay provisions.

4. Square 763 is bounded by D Street, SE to the south, 3rd Street, SE to the east, C Street, SE to the north, and 2nd Street, SE to the west. Folger Park is directly to the south of the square, and the Library of Congress Madison Building is to the northwest. The square is predominantly developed with 2 to 3 story row houses, but also includes a 6-story apartment building facing C Street, SE, and a sport club and an American Legion building along D Street.

5. Each of the three lots is improved with new homes that have been constructed by Folger. The homes are three level, two-family row houses with fully finished English basements and off-street parking. Because the property is located in the Capitol Hill Historic District, the Historic Preservation Review Board reviewed and approved the development plans for the row houses.

The Permits and Construction

6. On or about May 23, 2003, DCRA issued foundation permits for each of the three row houses.

7. On or about August 25, 2003, DCRA issued building permits for each of the three proposed row dwellings.

8. A previously existing PEPCO substation at the property was razed during June, 2003, and construction on the row house foundations began on or about July 1, 2003. Construction continued after the building permits were issued on August 25, 2003.

9. On or about September 2, 2003, DCRA issued a stop work order based upon an "invalid raze permit". The applicant met with DCRA officials to confirm the validity of the raze permit, and the stop work order was lifted on or about September 5, 2003.

10. DCRA issued a second stop work order on or about September 15, 2003,. Although the stop work order did not cite any code violation, DCRA later issued a letter stating that the proposed development did not comply with the minimum lot area and lot width requirements contained in § 401 of the Zoning Regulations.

11. On September 30, 2003, this appeal was timely filed. Among other things, Appellants challenged DCRA's August 25, 2003 issuance of the three building permits to construct

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[1] The CAP Overlay was established "to promote and protect the public health, safety, and general welfare of the U.S. Capitol precinct and the area adjacent to this jurisdiction, in a manner consistent with the goals and mandates of the United States Congress. . ." § 1200.1 DCMR.

the three row dwellings.

12. On or about October 30, 2003, the Folger and DCRA entered into an agreement that provided for DCRA's lifting of the stop work order in return for the applicant's agreement to indemnify DCRA for any construction related damages, and to seek variances from this Board from the minimum lot area and width requirements.

13. After entering into the agreement, Folger applied to this Board for the variance relief and resumed construction of the row dwellings. By the end of January 2004, the row dwellings were "under roof"; *i.e.* the main roof was in place in each of the three units.

14. None of three units were constructed with side yards. The middle unit at Lot 27 is an interior lot with two common division walls, one adjoining Lot 28 and one adjoining Lot 26. Lot 28 has one common division wall with Lot 27 and abuts an alley which is 15 feet in width on the other side. Lot 26 has one common division wall with Lot 27 and abuts a four foot right of way on the other side.

15. By separate decision issued and served upon the parties, the Board granted the lot size and width variances.

Appeal of the Side Yard Issue

16. At the time it filed its appeal, the Appellants did not specifically raise the side yard issue However, the side yard issue was raised and discussed by Appellants and the Office of Planning (OP) during the variance case.

17. On or about May 6, 2004, Appellants filed a submission claiming that the two end units (Lots 26 and 28) required side yards under the Zoning Regulations. As a result, they argued, the building permits which approved the two structures were issued in error.

18. The Owner maintained that the side yard issue was untimely raised and that, in any event, this portion of the appeal lacked merit (See, Exhibits 49 and 51).

CONCLUSIONS OF LAW

An appeal to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the Zoning Regulations. D.C. Official Code § 6-641.07 (2001). Here, the Appellants allege and DCRA concedes that the three record lots were substandard and should not have been created. Appellants also claim that the two building at each end should have had a side yard.

The Challenges to the Building Permits based upon The Substandard Lots Is Moot.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome. *See Murphy v. Hunt*, 455 U.S. 478, 481, 71 L. Ed. 2d

353, 102 S. Ct. 1181 (1982) (citations omitted)", *Cropp v. Williams, 841 A.2d 328* (D.C. 2004) In the companion decision to this case, the property owner has been a granted variance from strict compliance with the lot size and width requirement of the Zoning Regulation. The variance relief converts these lots to a conforming status and thus negates any errors that had been made in creating them. Thus, the legal issue as to whether DCRA erred in issuing building permits that allowed construction on substandard lots is "no longer live".

The Motion to Dismiss the Side Yard Appeal

Folger and DCRA maintain that the portion of the appeal regarding the side yard violations was untimely filed and that the appeal must therefore be dismissed.[2] Appellants maintain that the side yard challenge should be treated as an amendment to the initial appeal, which was indisputably filed on a timely basis. The Board agrees with the Appellants because the facts and procedural posture of this case are so unusual. First, the side yard issue was raised early on in the variance case which was inextricably connected with this appeal. Although the cases were not consolidated, the granting of the variance relief caused most of the appeal to become moot. Second, because the side yard issue was raised during the variance case, Folger had ample notice of the challenge. Thus, there was no prejudice to Folger in permitting the Appellants the flexibility to amend their appeal to include the side yard challenge.

