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May 6, 2004

2004 MAY 6 AM 9:50
GOVERNMENT OF THE DISTRICT OF COLUMBIA

**BY HAND**
Mr. Geoffrey Griffis
Chairperson
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, DC 20001

Re: BZA Appeal No. 17085 of Appeal of Larry & Louise Smith and Mary Ann Snow and James Marsh
210 D Street, S.E.; Square 763, Lot 26, 27 and 28 (the "Properties")

Dear Mr. Griffis:

On February 10, 2004, the appellants in the instant matter, Larry & Louise Smith and Mary Ann Snow and James Marsh (the "Neighbors") filed their prehearing statement. As noted in their prehearing statement, the Neighbors are seeking review of the building permits issued for the Properties. In light of the Board's recent decision to grant area variances from requirements of the zoning regulations, this letter serves to clarify the nature of the appeal regarding the building permits. In that regard, the Neighbors contend that building permits for Lots 26 and 28 should not have been issued since the he proposed construction did not comply with the applicable side yard requirements. This issue, which was not resolved by the Board in the related matter of BZA Application No. 17108 of Folger Park North, L.L.C., was briefed by both the Office of Planning in that matter (*see Exhibit* A), as well as the Neighbors in their Supplemental Statement in opposition to that Application (*see Exhibit* B). The following is a recap of the Neighbor's position on this issue:

**The Applicant Needs a Side Yard Variance for the Two End Units.**

As pointed out by the Office of Planning in its report in BZA Application No. 17108, as the two end homes (Lots 26 and 28) do not adjoin another row house, they must comply with the side yard requirements. *See* 11 DCMR § 405.3. Specifically section 405.3 provides that:

> In R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple dwelling is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, it shall have a side yard on each



BZA
Case No. 17085
Exhibit No. 47

Board of Zoning Adjustment
District of Columbia
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EXHIBIT NO. 47

resulting free-standing side.

While this provision is arguably in conflict with section 405.6,[1] a review of the legislative history and subsequent interpretation of section 405.3 removes any ambiguity of the intent of that section, which is to ensure that semi-detached buildings provide a side yard. *See Exhibit A* at 7. That a side yard is required for the exterior lots (Lots 26 and 28) is consistent with the Board's decision in BZA Application 16811 of David and Janet Pritchard (April 2, 2002; June 4, 2002) (attached as *Exhibit* C). In that matter, building permit was issued allowing the conversion of a semi-detached dwelling to a row dwelling by allowing an addition that could not share, on one side, a common division or party wall with an adjacent building. *Id.* at p. 1. The appellants' position in Appeal No. 16811 was, in relevant part, that the permit was erroneously issued as section 405.3 requires a side yard for any free-standing side of a row dwelling. Appellants argued that, to the extent that section 405.3 was ambiguous, section 101 of the zoning regulations expressly favor the interpretation that best provides light and air, and encourages stability of the zone districts and land values. The Capitol Hill Restoration Society testified in favor of the application as part of the applicants' case. ANC 6A supported the appeal.

The Zoning Administrator ("ZA") argued that § 405.3 does not prevent the conversion to a row dwelling as a matter of right. *Id.* at p. 3. The ZA argued that § 405.3 was meant to prevent a free-standing wall from being constructed within one foot of a lot line. *Id.*

The property owners adopted the position of the ZA. Additionally, they argued that a "'non-party' wall may be constructed face-on-line, without any side yards" and that section 405.3 only applied to new construction. *Id.*

The Board rejected the ZA's argument and agreed with the appellants. In its interpretation of section 405.3, the Board stated that

> The Board rejects the arguments of the Zoning Administrator and the property owners that § 405.3 does not apply as long as a dwelling has (at least) one common division wall. Subsection 405.3 must be read in its entirety. The first clause employs the general phrase "one-

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[1] Section 405.6 states that:

> Except as provided in §§ 405.1 and 405.2, a side yard shall not be required in an R-3, R-4, R-5-B, 1R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3" in.) wide per foot of height of building, but not less than eight feet (8' ft.) wide.

family dwelling," defined in § 199.1 as "a dwelling used exclusively as a residence for one (1) family," rather than the more specific classifications, "one-family detached," "one-family semi-detached dwelling," or "row dwelling," all defined in § 199.1. If the purpose of § 405.3 was limited to the preventing the construction of only one-half of a pair of semi-detached dwellings as urged by the property owners, then the regulation would have used the specific term "one-family semi-detached dwelling," and not the general term, "one-family dwelling."

Moreover, the last clause of the sentence, in requiring "a side yard on each resulting free-standing side," refers to each one of potentially two free-standing sides.[2] Moreover, the use of the word "resulting" indicates that the free-standing side results from the absence of a common division wall with an adjacent building, such that a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.

Subsection 405.5, which states that "A side yard shall not be required along a side street abutting a corner lot in a Residence District," provides an exception to § 405.3. Thus, at the end of a row of row dwellings, except in the case of a corner lot, the last dwelling (a semi-detached dwelling) must provide a side yard.

The Zoning Administrator also argued that the purpose of 405.3 was to prevent property owners from constructing a semi-detached dwelling to within one foot or so of the lot line. Subsection 405.3,

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[2] The word "each" is defined as:

> . . . being one of two or more distinct individuals having a similar relation and often constituting an aggregate: this as well as that or the next or any other of two or more separate but similar individuals (a boat hung from the ceiling by ropes attached at each end . . . ) (the little chipmunk with a pinion nut in each cheek pouch . . . ) (each day was like every other one . . ) (each year the Cape has a summer inundation of people . . . ) (a program flexible enough to be tailored to each individual employee . . . ) (giving to each syllable an equal stress . . . ) (some publishers . . . will have books to show in each category. . . ).

Webster's Third New International Dictionary (1986) (citations to sources of examples omitted).

> however, does not address the required minimum width of side yards. Rather, it specifies circumstances under which a side yard must be provided. Subsections 405.6 and 405.9 specify minimum side yard width requirements. These regulations were in place prior to the adoption of § 405.3. Therefore, § 405.3 could not have been intended to prevent narrow, one-foot side yards, since §§ 405.6 and 405.9 already required a semi-detached dwelling to provide one side yard, a minimum of eight feet in width.
>
> Finally, the Zoning Administrator argued that an interpretation of § 405.3 as requiring a side yard on the side of a dwelling that does not share a common division wall would not make sense in light of § 401.3, which prescribes for row dwellings in the R-4 District a minimum lot area of 1,800 square feet and a minimum lot width of 18 feet. The Zoning Administrator noted that the provision of an 8-foot wide side yard on an 18-foot wide lot would leave only 10 feet for the dwelling. Subsection 401.3, however, also prescribes for a one-family semi-detached dwelling in the R-4 District a minimum lot area of 3,000 square feet and a minimum lot width of 30 feet. Subsection 101.6 provides in pertinent part that "Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards . . . applicable to that lot or any lot created." To comply with the side yard requirement of § 405.3, property should be subdivided such that the end lot (that is not a corner lot) of a row of lots subdivided for purposes of constructing row dwellings will have sufficient width to accommodate a semi-detached dwelling.

*Exhibit C* at pp. 8-9.

Likewise, in BZA Application No. 16709 of Mr. and Mrs. William Brannon (July 3, 2001), the Board denied a variance from, *inter alia*, section 405.3. The Board specifically found that "[u]nder § 405.3, a semi-detached flat in an R-4 District must have a side yard on the free-standing side." *Exhibit* D at p. 4 (finding of fact 11).

For these reasons, as well as the reasons set forth in the Neighbor's appeal and Prehearing Statement in Support of the Appeal, the Neighbor's respectfully request that the Board grant the Appeal.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: Mary Ann Snow & James Marsh
Larry & Louise Smith
Office of Planning (by hand; w/encl.)
ANC 6B (w/encl.)
Richard Aguglia, counsel for Intervenor (w/encl.)

# A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF PLANNING

Office of the Director

**MEMORANDUM**

**TO:** Board of Zoning Adjustment

**FROM:** Andrew Altman, Director

**DATE:** February 17, 2004

**SUBJECT:** BZA Case #17108, Area Variance Request

## I. OFFICE OF PLANNING RECOMMENDATION-IN-BRIEF

**If the three lot subdivision is considered "valid", resulting in the lots being considered three "legal non-conforming" lots, the Office of Planning recommends the application be approved;**

**If the three lot subdivision is not considered valid, resulting in the property being considered one legal lot (which may permit subdivision into two legal lots), the Office of Planning recommends the subject application be denied as the variance test has not been adequately met.**

## II. APPLICATION-IN-BRIEF

| | |
|---|---|
| **Location** | 206 – 210 D Street SE, Washington DC<br>Square 0763, Lots 26, 27, 28 38, Ward 6; ANC 6B |
| **Applicant:** | Folger Park North, LLC, owner and developer |
| **Zoning:** | CAP/R-4 |
| **Proposal:** | Construction of three new two family flats. |
| **Relief Sought:** | Variance from §401.3, lot area and lot width for each lot, pursuant to §3103.<br>Possible variance from §405.3, side yard for buildings on lots 26 and 28, pursuant to §3103. |

## III. EXECUTIVE SUMMARY

BZA case # 17108 has a complicated history. Following a subdivision in 2002, foundation permits and building permits were issued and construction of three new flats commenced in 2003. Subsequent to this, possible Zoning Regulations non-conformities were noted, and a stop-work order was placed on the property. DCRA and the owners reached an agreement that permitted continuation of construction, subject to the submission of this BZA variance application for lot area and lot width, as none of the three lots provide the minimum required lot width or area. Further confusing the issue is that an additional variance *may* be required for side yard, although OP feels that the zoning regulations are not entirely clear on this matter.

Central to the discussion of the merits of this application is the purpose and "validity" of the 2002 subdivision. The question is whether the subdivision created three lots that do not provide the currently required minimum lot width and area; or whether the subdivision plan is legal and reflects the historic use of the land area as three small lots. This issue

may be resolved as part of BZA Case # 17085, which is an appeal by neighbors of the issuance of the permits for this development. Because of these questions, OP is not able to provide a standard recommendation. Rather, pending resolution of the subdivision question, there are two possibilities:

- If the subdivision is deemed valid, the Office of Planning (OP) feels that the requested variances for lot width and area are supportable as the flats are located on legal non-conforming lots. The possible variance for side yard would be supportable, due to the hardship resulting from the small lots (a 9.25 foot minimum side yard on the two end units would result in an 6.75 foot wide building).

- If the issuance of the subdivision is deemed invalid, OP feels that the requested variances are not supportable and do not meet the variance test, as it would be possible to subdivide the property into 2 larger, conforming lots for development as flats, for which the provision of the required side yard would be possible. A 2-lot subdivision would be more in keeping with current zoning regulations, and such larger lots would not be out of character with this particular portion of streetscape (which includes a large health club and other larger non-residential buildings).

## IV. AREA AND SITE DESCRIPTION – Refer to Location Plan, Attachment I, and Context Photos Attachment II

Square 763 is located in Capitol Hill. The site 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. Directly to the south is Folger Park; to the northwest of the square is the Library of Congress Madison Building. The square is predominantly developed with 2 to 3 story rowhouses, but also includes a 6-story apartment building facing C Street SE, and a sport club and an American Legion building along D Street SE. The square is served by an internal alley system with access from C Street, and normally from D Street. The square is within the Capitol Hill Historic District.

The property that is the subject of this application faces D Street, and is bound by alley to the north and east. To the west are the rear yards of properties facing 2nd Street, and a narrow walkway easement, collectively owned by a group of 2nd Street property owners. Maps from the early 1900's indicate that the property was subdivided into three lots, and developed with a rowhouse on each. (Attachment III). In 1942, PEPCO applied for a Building Permit to construct a one story plus basement substation, and the structure was constructed in 1943. Area maps are conflicting – some show the building located on one lot, Lot 4; some show three tax lots labeled "800, 801 and 802". (Attachments IV and V). At some point, the PEPCO substation was discontinued although the building remained in place.

## V. PROJECT DESCRIPTION

The recent history of this site is complicated – a chronology, as best as could be determined by OP, is attached as Attachment VII. After purchasing the property, the new owners, Folger Park North LLC, received from the Office of the Surveyor a subdivision of the property into three lots, none of which conform to current zoning standards, labeled Lots 26, 27 and 28 (Attachment VI). These lots correspond to the former tax lots, 800, 801 and 802 on Lot 4.