The Merits of the Side Yard Appeal

Appellants principally rely on section 405.3 of the Zoning Regulations and this Board's opinion in, *Appeal of David and Janet Pritchard,* BZA No. 16811, 49 DCR 9707 (2002) (the *Pritchard* case), which interpreted this section. Section 405.3 provides in part that, side yards are required at properties in the R-4 zone unless the dwelling at the property shares a common division wall with the adjacent property. Since, here, both end units have a common division wall at only one side – the sides abutting the middle unit – Appellants argue that side yards are required next to the free standing wall at both units.

Folger and DCRA argue that 405.3 is not apposite in this case and that the facts of the *Pritchard* case are distinguishable from the facts herein.

Folger claims that section 405.6 of the Regulations is applicable to this case, rather than section 405.3, and that section 405.6 squarely states that no side yard is required in the R-4 zone. As to *Pritchard*, Folger claims that decision is distinguishable for two reasons. First, unlike the property in *Pritchard*, the property in this case consists of two substandard lots that are unable to accommodate side yards on both sides. Second, the rationale underlying *Pritchard's* side yard requirement was to ensure adequate light and air. That rationale does not apply to this case where one end unit abuts an alley and the other end unit abuts a four foot right of way.

DCRA argues, in addition, that section 405.3 does not apply because this is a multiple dwelling "development" and that the logic of *Pritchard* cannot apply to such a development.

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[2] See, 11 DCMR 3112.2, which requires generally that an appeal must be filed within 60 days of the administrative decision being complained of.

For the reasons stated below, the Board holds that the *Pritchard* decision does not prohibit the construction of new end-unit row dwellings, or any new row dwelling, regardless of whether the structure shares one or common division wall, or none at all.

Since thee issuance of the *Pritchard* decision, the Board has on two occasions emphasized the narrow scope of that decision. In *Appeal* of *Southeast Citizens for Smart Development,* BZA No. 16935, 50 DCR 8108 (2003), the Board rejected an interpretation that *Pritchard* barred the construction of single family semi-detached structures that sit on a lot line, and thus share no common division wall. The Board held that because the Zoning Regulations define semi-detached dwellings to include structures "the wall on one (1) side of which is ...a lot line wall, having one (1) side yard", *Pritchard* could not be interpreted as disallowing this matter of right structure.

Similarly, in *Application of Kathleen Peoples and Philip Sedlak,* BZA 17007, 51 DCR 9518 (2004), a case decided after this appeal, the Board made it clear the *Pritchard* does not preclude the construction of in-fill row dwellings.

> [T]he Board wishes to stress the narrowness of the Pritchard ruling. As noted in Appeal No. 16935 of Southeast Citizens for Smart Development, the Pritchard decision did not make single semi detached dwellings illegal if one side of the structure sat on a lot line (and was thus free standing on both sides). Nor did Pritchard require two side yards for new structures on lots with row dwellings on either side. Row dwellings, when permitted as a matter of right, may be constructed on all lots, except in the narrow circumstances that existed with respect to this subject property.
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> The Pritchard decision is thus limited to its facts.

Id. at 9520.

The Board reaffirms this limitation. The *Pritchard* decision only addressed the narrow question of "whether the owner of a one-family semi-detached dwelling in an R-4 District *may convert* the dwelling to a row dwelling as a matter of right, where the dwelling will not share on both sides a common division wall with an adjacent building", *Pritchard*, 49 DCR at 9713 (emphasis added). The facts in this appeal are different. Here, Folger is not converting an existing semi-detached single family dwelling into a row dwelling, but building three entirely new row dwellings (*i.e.* a single family dwelling without side yards). And unlike the *Pritchard* scenario, Folger cannot avail itself of the special exception relief made available to additions to single family homes pursuant to 11 DCMR § 223[3], a factor that the *Pritchard* decision viewed as relevant in reaching it conclusions. *See Pritchard,,* 47 DCR at 9716-9717.

As newly constructed matter of right row houses, no side yards are required. To the extent it suggests otherwise, *Pritchard* is overruled.

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[3] In fact, the owners of the property that was the subject of the *Pritchard* decision were granted special expection approval to build the addition in *Application of Kathleen Peoples and Philip Sedlak*, discussed *infra.*

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

a. the motion to dismiss the side yard challenge is **DENIED**

Vote taken on June 22, 2004

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II, and Anthony J. Hood)

b. the motion to deny the appeal is **GRANTED** with respect to the side yard challenge

Vote taken on July 6, 2004

VOTE: **3-0-2** (Geoffrey H. Griffis, Ruthanne G. Miller, and Curtis L. Etherly, Jr., voting in favor of the motion, and John A. Mann II and Anthony J. Hood voting by absentee ballots against the motion)

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: FEB 2 8 2005

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 17085

As Director of the Office of Zoning, I hereby certify and attest that on FEB 28 2005 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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