Plans for a three unit – two family flat development were drawn up, and received approval by ANC 6B, the Commission of Fine Arts, and the Historic Preservation Review Board, although concerns were raised about the level of conformity of the lots to current zoning standards. The owner applied for and received a

demolition permit for the existing building in November of 2002. Foundation Permits for 3 - two family flats were issued in May of 2003, and the PEPCO Building was demolished the next month. Building Permits for the 3 - two family flats were issued in July, 2003. A stop work order was issued by DCRA one week later, but this was lifted three days after that. As second stop work order was issued in September, 2003. This came shortly after an appeal of the issuance of the Building Permit was submitted on behalf of a number of neighbors on 2nd Street SE (Appeal number 17085, hearing date also set for February 24, 2004). The second stop work order was also lifted, and construction commenced, in return for the owner agreeing to sign a "hold harmless" agreement and the submission of this BZA application for variances to lot width and area (a possible additional variance, for side yard setback, has also been identified by OP),

The flats are now nearing completion, a process that apparently included the excavation of the walkway easement owned by the 2nd Street property owners. At the request of the applicant, the originally scheduled hearing date of January 27, 2004 was postponed to February 24, 2004.

## VI. RELATIONSHIP OF THE APPLICATION TO THE COMPREHENSIVE PLAN

The property is designated "moderate density" residential (row houses and garden apartments being the predominant uses) on the Comprehensive Plan Generalized Land use Map. The proposed use of the site is not contrary to this designation. The level of conformity to the Comprehensive Plan, particularly Chapters 11, Land Use and Chapter 17, Ward 6 Elements, varies. The following Comprehensive Plan policies and objectives would be of relevance to the requested variances:

| **Comprehensive Plan Section** | **OP Comments** |
|---|---|
| ***Chapter 11 – Land Use:***<br>*§1104 Policies in Support of the Residential Objectives:*<br>*§1104.1 (a) Promote the conservation, enhancement, and revitalization of the residential neighborhoods of the District for housing and neighborhood-related uses;* | Provides residential development in a residential neighborhood; the former non-residential building did not warrant conservation. |
| *(b) Conserve and maintain the District's sound, established neighborhoods through the strict application and enforcement of housing, building, and zoning codes and the maintenance of the general level of existing residential uses, densities, and heights;* | Would be denser than would be permitted by current zoning regulations, and may be somewhat denser (due to smaller lot size) than nearby rowhouses. However, the square also includes an apartment building, non-residential buildings, and smaller-lot rowhouses. |
| ***Chapter 17 – Ward 6 Plan***<br>*§1705 Ward 6 Objectives For Housing*<br>*§1705.1 (a) To maintain and strengthen the quality and construction of housing in the various neighborhoods throughout Ward 6, seek to provide incentives for infill housing constructed in an architectural style and of material compatible with the predominant Fairlawn brick row housing; and* | The overall form and design of the new flats are in keeping with the general area, and the Historic Preservation office has approved the design. |

| Comprehensive Plan Section | OP Comments |
|---|---|
| *(b) To stimulate production in Ward 6 of new and rehabilitated housing ... to provide housing opportunities to accommodate and allow for residential growth and stability according to area needs, encourage row house construction compatible with existing neighborhoods ...* | Provides new residential development, as would a conforming subdivision and development. |
| *§1725 Ward 6 Objectives For Preservation and Historic Features*<br>*§1725.1 (c) To encourage new development and renovations of structures that are sensitive to the character of the historic districts in Ward 6;* | As noted, the design has received HP approval. |
| *§1733 Ward 6 Objectives For Land Use*<br>*§1733.1 (a) To maintain the general level of the existing Ward 6 residential uses, densities and heights, and to improve the physical condition of Ward 6 through the provision of functional, efficient and attractive residential, commercial and open space areas;* | The small lots permit more density (in terms of number of units) than would now be permitted, but conform to height and lot occupancy regulations and would not be out of character with housing in the area. |
| *§1734 Ward 6 Policies in Support of Land Use Objectives*<br>*§1734.1 (a) Stabilize and improve residential and commercial areas throughout Ward 6;* | The site is now vacant; residential development is appropriate. |
| *(b) Ensure that the integrity of the Capitol Hill and Anacostia Historic Districts that are located in Ward 6 is maintained;* | As noted, the design has received HP approval. |

## VII. AREA ZONING – CAP/R-4

The property is zoned R-4, row dwellings and flats, as is most of the surrounding land. The zone permits one family dwellings, rowhouses and flats. The remainder of the square is also zoned R-4, although the square includes a commercial health club enterprise and a 6 story apartment building.

The site is within the Capitol Interest Overlay District (Chapter 12 of the Zoning Regulations), "*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). Although the Overlay provides for restrictions on use, height and bulk of buildings, the proposed development conforms with overlay provisions.

## VIII. REQUESTED ZONING RELIEF (refer to Project Profile, Attachment III)

The applicant has requested the following variance relief pursuant to §3103:

| 1. | Zoning Regulation: | Proposed: |
|---|---|---|
| | **Lot Area: (§401.3)** – 1,800 sq. ft. min. | 1,447.3 – 1,529.3 sq.ft.– variance of 352.7 – 270.7 sq.ft. required |
| | **Lot Width: (§401.3)** – 18. ft. min. | 16 feet - variance of 2 ft. required |

The lot width and area variances are the result of the subdivision that created three non-conforming lots. However, at issue and central to the discussion of the variances is whether the subdivision:

- is "valid", in that it represents a continuation of three existing, or proper reestablishment of formerly existing, lots that do not conform to current zoning standards; or
- is "invalid", in that it created three new lots that do not conform to current lot area and width minimum requirements.

Of relevance to the discussion are the following subsections of Section 401 (Minimum Lot Dimensions, Residential Districts):

*§401.1 Except as provided in chapters 20 through 25 of this title, in the case of a building located, on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.*

§401.1 deals with the enlarging or replacement of an existing building on a non-conforming lot. The definition of "building" is such that the three flats cannot be considered one building, and they are considerably larger than the former PEPCO building that was on the site. As such, this section does not appear to permit a replacement of a PEPCO substation (in existence in 1958) with three new flats.

The section also references Chapter 20 – Nonconforming Uses and Structures. The most relevant section of Chapter 20 would appear to be §2001 – Nonconforming Structures Devoted to Conforming Uses. However, this section addresses the construction of additions to existing nonconforming buildings, and the replacement of non-conforming buildings that were destroyed by "casualty or act of God"; it does not address the construction of new dwellings on non-conforming lots as is the case here.

*§401.2 Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than that specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.*

This section deals with the construction of a new building on a non-conforming lot, provided the lot is at least 80% of that required by the zoning regulations. Assuming that the lots are "valid", the proposed flats meet this 80% requirement as noted in the Project Profile. However, in this case, each of the three lots does "*adjoin another unimproved lot in the same ownership*". The intent of this clause seems to be that the single owner of the multiple non-conforming lots is expected to re-

subdivide to create conforming lots. In addition, the lots were not unimproved in 1957, being developed with the PEPCO substation, and it is unclear if the property in 1957 consisted of one consolidated lot, or three adjacent lots.

*§401.3 Except as prescribed in the other provisions of this chapter, the minimum dimensions of a lot in a Residence District shall be as set forth in the following table* (excerpt)*:*

| *ZONE DISTRICT AND STRUCTURE* | *MINIMUM LOT AREA (square feet)* | *MINIMUM WIDTH OF LOT (feet)* |
|---|---|---|
| *R-4 - Row dwelling and flat* | *1,800* | *18* |
| *R-4 - One-family semi-detached dwelling* | *3,000* | *30* |

The three lots do not provide the minimum required lot area or lot width for a "flat" – the intended use.

**Does the property exhibit specific uniqueness with respect to exceptional shape, narrowness, shallowness, topography or other extraordinary or other exceptional situations or conditions?**

If the subdivision is valid, the legal, non-conforming lots are regularly shaped but are narrower and smaller in area than currently required. The variances requested are, in essence, for the lots themselves – lot width and lot area. Since the property was improved in 1957, §401.2 does not appear to apply, therefore the exceptional situation is the narrowness and size of the legal, albeit non-conforming, lots.

**Does the extraordinary or exceptional situation impose a practical difficulty that is unnecessarily burdensome to the applicant with regard to the lot area and width?**

If the subdivision is valid, the lots could not be developed without variances as the lots themselves do not meet current standards. There is no form of development that would be permitted on these lots, without a re-subdivision. On the surface, this would represent a practical difficulty. However, the lots could have been (re)subdivided to create two larger lots. The applicant also notes the practical difficulty and the burden associated with receiving numerous District approvals for construction.

**Can the relief be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map?**

If the subdivision is valid, development of these lots as flats is consistent with zoning regulation permitted uses, and the development appears to conform to height, lot coverage, and most or all setback requirements of the zoning regulations (refer to Section IX of this report). The development also conforms with the Comprehensive Plan. The buildings would physically not be out of scale with the rest of the block.

## IX. POSSIBLE ADDITIONAL ZONING RELIEF REQUIRED

In addition, in reviewing this application, OP ascertained possible side yard nonconformities for the two end flats. §405.3 states that "***In** R-2, R-3, **R-4**, and R-5 Districts, **when a** one-family dwelling, **flat**, or multiple dwelling is erected **that does not share a common division wall with an existing building or a building being constructed together with the new building, it shall have a***

***side yard on each resulting free-standing side***" (emphasis added). This section indicates an intent that a side yard be required for end units of rows of flats; in this case, on the east (facing the alley) side of the building on lot 28, and on the west (facing the easement / 2nd Street lots) side of lot 26. However, §§405.6 and 405.9, which establish the amount of side yard, do not reference §405.3, and do not establish what the side yard should be, specifically referencing §§405.1 and 405.2 which are not applicable to a flat in the R-4 District. The intent of the regulations, therefore, is not clear, but it appears to OP to be logical to assume that the side yard requirements of §405.9 were intended to apply to the end units of rows of flats. OP's following analysis is based on the assumption that a side yard for the two end units is required, and that the extent of the side yard is as required in §405.9.

Also supporting the requirement for a side yard is BZA Appeal # 16811 (for a property also in the R-4 District), in which the BZA ruled that the end units of a row of row dwellings are considered "semi-detached" units for the purposes of requiring a side yard, provided they are not "along a side street abutting a corner" (§405.5). However, as noted above, §401.3 and the definitions section of the zoning regulations clearly differentiate between a "row dwelling" and a "flat".

| 2. | Zoning Regulation: | Proposed: |
|---|---|---|
| §405.3 / §405.9 | **Side Yard:** - 3" / foot of building height = 9.25' | 0 feet for lots 26 and 28, variance of 9.25 feet required for each of those lots |

**Does the property exhibit specific uniqueness with respect to exceptional shape, narrowness, shallowness, topography or other extraordinary or other exceptional situations or conditions?**

If the subdivision is valid, the individual lots are narrower than otherwise required, making the provision of side yards difficult at best. OP notes, however, that a re-subdivision to two larger (24' wide) lots would provide the opportunity for side yards and appropriately wide buildings – i.e buildings with the required side yard would be more in keeping with the form and width of other buildings in the area, and would provide a normally desirable setback from the edge of the alley to the east, and the rear yards of the adjacent houses to the west.

**Does the extraordinary or exceptional situation impose a practical difficulty that is unnecessarily burdensome to the applicant with regard to the lot area and width?**

If the subdivision is valid, requiring the full side yard of about 9.25' would result in buildings of less than 7' in width. This would not only be out of character with this form of development in this and any other neighborhood, it would result in unlivable buildings. In essence, the two end lots would be unbuildable.

**Can the relief be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the Zoning Regulations and Map?**

If the subdivision is valid, OP feels that the buildings as proposed are generally in character with the neighborhood. The presence of the easement area to the west and that alley to the east lessen potential impacts on neighboring properties. However, the presence of the building elevation directly adjacent to the alley could affect its functionality, particularly access for service and emergency vehicles. The variance would also not generally impair the overall purpose or integrity of the Zoning Regulations and Map, which is to permit development which is in keeping with the prevailing neighborhood character.

## X. ADVISORY NEIGHBORHOOD COMMISSION (ANC) COMMENTS

ANC 6B reviewed the then proposed building design at its February 2003 meeting, and adopted a motion in support of the design. The ANC voiced concern that the units would be used by lobbying firms, rather than as residences, and noted that the properties did not appear to meet current zoning standards. The ANC further reviewed this BZA application at its February 09, 2004 meeting and voted to support the variances. However, the ANC also voted to support Appeal 17085.

## XI. OTHER AGENCY COMMENTS – refer to Attachment IX for complete comments.

- The **Metropolitan Police Department, Fire and Emergency Medical Services Department, DC Department of Transportation,** and **Department of Parks and Recreation** all noted no concerns with this application.
- The **Department of Health** (DOH) noted that the former use of the site would warrant soil investigation. The applicant completed separate Environmental Intake Forms for individual lots, although there appear to be errors regarding ownership of adjoining lots in the information supplied by the applicant on these forms. The applicant has also provided to OP a copy of a Phase 1 Environmental Site Assessment (ESA) prepared by Dominion Environmental Group, Inc for the current owners prior to sale of the PEPCO site and prior to demolition of the former PEPCO building. It is not clear to OP that this environmental review was submitted to any district or federal agency as part of an environmental assessment.
- The **Department of Housing and Community Affairs** notes support for the proposal, in that it provides 6 new units of housing.
- The **Water and Sewer Agency** notes a number of potential technical issues, normally dealt with through the building permit process, but does not note support or opposition to the proposal.

## XII. OP SUMMARY RECOMMENDATION

OP feels that the level to which the proposed variances meet the zoning regulations test is significantly affected by the "validity" of the underlying subdivision to create (or recreate) the three non-conforming lots.

If the three-lot subdivision is considered "valid", making the lots "legal non-conforming", the Office of Planning recommends the application be approved;

If the three-lot subdivision is not considered valid, the Office of Planning recommends the subject application be denied as the variance test cannot be adequately met, as conforming alternatives for the property (i.e. a two lot subdivision) exist.

AA/jl

**ATTACHMENTS:**

I. Location Plan
II. Context Photos
III. 1927/28 Map
IV. Map showing PEPCO substation on one Lot 4
V. Map showing PEPCO substation on three tax lots
VI. Survey Plan, July 2003
VII. Chronology
VIII. Project Profile
IX. Agency comments

B

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Appeal of Larry & Louise Smith and
Mary Ann Snow and James Marsh BZA Appeal No. 17108

**SUPPLEMENTAL STATEMENT OF MARY ANN SNOW, JAMES MARSH AND LARRY & LOUISE SMITH IN OPPOSITION OF THE APPLICATION**

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In response to the Applicant's prehearing statement and the report of the Office of Planning, Mary Ann Snow, James Marsh and Larry & Louise Smith (the "Neighbors") offer the following brief response:

**A. Subdivision and Grandfathering of the Subject Properties.**

In its recent submissions, the Applicant asserts, in support of its request for a variance, that:

(1) It relied on a recorded plat for lots 800, 801 and 802 (the "A&T lots");

(2) The A&T lots were once improved with three residential houses (circa 1928) and later by a Pepco substation all constructed prior to 1958;

(3) When the applicant applied for building permits, the A&T lots were converted to record lots;

(4) Lot 801 (now Lot 27) was exempt from the lot size and width by section 401.1 of the zoning regulations; and

(5) Lots 800 and 802 (now Lots 26 and 28) are exempted by section 401.2.

However, the Applicant's arguments fail on several grounds.

First, the previous residential homes do not create any grandfathering rights because of the intervening use of and improvements on the property with the Pepco substation. As clearly depicted on the plat for the substation (*see **Exhibit 1***), the substation was constructed on Lot 4. For reasons unknown, the certificate of occupancy was issued for the substation for the address of 210 D Street, S.E. but listing the lots as "800&802". These are the exterior A&T lots and it is undisputed that the substation also occupied lot 801, the interior lot. In fact, the Applicant would have you believe that the substation only occupied lot 801 and that lots 800 and 802 were vacant. *See* Applicant's Prehearing Statement at p 2, fn. 2 and BZA Case No. 17108 Exhibit 4 at pp. 5-6 (wherein the Applicant claims that the substation footprint "sat principally on Lot 801 (middle lot), and encroached for approximately 8.5 feet onto each of the end lots"). In support of its contention that lots 800 and 802 were vacant, the Applicant points to the DC assessment records, which listed these properties as unimproved. *See* BZA Case. No. 17108 Exhibit No. 4 at p. 5.

However, as this Board discussed in BZA Appeal No. 17034, unimproved means "lands once improved that have reverted to a state of nature as well as lands that have never been improved" and "unimproved land" means land "not built upon or otherwise improved for use, retained in the wild or natural state." *See* ***Exhibit 2a*** at p. 51-52 (citing Black's Law Dictionary and Webster's Dictionary); *see also* ***Exhbit 2b*** (granting the appeal). Clearly, lots 800 and 802 were improved, as the Pepco substation extended onto those properties by 8.5 feet (or, more than half the width of those lots).

Second, with respect to the "grandfathering" in this matter, the Applicant has not attempted to build on the A&T lots, which it claims are grandfathered. Instead, the Applicant is building on subdivided lots it created. *See Sagalyn v. Foundation for Preservation of Historic Georgetown*, 691 A.2d 107, 112 & 114 (taking an A&T lot and converting it into a record lot held to be a subdivision)(attached as ***Exhibit 3***). As lots 26, 27 and 28 did not exist prior to 2002, they could not have acquired any rights under section 401.1 or 401.2 of the zoning regulations. Furthermore, in creating the subdivision, the Applicant was required to either (1) create conforming lots or (2) to the extent nonconforming lots were created, maintain those lots as vacant.

Third, the A&T lots were not "converted into record lots" when the Applicant applied for building permits. To the contrary, the Applicant applied for the subdivision plat in September 2002, but did not apply for building permits until April 2, 2003. As set forth below, this was part of the Applicant's piecemeal approach to get the development through DCRA without needing any variances. A telling fact on this point is the absence of review of the subdivision by the Historic Preservation Review Board.[1]

**B. The Applicant Cannot Meet the Variance Test.**

1. Practical Difficulty.

The Applicant supports its argument of practical difficulty by essentially saying that, if two conforming lots had been created, the resulting homes would be have been large and out of proportion with the neighboring houses. This argument falls short of proving any practical difficulty with complying with the zoning regulations for several reasons.

First, the argument ignores the simple fact that the Applicant would not have been required to build to the same footprint as the current structures occupy. That is, there is no

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[1] D.C. Code Section 6-1106 requires that all applications for subdivision in an historic district, be reviewed by the Mayor in accordance with this section [6-1106(a)] and place notice of the application in the District of Columbia Register. D.C. Code § 6-1106(a). Accordingly, an application for subdivision of a property in an historic district is to be referred to the Historic Preservation Review Board for its recommendation and findings as to whether the subdivision "is necessary in the public interest or that a failure to do so will result in unreasonable economic hardship to the owner." D.C. Code §§ 6-1106 (b) & (e). "Subdivide" or "subdivision" is defined as "the division or assembly of land into 1 or more lots of record, including the division of any lot of record into 2 or more theoretical building sites as provided by the Zoning Regulations of the District of Columbia (11 DCMR 2516 et seq.)." D.C. Code § 6-1102(13); *See Sagalyn*, 691 A.2d 107, 114.

requirement that the Applicant build large houses and, in fact, the Applicant could build smaller houses that would be in conformity with the neighborhood.[2] For example, the Applicant could have built houses with either a smaller footprint and/or with only two (2) stories. This would address the Applicant's concern that HPRB may not approve a design plan for two (2) large town homes.

Second, as raised by the Office of Planning, pursuant to section 405.3 of the zoning regulations, the outside lots of the new row houses are required to have side yards. Had the Applicant created (two) conforming lots and, consequently, complied with the side yard requirements of the zoning regulations, the resulting homes would not have been unexceptionally wide or large.[3]

Third, any "practical difficulty" arises out of the Applicant's own actions of creating substandard lots. *See*, the Neighbor's Request for Party Status at pp. 10-11.

Simply put, there was nothing unique about the property, which is flat and rectangular, that makes it difficult for the Applicant to comply with the zoning regulations.

2. The Applicant Did Not Rely in Good Faith on the District's Approvals of Its Proposed Development.

The Applicant claims that the exceptional situation in the instant matter is the approvals by zoning officials on "numerous occasion" that "construction of three row houses on the three 800 lots/three record lots was matter of right zoning without the need for a variance." *See* Applicants February 10, 2004 Filing at p. 4. However, what the Applicant fails to disclose in making this statement is the numerous and repeated misrepresentations that it made to the District that lead to the District erroneously approving the development without referring the Applicant to the Board. The Applicant would have this Board sanction these misrepresentations by allowing the Applicant to boot-strap the resulting approvals to support its belated request for a variance.

Despite the Applicant's claims, it did not rely in good faith on the District's approvals. Attached is a time line depicting the convoluted process that resulted in the erroneous grant of the various permits. The salient points of the extent of the Applicant's actions and misstatements can be summarized as followed:

a. The Applicant applied for the permits in a piecemeal manner and under different names;

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[2] In fact, the neighborhood is replete with larger buildings and larger lots. *See* ***Exhibit 4***.

[3] Even if the side yard requirements do not apply, the resulting homes would not have been out of character with the neighborhood. *See* ***Exhibit 4***.

b. The Applicant misrepresented the nature of the structure being demolished. *See* ***Exhibit 5a*** (raze permit application);

c. The Applicant misrepresented the fact that it owned vacant, adjacent property within Square 763 and that it was undertaking additional development within the Square. *See* ***Exhibit 5b-d*** (foundation permit applications at EIS form);

d. The Applicant attached a certificate of occupancy for a flat for a property at 610 D Street, S.W. to its foundation permit applications, presumably as evidence of the preexisting use of the property. *See* ***Exhibit 5b-c;***[4] and

e. The Applicant misrepresented the lot depth of the adjacent properties of 324 and 326 2nd Street, S.E. as being 75½ feet (as opposed to their actual depth of 81'9.5"), as well as the nature of the right of way to the west of the property (which the Applicant represented to be an "Alley"). *See* ***Exhibit 6a-d.***

In addition to the foregoing unequivocal evidence, the Applicant has made several statements to the Neighbors that belie their assertion that the District always told them that they could build three homes on the property. To the contrary, the Applicant informed Louise Smith during a visit to her at her home that it took them six months to figure out how they could build three homes.

The fact that the Historic Preservation Division of the Office of Planning confirmed with DCRA that no variance relief was necessary does not bolster the Applicant's case. Instead, it is merely a continued illustration of the fact that DCRA was mistaken as to the nature of the development, which, again, was a direct result of the Applicant's misinformation provided to DCRA. Furthermore, based on the Historic Preservation Review Board ("HPRB") hearing, the Applicant was on notice of the doubt as to the matter-of-right nature of their development. Specifically, HPRB member Amy Weinstein questioned the ability to develop the substandard lots and pointed out by way of example a proposed development on a sixteen foot (16') wide lot at 315 East Capitol Street, which lot had been in existence since the 1890s. *See* ***Exhibit 9.***

3. <u>There Would Be No Hardship to the Developers If the Variance Was Denied</u>.

The Applicant attempts to play on the sympathy of the Board by stating that

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[4] Conspicuously, the Applicant failed to submit these misleading documents with its filings before this Board.

> Denial of the variances requested will cease extreme hardship on Folger and possible bankruptcy for its investors, who have already expended $2.4 million under the impression that construction of the three row houses was matter of right.

Applicant's February 10, 2004 filing at p. 3. To the contrary, this money has been expended at the Applicant's own risk when it proceeded with construction after the issuance of the stop work order in September 2004. At the time of the issuance of the stop work order, the Applicant had just started construction above-grade. Clearly then, the Applicant could have taken steps to protect the foundations from the elements, waited for the Board's decision and then, if necessary, reconfigured the development to conform to the zoning regulations.[5] Although there may have been some financial loss, it would have been much less than the claimed $2.4 million.

Furthermore, the Applicant has failed to show how any uniqueness of the property gave rise to practical difficulties in complying with the zoning regulations. Instead, developing three (3), as opposed to two (2), row houses was simply the preferred development of the Applicant. *See* Discussion at pp. *infra*.

4. Harm to the Public Good.

This overdevelopment of the site will result in harm to the surrounding community and harm to the public good by way of increased traffic congestion and parking, as well potential over taxation of the water/sewer facilities for the Square.

The subject property is located within one block of the Library of Congress and two blocks of the Capitol. *See* ***Exhibit*** 4 (map); *see also* Office of Planning Attachments I & II. The two (2) block radius within the property is improved with numerous apartment buildings, condominiums, office buildings and other commercial facilities. *Id.* By way of example, St. Peters Church is located directly to the east of Square 763 on 2nd Street, S.E. Also in that square (Square 733) is an apartment building and the Republican National Committee building. *Id.* In Square 763, to the immediate east of the property across the public alley, is a private club with offices. *Id.* There is also an apartment building along 3rd Street and one on C Street in Square 763. *Id.* Since September 11, 2002, the traffic patterns in the neighborhood have been redirected and parking surrounding the Capitol and attending buildings restricted. This, along with the mixed uses in the vicinity, has caused a burden on streets such as 2nd and D Streets, S.E. by way of traffic and parking. In deed, this neighborhood suffers one of the most severe parking shortage of parking in the Capitol Hill district.

Allowing three (3) flats will only serve to exacerbate this already undue burden on the neighborhood in terms of parking and traffic. In today's day and age with most families owning two (2) (or more) automobiles, the potential increase in demand on parking by the three (3) large (luxury) flats is between nine and twelve (9-12) on a regular basis. This increase is especially likely given the steep sales price of the homes of $1.8 million each. In contrast, if two smaller,

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[5] Such prudent action would have supported the request for an expedited hearing.

more compatible units were constructed, the maximum increase would be approximately four to six (4-6).[6]

With regard to parking, the Applicant shows one parking space per unit. However, when questioned about a covenant for the shared driveway, the Applicant stated that they do not yet have one in place, as they are unaware as to the exact location of the driveway. This raises grave concern about the ability of the Applicant to provide the requisite parking, given that the plans submitted to the District show a driveway and, yet, the Applicant is unsure where that driveway will be located. Additionally, when the question of the adequacy of the parking provided was raised, the Applicant stated that they could provide two (2) parking spaces per row dwelling. Again, this causes concern as to the intent of the Applicant and the accuracy of their plans. Specifically, each lot is only sixteen feet (16') wide. Required parking spaces must have a width of nine feet (9') and accessory spaces a width of eight feet (8'). 11 DCMR §§ 2115.1 & 2115.3. Thus, with three lots, it is impossible to provide two parking spaces per lot. In contrast, it would be possible to provide two (2) parking spaces per lot if two (2) conforming lots had been created.

As to harm to the public good concerning storm water run off and demand for water by the new development, it is clear that insufficient information has be provided to the District. *See* Office of Planning report. Furthermore, given the narrow width of the lots and the lack of side yards, storm water run off had to be provided underneath the Neighbor's right of way and underneath the property at 324 (the Smith property) and 326 2nd Street, S.E. Granting the requested variance would condone the taking of neighboring property for the purpose of developing a non-matter of right development. Given that the District Water and Sewer Agency ("WASA") could not determine the impact of this development on the surrounding public systems, granting a variance without full comment and review by WASA would be premature.

**The Applicant Needs a Side Yard Variance for the Two End Units.**

As pointed out by the Office of Planning, as the two end homes do not adjoin another row house, they must comply with the side yard requirements. *See* 11 DCMR § 405.3. Specifically section 405.3 provides that:

> In R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple dwelling is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, it shall have a side yard on each resulting free-standing side.

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[6] If smaller units were developed on the site, the resulting rental units would demand a lower rent, which may, in turn, encourage tenants who would take advantage of Metro, rather than car ownership.

While this provision is arguably in conflict with section 405.6,[7] a review of the legislative history and subsequent interpretation of section 405.3 removes any ambiguity of the intent of that section, which is to ensure that semi-detached buildings provide a side yard. *See* Office of Planning report at 7. That a side yard is required for the exterior lots (Lots 26 and 28) is consistent with the Board's decision in BZA Application 16811 (attached as ***Exhibit 7***). In that decision, in interpreting section 405.3, the Board stated that

> The Board rejects the arguments of the Zoning Administrator and the property owners that § 405.3 does not apply as long as a dwelling has (at least) one common division wall. Subsection 405.3 must be read in its entirety. The first clause employs the general phrase "one-family dwelling," defined in § 199.1 as "a dwelling used exclusively as a residence for one (1) family," rather than the more specific classifications, "one-family detached," "one-family semi-detached dwelling," or "row dwelling," all defined in § 199.1. If the purpose of § 405.3 was limited to the preventing the construction of only one-half of a pair of semi-detached dwellings as urged by the property owners, then the regulation would have used the specific term "one-family semi-detached dwelling," and not the general term, "one-family dwelling."
>
> Moreover, the last clause of the sentence, in requiring "a side yard on each resulting free-standing side," refers to each one of potentially two free-standing sides.[8] Moreover, the use of the word "resulting" indicates that the free-standing side results from the absence of a common division wall with an adjacent building, such

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[7] Section 405.6 states that:

> Except as provided in §§ 405.1 and 405.2, a side yard shall not be required in an R-3, R-4, R-5-B, 1R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3" in.) wide per foot of height of building, but not less than eight feet (8' ft.) wide.

[8] The word "each" is defined as:

> being one of two or more distinct individuals having a similar relation and often constituting an aggregate: this as well as that or the next or any other of two or more separate but similar individuals (a boat hung from the ceiling by ropes attached at each end . . . ) (the little chipmunk with a pinion nut in each cheek pouch . . . ) (each day was like every other one . . . ) (each year the Cape has a summer inundation of people . . . ) (a program flexible enough to be tailored to each individual employee . . . ) (giving to each syllable an equal stress . . . ) (some publishers . . . will have books to show in each category. . . ).

Webster's Third New International Dictionary (1986) (citations to sources of examples omitted).

that a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.

Subsection 405.5, which states that "A side yard shall not be required along a side street abutting a corner lot in a Residence District," provides the an exception to § 405.3. Thus, at the end of a row of row dwellings, except in the case of a corner lot, the last dwelling (a semi-detached dwelling) must provide a side yard.

The Zoning Administrator also argued that the purpose of 405.3 was to prevent property owners from constructing a semi-detached dwelling to within one foot or so of the lot line. Subsection 405.3, however, does not address the required minimum width of side yards. Rather, it specifies circumstances under which a side yard must be provided. Subsections 405.6 and 405.9 specify minimum side yard width requirements. These regulations were in place prior to the adoption of § 405.3. Therefore, § 405.3 could not have been intended to prevent narrow, one-foot side yards, since §§ 405.6 and 405.9 already required a semi-detached dwelling to provide one side yard, a minimum of eight feet in width.

Finally, the Zoning Administrator argued that an interpretation of § 405.3 as requiring a side yard on the side of a dwelling that does not share a common division wall would not make sense in light of § 401.3, which prescribes for row dwellings in the R-4 District a minimum lot area of 1,800 square feet and a minimum lot width of 18 feet. The Zoning Administrator noted that the provision of an 8-foot wide side yard on an 18-foot wide lot would leave only 10 feet for the dwelling. Subsection 401.3, however, also prescribes for a one-family semi-detached dwelling in the R-4 District a minimum lot area of 3,000 square feet and a minimum lot width of 30 feet. Subsection 101.6 provides in pertinent part that "Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards . . . applicable to that lot or any lot created." To comply with the side yard requirement of § 405.3, property should be subdivided such that the end lot (that is not a corner lot) of a row of lots subdivided for purposes of constructing row dwellings will have sufficient width to accommodate a semi-detached dwelling.

***Exhibit** 7* at pp. 8-9.

Likewise, in BZA Application No. 16709, the Board denied a variance from, *inter alia*, section 405.3. In that case, the applicant requested the area variances so as to allow the conversion of the property, which was purchased two (2) years earlier as a two-unit (*ie,* a flat) rental property, to an owner-occupied, one-family dwelling and to construct an addition so as to

provide them with an increased amount of interior living space in which to raise a family. ***Exhibit 8*** at p. 2. In denying the requested variance, the Board found that the configuration of the property did render the property unique but that there was no practical difficulty in complying with the zoning regulations. *Id.* at p. 6. Specifically, the Board stated that the identified practical difficulties – "the amount of interior living space that would be available if they converted the flat to a one-family dwelling without variance relief, the elongated floor plan of the dwelling, and the split floor levels within the building" and the preference for "a larger home, with an improved interior circulation pattern, in which to raise a family" -- was merely the preferred option of the applicant, but not the only option. *Id.* The Board pointed out that the applicant had not proven that alternative methods of combining the two units to create a one-family dwelling were unnecessarily burdensome or rose to the level of "peculiar and exceptional practical difficulties" required for variance relief. *Id.* Alternatives to the applicants proposal, as pointed out by the Board, included combining the two units into a one-family dwelling without variance relief (*ie,* without the addition), or alternatively, continue the two-family rental use of the property. Citing *Barhour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976), the Board noted that:

> The fact that an expansion requiring a variance is personally preferable to other methods not requiring variances does not constitute a unique property situation. Further, this case does not present a situation where no use could be made of the property absent a variance. as in A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment, [338 A.2d 428 (1975)].

*Id.*

## CONCLUSION

For the reasons stated herein and for the reasons provided at the hearing, the Neighbors respectfully submit that the application should be denied.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI, LLP

By: _____
Richard B. Nettler
Jeannine Rustad

cc: Mary Ann Snow & James Marsh
Capitol Hill Restoration Society, c/o Gary Petersen
Office of Planning, c/o Joel Lawson
ANC 6B c/o David Sheldon (119 Duddington Place SE, Washington, DC 20003)
Richard Aguglia, Esquire
(All by hand and with enclosures)

## 210 D Street, S.E. - Chronology

**February 20, 1948** Certificate of Occupancy No. 118519 issued for Pepco substation.

**November 1, 1957** Trigger date for sections 401.2 and 401.3 of the Zoning Regulations (lot must be unimproved and in single ownership as of this date).

**May 12, 1958** Trigger date for section 401.1 of the Zoning Regulations (building must be existing as of this date).

**June 14, 2002** Developer closes on purchase of the Properties

**End June 2002** Sign erected announcing the coming of three luxury town homes (no mention of size/lot dimensions)

**July 1, 2002** Date of plans for proposed new row houses – these plans were submitted with the permit applications

- Page C2 – private right of way to west of the Property listed as an "alley"
- Plans depict the lot depths of 326 and 324 2nd Street, S.E. as 75'1/2". In fact, the depths of those properties are 81'9.5"

**September 30, 2002** Subdivision Plat recorded subdividing Lot 4 in to Lots 26, 27 and 28

**Nov. 5 or 11, 2002** Applicant applies for raze permit for 210 D Street, S.E., (lots 800,801 & 802 in square 763). Application is dated Nov. 5, 2002 but wasn't signed until Nov. 11, 2002.

- Owner of Property listed as Folger Park North, LLC
- Address of Owner: 5000 Gardner Drive, Alexandria, VA 22304
- W.J. Maiden signing for owner.
- Per application & DC sign-offs, no environmental review.
- Description: ***Raze Ancillary STORAGE Building. No Electric or Plumbing Utilities***

**November 13, 2002** Demolition Permit No. B424724 issued. Building listed as "Ancillary storage building, no electric or plumbing utilities".

**February 11, 2003** James Marsh and Mary Ann Snow attend ANC 6B meeting on HBRB design review and obtain copy of plans from Alger Stoneburner; Stoneburner mentions existence of deed of right-of-way behind Neighbors' properties and Property.

**February 27, 2003** Louise Smith and Mary Ann Snow attend Historic Preservation Review Board Meeting re: architectural renderings submitted by the developers; architect on HPRB (Amy Weinstein) comments that she does not understand how developers were able to get a variance.

Nancy Metzger, Capitol Hill Restoration Society tells Mary Ann and Louise that Stoneburner told CHRS that they were building as a matter-of-right because there previously had been three town homes on the site.

**April 2, 2003**[1]

**Application for building permit for 206 D Street, S.E. filed (Lot 26)**

- Owner: Folger Park North, LLC
- Filed by Elizabeth Johnson
- Address of owner listed as 206 D Street (210 crossed out)
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary
- Zoning sign off dated **July 22, 2003**

**Application for building permit for 208 D Street, S.E. filed (Lot 27)**

- Owner: Folger Park North, LLC
- Filed by W.J. Maiden
- Address of owner listed as 208 D Street (210 crossed out)
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary
- Zoning sign off dated **July 22, 2003**

**Application for building permit for 210 D Street, S.E. filed (Lot 28)**

- Owner: Folger Park North, LLC
- Filed by W.J. Maiden
- Address of owner listed as 210 D Street
- Box 13 – existing use listed as vacant
- Box 43 – greenery listed as 20%
- Box 54 – no driveway
- Box 55 – no sheeting/shoring necessary (yes checked and then scratched out)
- Zoning sign off dated **July 22, 2003**

**April 21, 2003**

**Application for foundation permit filed for 210 D Street, S.E. (Lot 28)**

- application signed and dated 4/21
- Owner: Chris Doefler
- Filed by W.J. Maiden
- Address of owner listed as 210 D Street, S.E.
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- Box 55: No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)

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[1] Developer, in its application to the BZA, claims that building permit applications were filed on August 8, 2002.

- Notation on section J "Restrictions of the Permit" was "Approved for foundation only[2]

April 29, 2003

**Application for foundation permit filed for 206 D Street, S.E. (Lot 26)**

- application dated 4/29; signed on 4/30
- Owner: Chris Doefler
- Filed by Elizabeth Johnson
- Address of owner listed as 210 D Street, S.E.
- Box 42 – total lot area not provided
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- Box 55 - No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)
- Notation on section J "Restrictions of the Permit" was "Approved for foundation only (same on Building permit control batch sheet)
- Environmental Intake Form: Applicant checks "no" on questions 1-3. Question 1 asks "Does the owner of this site own adjacent or abutting property?" Question 3 asks "Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?" Yes answers to either of these questions require the submission of a site plan to the EIS Coordinator of DCRA. If no plan exists, the applicant is required to submit a written explanation to the EIS Coordinator.

**Application for foundation permit for 208 D Street filed (Lot 27)**

- Application unsigned
- Owner listed as Chris Doefler
- Filed by Elizabeth Johnson
- Address of owner listed as 210 D Street, S.E.
- Box 47 – answers "yes" to projection beyond building line; does not answer 48-52, as required.
- No sheeting/shoring necessary
- Attach Certificate of Occupancy for 610 D Street, S.W. (Square 495, Lot 839)
- Notation on section J "Restrictions of the Permit" was "Approved for foundation only (same on Building permit control batch sheet)
- Environmental Intake Form: Applicant checks "no" on questions 1-3. Question 1 asks "Does the owner of this site own adjacent or abutting property?" Question 3 asks "Is additional activity planned by the applicant for this site or any site within the same square during the next three years that requires a permit?" Yes answers to either of these questions require the submission of a site plan to the EIS Coordinator of DCRA. If no plan exists, the applicant is required to submit a written explanation to the EIS Coordinator.

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[2] Neither the Control Batch nor the Environmental Intake Form not provided to Appellants by DCRA sheet not provided to the Neighbors by DCRA

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| **May 23, 2003** | Permit No. B451616 issued (foundation Lot 26)<br><br>Permit No. B 451615 issued (foundation Lot 27)<br><br>Permit No. B451617 issued (foundation Lot 28) |
| **In or about June 2003** | Property is fenced in, including the property behind Neighbors' fences, and the trailer is placed on the public alley; Jim measures lot line depth of our house and compares it with measurements on builder's plans. |
| **June 30, 2003** | Mary Ann Snow obtains from the Register of Deeds certified copy of 1928 deed providing a perpetual right of way over area behind fences of 318, 320, 322, 324 and 326 Second Street, S.E.; same day, Mary Ann Snow calls Maiden & Associates, speaks with Phil Maiden, and tells him their plans contain an inaccurate measurement; Maiden says plans are only "preliminary." |
| **Between approx. June 30 & July 8, 2003** | Former Pepco substation is razed. |
| **Week of July 7, 2003,** | Neighbors' fences are boarded up and their property/right-of-way is excavated. This conduct alarms Neighbors, and raises the fear that the developers may try to build on their right-of-way.<br><br>Neighbors' research on zoning regulations begins, as well as calls to ANC 6B, Capitol Hill Restoration Society, and the Department of Consumer and Regulatory Affairs for information and assistance. SMD member of ANC recommends that the Neighbors hire an attorney. |
| **July 22, 2003** | Zoning sign off on applications for building permits |
| **July 25, 2003** | **Application for plumbing permit for 206 D Street filed (Lot 26).**<br>- Owner – Chris Doefler<br>- Owner address – 210 D Street<br>Plumbing Permit PLBG59014 issued<br><br>**Application for plumbing permit for 208 D Street filed (Lot 27).**<br>- Owner – Chris Doefler<br>- Owner address – 210 D Street<br>Plumbing Permit PLBG59013 issued.<br><br>**Application for plumbing permit for 210 D Street filed (Lot 28).**<br>- Owner – Chris Doefler<br>- Owner address – 210 D Street |

Plumbing Permit PLBG59011 issued

**July 2003** Mary Ann Snow visits DCRA and leaves a note for Juan Scott, building inspector, regarding the razing of the building without a permit.

**Approx. end July/ Early August 2003** Neighbors ask developers' site superintendent to see permits - Stan shows Mary Ann Snow permits for foundation; no building permit; Louise Smith is told the permits are "all downtown;" Mary Ann Snow calls DCRA repeatedly during July and August to discuss the zoning and building permit issues; is told repeatedly that the lots must be a minimum 18' feet wide & 1800 square feet, and that anything less will require a variance; DCRA also says no building permits had been issued for the property; could not find a permit to raze the building.

**End July/early Aug.** FIRST STOP WORK ORDER posted on basis of no raze permit.

Mr. Scott later found raze permit, and withdrew first stop work order.

**August 4, 2003** Mary Ann Snow calls the Office of Zoning and speaks with Richard Nero, who says the procedure is that the Zoning Administrator would examine the building permit applications to make sure they were in compliance with zoning regulations, and would be rejected if only 16 feet wide in an R4 district and referred to the BZA for a variance. Mr. Nero checked their records, and stated that no applications for a variance were on file with respect to this property; he stated, further, that if permits were to be issued, we would have to appeal the issuance of the permits under which they are proceeding with construction.

Mary Ann Snow calls the DCRA permit branch and was told that the only type of applications on file for construction at this location were for a new foundation - "family flat," and, upon information and belief, for plumbing; there were no building permits on file. Ms. Epps provided Mary Ann Snow with the application numbers for the foundation permits (B451616 - 206 D Street, S.E.; B451615 - 208 D Street, S.E.; and B451617 - 210 D Street, S.E.).

Mary Ann Snow also spoke with Mr. Lenny Douglas with the permit issuance branch of DCRA. Mr. Douglas said that a building permit is not needed until construction goes above ground; since the foundation is underground, no building permit is needed at this time.

Mary Ann calls Mr. Frank Moody with the permit intake branch - no building permit applications on file. Mary Ann also speaks with Rochelle Joseph at DCRA, who advised that when the developers apply for a building permit, they would be told they have to file for a variance because the lots do not conform with R4 width and area zoning requirements.

**August 5, 2003** Mary Ann calls OSHA to see if that agency had any jurisdiction over possible PCB contamination and potential worker exposure to it; told the report had to come from an on-site employee.

Mary Ann Snow also sends an email to David Sheldon, ANC 6B, informing him that she learned that the developers only permits for a foundation and for plumbing only, that they did not have building permits and had not applied for building permits, and that they dug into our right-of-way, and asked for his help.

**August 7, 2003** Letter sent by neighbors to developers regarding the developers' destruction of neighbors' land and the substandard width and area construction of the lots.

**August 8, 2003** Developers write letter to neighbors in response.

**August 9, 2003** Larry Smith visits "Stan" (the superintendent of the Properties). Stan informed Larry that he had made a phone call overseas to talk about the problem of erecting a wall on the west side of the Properties without excavating the walkway and was informed by the Developer just to take out the walkway.

**Week of August 11, 2003** Developers visit Louise Smith at her home and ask if she like their letter. They explain that they were initially told by DCRA that they could only build two town homes, but they wanted to build three, and that it took them about six months to figure out how they could build three.

(on or about), Larry and Louise Smith, Jim Marsh and Mary Ann Snow meet and decide to hire an attorney; Larry Smith initiates contact with Piper and Rudnick law firm to see if they will represent the Neighbors.

Repeated calls to DCRA are not returned, or representative say to call someone else; numerous voice mail messages are left.

**August 12, 2003** Mary Ann Snow sends summary of information obtained to date to Piper and Rudnick

**August 13, 2003** Mary Ann Snow speaks with representative of DCRA (name not recorded) and is told to formally request a ruling on whether a variance is required, and request that no further permits be issued until a ruling on the variance issue is provided.

Conference call with attorney at Piper and Rudnick is scheduled for 8/15/03.

Around this time period, foundation floor is erected, extending about ten to twelve inches into our property/right-of-way. Black pipe is laid in same area. Photographs are taken.

**August 14, 2003** Mary Ann Snow visits DCRA, requests copies of all applications pertaining to 210 D Street, S.E.; picks up copies of applications for each of the lots; speaks with Ms. Yavocka Young, who takes Mary Ann Snow to surveyor's office; representative in Surveyor's Office says that the Pepco lot was always only one record lot; the three lot lines were tax and assessment lots - never lots of record; Mary Ann Snow orders copy of subdivision plan, but leaves it with Ms. Young, who said she would speak with one of her supervisors about it, and try to schedule a meeting.

Mary Ann Snow sends copy of 8/7/03 letter to David Sheldon, ANC 6B representative.

Mary Ann Snow speaks by phone with attorney from Piper and Rudnick; the law firm states they could handle the encroachment issues, but not the zoning issues. Neighbors decide to search for zoning counsel.

**August 15, 2003** Mary Ann Snow has conversation with Ms. Young at DCRA, who said she spoke with Mr. Noble, who stated that she should meet with Ms. Ogunneye, the chief zoning technician; Ms. Ogunneye is out until 8/22/03, so Ms. Young advised that Ms. Snow call Ed Reeves or Yvonne Epps to schedule a meeting with Ms. Ogunneye. Neither one could be reached; either their voice mail was full or they did not return the call. Ms. Young then recommended that Ms. Snow schedule a meeting with Ms. Ogunneye for 8/25/03 by sending her an email requesting a meeting on that date. Ms. Young provided email address of Faye.Ogunneye@dc.gov. Ms. Young said she will sit in on the meeting. Email sent by Ms. Snow to Ms. Ogunneye.

**August 16, 2003** Neighbors begin communications with Robins, Kaplan, Miller & Ciresi L.L.P. for legal representation.

**August 19, 2003** Counsel for Neighbors meeting with DCRA, including Denzil Nobel on another matter, brings up potential problems with the Property.

**August 20, 2003** (on or about) Mary Ann Snows picks up copy of subdivision plan from Ms. Young at DCRA; Ms. Young says she will direct the Neighbor's questions to Mr. Noble.

**August 25, 2003** Building permits are issued for construction of row houses (permit nos. B454260 for Lot 26, B454262 for Lot 27, and B454261 for Lot 28)

Ms. Ogunneye had not responded to request for a meeting; apparently had not returned to the office.

**August 26, 2003** Mary Ann faxes FOIA letter to Thomas Collier, Esquire, U.S. Department of Health, Office of General Counsel, per his direction, requesting information on environmental impact studies on the Pepco property (To date, no response received).

**August 27, 2003** Counsel for Neighbors writes DCRA (Theresa Lewis and Denzil Nobel) regarding Property, outlining concerns and requesting meeting within the next few days.

**August 30, 2003** Neighbor's write Councilmember Ambrose re: Property.

**September 3, 2003** Letter received by counsel for Neighbors from Joseph McClarley of DCRA (customer service) acknowledging receipt of counsel's "September 2, 2003" letter regarding the Property & indicating a response will be sent within 7 business days.

Mary Ann Snow speaks with Toye Bello of the Office of Zoning. Mr. Bello surprised that construction is new construction and that none of the lots (*ie.*, Lots 26, 27 & 28) met the minimum 1800 sf zoning requirement

**September 9, 2003** Mary Ann Snow speaks with building inspector at DCRA regarding the demolition of our right-of-way and the subsidence from the excavation; says inspector will be sent out, and is told to call public space.

Mary Ann speaks with Connie Wheeler at public space, who states that since the foundation wall had been erected next to the alley, the subsidence cannot be seen; it's our word against theirs, photographs are not sufficient, and they can do nothing.

**September 11, 2003** Counsel for Neighbors writes DCRA (Denzil Noble and Theresa Lewis) attaching Aug. 27 letter and notifying DCRA of the denial of a public space permit to the developer. Request inspection of work at the Property.

**September 12, 2003** Neighbors' appeal is filed with the Board of Zoning Adjustment; about the same time, the private right-of-way is replaced, prior to the hurricane Isabel's occurrence beginning on Thursday, September 18, 2003.

**September 16, 2003** Denzil Noble writes the developers stating that the subdivision is flawed and should not have been approved, and that the developers need to seek a variance through the Board of Zoning Adjustment.

SECOND STOP WORK ORDER ISSUED. The construction consists solely of foundation and foundation walls.

**September 22, 2003** (in or about week of 9/22/03) - construction RESUMES.

**September 25, 2003** Counsel for Neighbors receives letter from Mr. Noble (dated September 16, 2003) that stop-work has been imposed.

**October 1, 2003** Construction resumes

**October 1-3, 2003** Counsel for Neighbors attempts to reach Denzil Noble at DCRA to discuss (and/or meet) whether (and) why stop work order was lifted. No response received

**October 6, 2003** The following response is received from DCRA:

> Ms. Zigner
>
> This is matter is pending an appeal before the BZA in which you represent the appellant. The appellant appealed my decision to issue the building permits. The General Counsel has advised me that any matters pending before BZA or any courts in the District of Columbia, the parties must contact the Office of the General Counsel for a meetings relating to the case. The General Counsel can be reached at (202) 442-8475.
>
> Denzil L. Noble
>
> Administrator
> 941 North Capitol Street, N.E. - Suite 2000
> Washington, D.C. 20002
> (202) 442-4542

**October 6 – end Oct. 2003** Attempts made by counsel for Neighbors to contact DCRA Counsel to set up meeting between parties and to ascertain why stop work order was lifted.

**October 23, 2003** Office of Planning ("OP") recommends expedited hearing. Reason for expedited hearing "due to the quick onset of winter and potential for adverse weather effects on the partial construction, the applicant and DCRA are anxious to resolve the issue." (This, despite construction ongoing)

**October 31, 2003** Appeal supplemented to include the lifting of the stop work order, referenced in Mr. Noble's letter dated September 16, 2003, which was received by Robins, Kaplan, Miller & Ciresi on September 25, 2003.

**November 4, 2003** Meeting with Office of Planning.
Informed that developer granted DCRA an indemnity in exchange of being allowed to proceed with construction

Developer writes Tracy Gruis, owner of adjoining properties, and states that:

> The building has been constructed under city approved and permitted set of drawings and built in accordance with standard construction practices. You specifically mentioned concrete and black

plastic drainage pipe. The concrete could only refer to miscellaneous overflow or spillage, and would be 8 feet or more underground, and provides no conflict with any future use of your site.

The black plastic pipe was shown on the approved plans and provides hydrostatic pressure relief to both sides of the site.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

**Appeal No. 16811 of David and Janet Pritchard**, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, for the issuance of Building Permit No. B431591 allowing the construction of an addition allegedly not complying with the side yard requirements (section 405) in an R-4 District at premises 1018 Constitution Avenue, N.E. (Square 964, Lot 46).

**HEARING DATES:** January 8, 2002; February 26, 2002; March 5, 2002
**DECISION DATES:** April 2, 2002; June 4, 2002

## DECISION AND ORDER

David and Janet Pritchard filed an appeal with the Board of Zoning Adjustment on October 30, 2001, challenging the decision of the Zoning Administrator to approve the issuance of a building permit to their neighbors at 1018 Constitution Avenue, N.E. (Square 964, Lot 46), as violating the side yard requirements of the Zoning Regulations. Janet Pritchard represented herself and Mr. Pritchard in this proceeding. Assistant Corporation Counsel Marie Claire Brown represented the Zoning Administrator. The property owners, Philip Sedlak and Kathleen Peoples, have party status in this appeal and are represented by the law firm, Jackson & Campbell.

The building permit in question allowed the construction of an addition at the rear of a one-family semi-detached dwelling, located in an R-4 Zone District. The addition spans the width of the lot, converting the semi-detached dwelling (a dwelling, the wall on one side of which is either a party wall or a lot line wall, having one side yard) into a row dwelling (a dwelling having no side yards). Given the configuration of the adjacent properties, the dwelling with the addition cannot share on one side a common division or party wall with an adjacent building. The appellants argue that the dwelling is therefore subject to the side yard requirements in 11 DCMR § 405. Both the Zoning Administrator and the property owners contend that because a row dwelling is a matter of right use in the R-4 District, the addition may be constructed as a matter of right. After a public hearing, the Board granted the appeal, determining that § 405.3 requires the provision of a side yard, such that the addition cannot be constructed as a matter of right.

The terms "one-family semi-detached dwelling," "row dwelling," and "side yard" are terms of art in the Zoning Regulations, and defined in § 199.1 For the convenience of the reader, the definitions of these terms and other pertinent provisions of the regulations are reprinted in Appendix A to this Decision and Order.

## PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing. By memoranda dated November 6, 2001, the Office of Zoning advised the Zoning Administrator; the Office of the Corporation Counsel; Advisory Neighborhood Commission (ANC) 6A, the ANC for the area within which the property that is the subject of this appeal is located; the ANC Commissioner for the affected Single-Member District; the Ward 6 Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for January 8, 2002. Pursuant to 11 DCMR § 3113.14, the Office of Zoning on November 16, 2001, mailed the appellants, the Zoning Administrator, and ANC 6A notice of hearing. The owners of the subject property were copied with the appellants' notice. Notice of hearing was also published in the D.C. Register on November 23, 2001, at 48 DCR 10,614. At the January 8 hearing, the Board postponed the hearing until February 26, 2002, at the request of the property owners, to afford them the opportunity to obtain legal counsel and prepare their case. Due to the Board's congested calendar, the appeal was heard the following week, on March 5, 2002.

Appellants' Case. The Pritchards present four arguments. First, they argue that the building permit conflicts with the plain language of 11 DCMR § 405.3, which provides that in the R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling is erected that does not share a common division wall with an existing building or a building being constructed with the new building, it must have a side yard on each resulting free-standing side. Second, they point out that the Zoning Administrator required a similarly situated property owner at 220 – 5th Street, S.E., to obtain special exception approval for an addition to a semi-detached dwelling that converted the dwelling to a row dwelling. Third, they argue that the Zoning Administrator's position conflicts with other provisions of the Zoning Regulations, including § 405.2, which requires that a semi-detached dwelling provide one eight-foot side yard; § 405.5, which provides that a side yard shall not be required along a side street abutting a corner lot; § 405.6, which provides that except for detached and semi-detached dwellings, a side yard shall not be required in the R-4 District; however, if a side yard is provided, it must be a minimum of eight feet in width; and § 223, which authorizes the Board to grant special exception relief from the minimum side yard requirements. Finally, the appellants argue that even if § 405.3 is found to be ambiguous, the Zoning Administrator's interpretation of § 405.3 conflicts with the interpretation guidelines in § 101 of the Zoning Regulations that expressly favor the interpretation that best provides light and air, and encourages stability of zone districts and land values.

The appellants also included within their case arguments presented by Lyle Schauer, Zoning Chairman of the Capitol Hill Restoration Society. Mr. Schauer argued that under § 405.3, a building constructed as a row dwelling must have common division walls on both sides; otherwise, the building must have a side yard on each resulting free-standing side. He argued that § 405.5, which provides that no side yard is required along a side street abutting a corner lot, constitutes the only exception to § 405.3.

Zoning Administrator's Case. The Zoning Administrator argues that conversion to a row dwelling is a matter of right in an R-4 District, such that the subject dwelling is not required to provide side yards. While the Zoning Administrator's final determination letter dated August 20, 2001, recognizes "that there is seemingly ambiguous or contradictory language between Section 405.3 and the allowance of a row dwelling in the R-4 district as a matter of right," the Zoning Administrator reasoned that the purpose of § 405.3 "is intended to ensure the establishment of a common division wall between each two adjacent properties. The referenced property has met that requirement by sharing a common division wall with an adjacent structure." At the hearing, then-Acting Zoning Administrator Toye Bello stated that the purpose of § 405.3 was to prevent a situation where a semi-detached dwelling could be constructed with a lot line wall on one side, and a free-standing wall within one foot of the lot line on the other side.

The Zoning Administrator also argued that an interpretation of § 405.3 that required a semi-detached one-family dwelling to maintain an eight-foot side yard would be inconsistent with § 401.3, which specifies minimum lot area and lot width requirements. That is, the Zoning Administrator argued that since the regulations allow in the R-4 District an 1800 square-foot lot as a matter of right, it would be illogical to interpret § 405.3 as requiring an eight-foot side yard, leaving only ten feet for the dwelling. Finally, the Zoning Administrator noted that § 405.6 specifies that, except for one-family detached and semi-detached dwellings, a side yard shall not be required in an R-3, R-4, R-5-B, R-5-C, R-5-D, or R-5-E District; but that if a side yard is provided at the discretion of a property owner, then it may be no less than eight feet wide.

Property Owners' Case. At the hearing, Bruce Wentworth of Wentworth Levine, Architect-Builder, Inc., described the addition. Ms. Peoples presented a statement indicating that the appellants had objected to the construction of the addition before the issuance of the building permit.

Mr. Sedlak and Ms. Peoples adopted the Zoning Administrator's case. They argued that since a row dwelling is a matter-of-right use in an R-4 District, a "non-party" wall may be constructed face-on-line, without any side yards. In addition, they argued that § 405.3 only applies to new construction. They asserted that § 405.3 does not apply where the owner seeks to construct a row dwelling, since a row dwelling has no side yards; nor where the owner seeks to convert a semi-detached dwelling to a row dwelling. They argued that the Zoning Commission's intent in adopting § 405.3 was limited to preventing the construction of only one-half of a pair of semi-detached dwellings. They also argued that the appellants' interpretation of § 405.3 would bar a use conversion.

ANC Report. In its report dated January 7, 2002, ANC 6A states that at a duly-noticed meeting held on December 6, 2001, with a quorum present, and after reviewing the report of the ANC's Zoning and Licensing Committee and hearing presentations from Mrs. Pritchard and Ms. Peoples, the ANC voted to support the appeal.

Closing of the Record. The record closed at the conclusion of the public hearing, with the exception of the proposed findings of fact and conclusions of law requested of the parties. Exhibits 17, 24 through 26, 32, and 33 consist of letters from nearby residents regarding this

appeal. Since the Board's Rules of Practice and Procedure do not provide for public comment in appeal cases, see 11 DCMR § 3177.11(a), Exhibits 17, 24 through 26, 32, and 33 are stricken from the record. The Board re-opened the record at its public meeting on April 4, 2002, to accept a report from the Office of Zoning related to this case, and to allow the parties the opportunity to submit written responses to the report.

Decision Meeting. At its public meeting on June 4, 2002, the Board voted 5 – 0 – 0 to grant the appeal.

## FINDINGS OF FACT

The Subject Lot and the Dwelling Prior to the Addition

1. The property that is the subject of this appeal is located at 1018 Constitution Avenue, N.E. (Square 964, Lot 46), in an R-4 Zone District, in the Capitol Hill Historic District.

2. As described in 11 DCMR § 330.1, "The R-4 District is designed to include those areas now developed primarily with row dwellings, but within which there have been a substantial number of conversions of the dwellings into dwellings for two (2) or more families." Matter-of-right uses include one-family detached dwellings, one-family semi-detached dwellings, and row dwellings. See 11 DCMR §§ 330.5(a), 320.3(a), 300.3(a) and (c), 201.1(a).

3. The subject lot is rectangular in shape, 26 feet wide and approximately 90.5 feet deep, with a lot area of 2352 square feet.

4. The subject dwelling is located on the north side of Constitution Avenue, at the east end of a row of row dwellings.

5. The dwelling shares one common division wall[1] with a row dwelling on the adjacent lot to the west.

6. To the east, the side yard was 7.0 feet wide at the front portion of the dwelling (32.4 feet in depth), and 12.33 feet wide at the rear portion (16 feet in depth).

7. The dwelling was therefore classified for zoning purposes as a "one-family semi-detached dwelling"; that is, "a one-family dwelling, the wall on one (1) side of which is either a party wall or a lot line wall, having one side yard." See 11 DCMR § 199.1.

8. The eastern side lot line of the subject property coincides with the rear lot lines of five lots developed with row dwellings fronting on 11th Street, N.W., including the appellants' dwelling. All five lots are relatively small, with shallow rear yards.

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[1] The Zoning Regulations do not define either the phrase "common division wall" or the phrase "party wall." The Zoning Administrator testified that a "common division wall" is a "party wall," and that a party wall straddles the lot line. *See* Tr. at 106-07 (Mar. 5, 2002).

9. Given the configuration of the abutting properties, the subject dwelling does not, and physically cannot, share a second common division wall with any other building to the east.

The Rear Addition

10. On May 21, 2001, Mr. Sedlak filed an application with the Department of Consumer and Regulatory Affairs (DCRA) to construct a two-story rear addition. The application describes both the existing use and the proposed use of the property as a one-family "semi-detached" dwelling. Mr. Bello acknowledged the description of the proposed use on the application form as a "minor oversight" that could be administratively corrected. Tr. at 100 (Mar. 5, 2002). Notwithstanding the stated proposed use category, DCRA reviewed the plans that accompanied the application as a conversion to a row dwelling. Tr. at 101 (Mar. 5, 2002).

11. DCRA issued Mr. Sedlak Building Permit No. B431591 on July 5, 2001, for the construction of a "two story addition on rear of existing home."

12. By letter dated August 7, 2001, the appellants requested DCRA to suspend the permit, alleging that it did not comply with (1) the percentage of lot occupancy limitations in 11 DCMR § 403.2;[2] and (2) the side yard requirements of §§ 405.2, 405.3, and 405.9.

13. By letter dated August 20, 2001, the Zoning Administrator issued a formal determination that the permit was "issued correctly, in accordance with the Zoning Regulations and previous precedence [sic], as established by past Zoning Administrators." The letter stated the reasons for the Zoning Administrator's determination, and indicated that it was a final decision, appealable to the Board of Zoning Adjustment. The Pritchards filed their appeal timely on October 30, 2001.

14. By the date of the hearing on this appeal, the construction of the rear addition was nearly complete.

15. The two-story addition is constructed at the rear of the dwelling. It spans the full 26-foot width of the lot for a depth of 20.5 feet. A second-floor deck facing the front has also been constructed along the east side of the dwelling, 12.33 feet wide and 4.6 feet deep, abutting the eastern side lot line. There is also a second-floor deck at the rear.

16. The addition has a lot line wall[3] on the east side.

17. The lot line wall is a free-standing wall.[4]

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[2] The appellants did not raise the issue of lot occupancy in their appeal before the Board.

[3] A "lot line wall" is defined in § 199.1 as "an enclosing wall constructed immediately adjacent to a side lot line, but not a party wall." According to the Zoning Administrator, a lot line wall is also called a "face-on-line wall." Tr. at 106-07 (Mar. 5, 2002).

[4] In 11 DCMR § 199.2(g), the Zoning Regulations stipulate that words not defined in § 199 be given the meaning in *Webster's Unabridged Dictionary*. The phrase "free-standing" is defined in *Webster's Third New International Dictionary* (1986) as "standing alone and on its own foundation free of architectural or supporting frame or attachment," as in the phrase "a free-standing wall."

18. Since the open space on the east side of the dwelling no longer extends the full depth of the dwelling, the open space is considered a "court" and not a "side yard" as those terms are defined in § 199.1 of the Zoning Regulations.

19. The dwelling with the addition is therefore classified as a "row dwelling" for purposes of zoning; that is, "a one-family dwelling having no side yards." See 11 DCMR § 199.1.

20. The addition abuts approximately three-quarters of the rear lot line of the appellants' property at 204 - 11th Street and approximately one-half of the rear lot line of the appellants' neighbors at 206 – 11th Street.

21. Because the appellants have a nonconforming rear yard, the addition is located approximately 13 feet from the rear of their dwelling. The appellants assert that the addition substantially interferes with the air and light to their rear yard and kitchen. Mrs. Pritchard describes the addition as shadowing and overwhelming her dwelling, creating a "tenement style feeling," with her dwelling bricked-in on three sides rather than two. Tr. at 70 (Mar. 5, 2002).

22. Mr. Shauer also testified that the addition adversely affects the light and air to the abutting 11th Street properties.

Miscellaneous Findings

23. The purpose of § 405.3, as expressly stated in Z.C. Order No. 17, published at 17 DCR 305 (1970), is "to insure the provision of adequate side yards for all residential buildings regardless of the zoning district in which they lie."

24. The Zoning Administrator required the property owners of a semi-detached dwelling at 220 – 5th Street, S.E., also located on Capitol Hill, to seek special exception approval to construct an addition under somewhat similar circumstances. The side lot line of 220 – 5th Street coincides with the side lot line of the adjacent property. The Zoning Administrator's memorandum on 220 – 5th Street, dated June 11, 2001, indicates that the property owners required special exception relief pursuant to 11 DCMR § 223 from the provisions of § 405.2, requiring a semi-detached dwelling in the R-4 District to provide one side yard, and from § 405.3, requiring a side yard when a dwelling does not share a common division wall with an existing adjacent building. Mr. Bello stated that upon further reflection, he believed that this case was referred to the Board of Zoning Adjustment for special exception review in error. Regardless of the 220 – 5th Street case or Zoning Administrator determinations in other cases, the Board has not previously interpreted § 405.3.

## CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(f) and (g)(1) (2001)), to hear and decide appeals where it is alleged by an appellant that there is error in any decision by an administrative officer in the

carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR § 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

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. Code, 2001 Ed. § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. While ANC 6A supports the Pritchards' appeal, the ANC did not identify any issues and concerns for the Board's consideration.

The issue in this case is 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. As explained below, the Board concludes that while a row dwelling is a matter-of-right use in the R-4 District, the side yard provisions of the Zoning Regulations limit the circumstances under which the owner of an existing semi-detached dwelling may convert the dwelling to a row dwelling.

**Subsection 405.3**

In 1970, in Z.C. Order No. 17, the Zoning Commission added Subsection 405.3 to the zoning regulations relating to the provision of side yards in Residence Districts. Subsection 405.3 states that:

> In R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple dwelling is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, then it shall have a side yard on each resulting free-standing side.

The subject dwelling, which fronts on Constitution Avenue, N.E., shares one common division wall with a row dwelling to the west. Prior to the construction of the addition, it had one side yard to the east. It was, therefore, classified for purposes of zoning as a "one-family semi-detached dwelling." See id. § 199.1 (definition of "one-family semi-detached dwelling"). The rear addition spans the full width of the lot. Since the remaining open space on the east side of the dwelling no longer extends the full depth of the dwelling, it is classified for purposes of zoning as a "court" rather than a "side yard." See id. § 199.1 (definition of "court" and "side yard"). The dwelling with the addition is therefore classified for purposes of zoning as a "row dwelling," a dwelling having no side yards. See id. § 199.1 (definition of "row dwelling).

Because the eastern side lot line coincides with the rear lot lines of several abutting lots fronting on 11th Street, N.E., the subject dwelling does not and, given the configuration of the adjacent dwellings, physically cannot, share a common division wall with a building to the east. The Board concludes therefore that under § 405.3, the dwelling must provide a side yard on the east side, the "resulting free-standing side."

The Board rejects the arguments of the Zoning Administrator and the property owners that § 405.3 does not apply as long as a dwelling has (at least) one common division wall. Subsection 405.3 must be read in its entirety. The first clause employs the general phrase "one-family dwelling," defined in § 199.1 as "a dwelling used exclusively as a residence for one (1) family," rather than the more specific classifications, "one-family detached," "one-family semi-detached dwelling," or "row dwelling," all defined in § 199.1. If the purpose of § 405.3 was limited to the preventing the construction of only one-half of a pair of semi-detached dwellings as urged by the property owners, then the regulation would have used the specific term "one-family semi-detached dwelling," and not the general term, "one-family dwelling."

Moreover, the last clause of the sentence, in requiring "a side yard on each resulting free-standing side," refers to each one of potentially two free-standing sides.[5] Moreover, the use of the word "resulting" indicates that the free-standing side results from the absence of a common division wall with an adjacent building, such that a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.

Subsection 405.5, which states that "A side yard shall not be required along a side street abutting a corner lot in a Residence District," provides the an exception to § 405.3. Thus, at the end of a row of row dwellings, except in the case of a corner lot, the last dwelling (a semi-detached dwelling) must provide a side yard.

The Zoning Administrator also argued that the purpose of § 405.3 was to prevent property owners from constructing a semi-detached dwelling to within one foot or so of the lot line. Subsection 405.3, however, does not address the required minimum width of side yards. Rather, it specifies circumstances under which a side yard must be provided. Subsections 405.6 and 405.9 specify minimum side yard width requirements. These regulations were in place prior to the adoption of § 405.3. Therefore, § 405.3 could not have been intended to prevent narrow, one-foot side yards, since §§ 405.6 and 405.9 already required a semi-detached dwelling to provide one side yard, a minimum of eight feet in width.

Finally, the Zoning Administrator argued that an interpretation of § 405.3 as requiring a side yard on the side of a dwelling that does not share a common division wall would not make sense in light of § 401.3, which prescribes for row dwellings in the R-4 District a minimum lot area of 1,800 square feet and a minimum lot width of 18 feet. The Zoning Administrator noted that the provision of an 8-foot wide side yard on an 18-foot wide lot would leave only 10 feet for the

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[5] The word "each" is defined as:

> being one of two or more distinct individuals having a similar relation and often constituting an aggregate: *this* as well as *that* or *the next* or *any other* of *two or more separate but similar* individuals (a boat hung from the ceiling by ropes attached at each end . . . ) (the little chipmunk with a piñon nut in each cheek pouch . . . ) (each day was like every other one . . . ) (each year the Cape has a summer inundation of people . . . ) (a program flexible enough to be tailored to each individual employee . . . ) (giving to each syllable an equal stress . . . ) (some publishers . . . will have books to show in each category . . . ).

*Webster's Third New International Dictionary* (1986) (citations to sources of examples omitted).

dwelling. Subsection 401.3, however, also prescribes for a one-family semi-detached dwelling in the R-4 District a minimum lot area of 3,000 square feet and a minimum lot width of 30 feet. Subsection 101.6 provides in pertinent part that "Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards . . . applicable to that lot or any lot created." To comply with the side yard requirement of § 405.3, property should be subdivided such that the end lot (that is not a corner lot) of a row of lots subdivided for purposes of constructing row dwellings will have sufficient width to accommodate a semi-detached dwelling.

**Subsection 405.3 Interpreted in Light of Section 405 as a Whole**

The side yard regulations as a whole are designed to ensure the provision of an adequate amount of separation between structures. Subsection 405.6, for example, reflects a policy of providing a meaningful amount open space between structures. It states that:

> Except as provided in §§ 405.1 and 405.2, a side yard shall not be required in an R-3, R-4, R-5-B, R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3 in.) wide per foot of height of building, but not less than eight feet (8 ft.) wide.

Further, while side yards are not required as a general rule in an R-4 District, § 405.6 recognizes § 405.2 as an exception to the general rule. Subsection 405.2 provides that in an R-4 District, "a one-family semi-detached dwelling shall be subject to the side yard requires of an R-2 District." Subsection 405.9, in turn, requires that each side yard in an R-2 District have a minimum width of eight feet.

Subsection 405.8 is plainly intended to preserve side yards in existence prior to the effective date of the Zoning Regulations. It states:

> 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.).

As applied to the subject property,[6] § 405.8 requires the maintenance of the seven-foot side yard at the front portion of the dwelling, and §§ 405.2 and 405.9 requires the provision of an eight-foot side yard at the rear portion of the dwelling (where the side yard prior to the addition was 12.33 feet wide). Read together, §§ 405.3 and 405.8 preclude the conversion of a semi-detached dwelling to a row dwelling, unless the addition to the semi-detached dwelling will share, on what would otherwise be its free-standing side, a common division wall with an existing building or a building being constructed together with the addition.

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[6] The parties did not introduce any evidence concerning the date of construction of the dwelling. However, if the dwelling was constructed after May 12, 1958, as a semi-detached dwelling, it would have been required to provide on the east side a minimum eight-foot side yard for the full depth of the dwelling.

**Purposes of the Side Yard Requirements**

Finally, the appellants' interpretation of § 405.3 is consistent with the Zoning Regulations. The minimum yard requirements require the provision of open spaces around buildings and structures. As described in 3 Rathkopf's The Law of Zoning and Planning § 34B.02[1] at 34B-2 to 34B-5 (2001):

> Restrictions on land development controlling building setback lines and requiring minimum front, side, or rear yard areas that must be kept free from structural development have long been recognized by courts as being reasonably related to promotion of the public welfare. Front yards, rear yards, and side yards provide light, air, and privacy. They afford room for lawns and trees, keep residences away from street traffic, noise, dust, and neighbors, provide space for recreation and relaxation, and add to the attractiveness and comfort of a residential district. They provide access for firefighting equipment to the rear of buildings, and space for accessory buildings and uses. . . . More generally, police power restrictions relating to yards, courts, and other open spaces promote the overall community interest by fixing a spatial land use land use pattern and thereby promoting the orderly physical development of a community.

These same policies are reflected in the provisions of 11 DCMR § 101.1, which states the purpose of the zoning regulations and guides their interpretation and application. Thus, in the terms employed in § 101.1, the minimum side yard requirements serve to provide separation between dwellings, ensuring adequate light and air, preventing the undue concentration of population and the overcrowding of land, and providing a distribution of population and use of land that will create conditions favorable to the protection of property and that will tend to further economy and efficiency in the supply of public services.

In adopting § 405.3 in Z.C. Order No. 17, the Zoning Commission expressly stated that its purpose is "to insure the provision of adequate side yards for all residential buildings regardless of the zoning district in which they lie." Interpreting § 405.3 in light of these purposes leads to the conclusion that the Zoning Administrator erred in approving the issuance of the permit, to allow as a matter of right the construction of an addition to a semi-detached dwelling, where the addition does not provide a side yard on its free-standing side.

A property owner seeking to construct an addition that will convert a semi-detached dwelling to a row dwelling under circumstances where it is not possible to construct a common division wall may apply to the Board for a special exception or variance, as appropriate.[7] Just as in the special exception case involving 220 – 5th Street, S.E., the public hearing process will provide an opportunity to explore whether the requested zoning relief meets the criteria for such relief,

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[7] While the parties recognized that a property owner could apply for a special exception under 11 DCMR § 223 for relief from the side yard requirements, to qualify for relief under § 223, a dwelling must meet the percentage of occupancy limitations specified in the rule. Otherwise, variance relief would be required. *See* 11 DCMR § 223.3.

including whether it would adversely affect neighboring properties or the character of the zone district. See §§ 3103.2, 3104.1.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED** and that they decision of the Zoning Administrator to approve Building Permit No. B431591 is **REVERSED**.

**VOTE: 5 – 0 - 0** (Peter G. May, Anne M. Renshaw, Geoffrey H. Griffis, Curtis L. Etherly, Jr., and David A. Zaidain, to grant the appeal).

**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:** OCT 15 2002

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. MS/rsn

# APPENDIX A – APPLICABLE ZONING REGULATIONS

## 101 INTERPRETATION AND APPLICATION

101.1 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 for the following purposes:

(a) To provide adequate light and air;

(b) To prevent undue concentration of population and the overcrowding of land; and

(c) To 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 cultural opportunities; and that will tend to further economy and efficiency in the supply of public services.. . . .

101.6 Where a lot is divided, the division shall be effected in a manner that will not violate the provisions of this title for yards, courts, other open spaces, minimum lot width, minimum lot area, floor area ratio, percentage of lot occupancy, parking spaces, or loading berths applicable to that lot or any lot created.

## 199 DEFINITIONS

199.1 When used in this title, the following terms and phrases shall have the meanings ascribed:

**Court** – an unoccupied space, not a court niche, open to the sky, on the same lot with a building, which is bounded on two (2) or more sides by the exterior walls of the building or by two (2) or more exterior walls, lot lines, or yards. A court may also be bounded by a single curved wall of a building.

**Dwelling, one-family** – a dwelling used exclusively as a residence for one (1) family.

**Dwelling, one-family detached** – a one-family dwelling, completely separated from all other buildings and having two (2) side yards.

**Dwelling, one-family semi-detached** – a one-family dwelling, the wall on one (1) side of which is either a party wall, or a lot line wall, having one (1) side yard.

**Dwelling, row** – a one-family dwelling having no side yards.

**Wall, lot line** – an enclosing wall constructed immediately adjacent to a side lot line, but not a party wall.

**Yard, side** - a yard between any portion of a building or other structure and the adjacent side lot line, extending the full depth of the building or structure.

199.2 For the purpose of this title, the following definitions shall not be held to modify or affect in any way the legal interpretations of these terms or words where used in other regulations:

(g) Words not defined in this section shall have the meanings given in *Webster's Unabridged Dictionary.*

**401 MINIMUM LOT DIMENSIONS**

401.3 Except as prescribed in the other provisions of this chapter, the minimum dimensions of a lot in a Residence District shall be as set forth in the following table:

| ZONING DISTRICT AND STRUCTURE | MINIMUM LOT AREA (SQUARE FEET) | MINIMUM WIDTH OF LOT (FEET) |
|---|---|---|
| R-4 | | |
| Row dwelling and flat | 1,800 | 18 |
| One-family semi-detached dwelling | 3,000 | 30 |
| All other structures | 4,000 | 40 |

## 405 SIDE YARDS (R)

405.1 In an R-2, R-3, R-4, or R-5 District, a one-family detached dwelling shall be subject to the side yard requirements of an R-1 District.

405.2 In an R-3, R-4, or R-5 District, a one-family semi-detached dwelling shall be subject to the side yard requirements of an R-2 District.

405.3 In R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple dwelling is erected that does not share a common division wall with an existing building or a building being constructed together with the new building, then it shall have a side yard on each resulting free-standing side.

405.4 Except as provided in § 405.1, in an R-5-A District, one side yard shall be provided for all structures unless the structure is an apartment house containing three (3) or more dwelling units per floor, in which case two (2) side yards shall be provided, each with the minimum width set forth in § 405.9.

405.5 A side yard shall not be required along a side street abutting a corner lot in a Residence District.

405.6 Except as provided in §§ 405.1 and 405.2, a side yard shall not be required in an R-3, R-4, R-5-B, R-5-C, R-5-D, or R-5-E District. However, if the yard is provided, it shall be at least three inches (3 in.) wide per foot of height of building, but not less than eight feet (8 ft.) wide.

405.7 In the case of a lot located in an R-1 or R-2 District proposed to be used by a public school that abuts or adjoins on one (1) or more side lot lines a public open space, recreation area, or reservation, the required side yard may be reduced or omitted.

405.8 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.).

405.9 Side yards shall be provided on lots in Residence Districts as set forth in the following table, subject to the special requirements of other provisions of this chapter:

| ZONING DISTRICT | MINIMUM DEPTH OF EACH SIDE YARD |
|---|---|
| R-1-A, R-1-B, R-2 | 8 feet |
| R-3, R-4 | None required, except as provided under §§ 405.1, 405.2, and 405.5[8] |
| R-5-A | 3 inches per foot of height of building, but not less than 8 ft. |
| R-5-B, R-5-C, R-5-D, R-5-E | None required, except as provided in §§ 405.1, 405.2, and 405.5[9] |

[8] Subsection 405.5 (formerly numbered § 3305.5) should have been renumbered § 405.6 (§ 3305.6, under the former numbering system) as a result of Z.C. Order No. 17, 17 DCR 305 (1970).
[9] See footnote 8.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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**BZA APPEAL NO. 16811**

As Director of the Office of Zoning, I hereby certify and attest that on OCT 15 2002, a copy of the Decision and 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 this matter and that is listed below:

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rsn

**ATTESTED BY:**

**JERRILY R. KRESS, FAIA**
**Director, Office of Zoning**

D

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

**Application No. 16709 of Mr. and Mrs. William Brannon**, pursuant to 11 DCMR § 3103.2 for variances from the side yard requirements under section 405, rear yard requirements under section 404, lot occupancy requirements under section 403, and subsection 2001.3, to allow an addition to a nonconforming structure in the CAP/R-4 District at premises 301 3rd Street, S.E. (Square 763, Lot 834).

**HEARING DATE: June 12, 2001**

**DECISION DATE: July 3, 2001**

## DECISION AND ORDER

William F. Brannon and Katherine Smith Brannon, the owners of Lot 834 in Square 763 filed an application with the Board of Zoning Adjustment on February 21, 2001, seeking area variances pursuant to 11 DCMR § 3103.2 from the maximum percentage of lot occupancy, minimum rear yard, and minimum side yard provisions of 11 DCMR §§ 403, 404, and 405, as well as from the provisions of § 2001.3, which restricts additions to nonconforming structures. The Brannons seek to construct an addition to a two-family dwelling in the CAP/R-4 Zone District. The application is self-certified pursuant to § 3113.2. After a public hearing, the Board denied the application on the grounds that the applicants had failed to show that they would encounter practical difficulties if the Zoning Regulations are strictly applied.

## PRELIMINARY AND PROCEDURAL MATTERS

Notice of Application and Notice of Hearing. By memoranda dated April 4, 2001, the Office of Zoning advised the Zoning Administrator; the D.C. Office of Planning; the Architect of the Capitol; Advisory Neighborhood Commission (ANC) 6B, the ANC for the area within which the subject property is located; the ANC commissioner for the affected Single-Member District; and the Ward 6 Councilmember of the filing of the application.

The Board scheduled a public hearing on the application for June 12, 2001. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on April 20, 2001, mailed the applicant, the owners of all property within 200 feet of the subject property, and ANC 6B notice of the hearing. Notice of hearing was also published in the *D.C. Register* on April 27, 2001, at 48 DCR 3652. The applicant's affidavit of posting indicates that on May 23, 2001, a zoning poster was placed on the corner of the subject property at 3rd and C Streets, S.E., in plain view of the public.

Request for Party Status. The Board granted Douglas C. Dacy party status pursuant to 11 DCMR § 3106.3, finding that his interests, as the owner of the adjacent dwelling at 305 3rd Street, S.E., would be more significantly affected than those of other persons in the general public.

Applicants' Case. The Brannons explained that they would like to convert the property, which they purchased two years ago as a two-unit rental property, to an owner-occupied, one-family dwelling. They presented their building plans, and stated that they were seeking zoning relief to construct an addition that would provide them with an increased amount of interior living space in which to raise a family. Their architect, Jerald Clark, described the addition and the required zoning relief.

Architect of the Capitol Report. By letter dated April 12, 2001, the Architect of the Capitol indicated that the addition would create no adverse effect on the Capitol complex or the Master Plan for the Capitol grounds and related areas, cited in 11 DCMR § 1200.1, or the other special objectives for which the Capitol Interest Overlay District was created.

ANC Report. The Board waived the seven-day filing deadline of 11 DCMR § 3115.1 to accept the ANC's June 5, 2001, written report. In its report, ANC 6B indicates that on May 8, 2001, at a properly noticed meeting with a quorum present, ANC 6B voted to support the application. The written report does not identify any specific issues or concerns with respect to the requested variances. Ann Black and David Sheldon represented the ANC at the hearing.

Persons in Support of the Application. The Board received a letter in support of the project from the Capitol Hill Restoration Society (CHRS). CHRS observed that the building, while not unusually small, is poorly configured internally for single-family use. Mary Weirich, a nearby neighbor, submitted oral and written comments in support of the application. The Board also received supporting letters from four other neighbors, who expressed their appreciation for the Brannons' efforts in painting and landscaping the property and their support for converting the property to an owner-occupied, one-family dwelling. The Brannons also submitted a petition in support of the application signed by approximately 52 of their neighbors.

Parties and Persons in Opposition to Application. Mr. Dacy, the adjacent property owner, presented written and oral testimony that the addition would adversely affect his property with respect to light, air, views, privacy, and water runoff, as well as reduce the value of his property and increase his property insurance premiums. He also argued that the applicants' difficulties were related to their personal aspirations, not practical difficulties resulting from peculiarities of their property.

Closing of the Record. The record closed at the conclusion of the hearing, with the exception of the certain photographs (Exs. 43 and 44), which have since been filed in the record.

Decision Meeting. At its public meeting on July 3, 2001, the Board, by a vote of 3 – 2 – 0, denied the application.

## FINDINGS OF FACT

### The Subject Property

1. The subject property, Lot 834 in Square 763, with a street address of 301 3rd Street, S.E., is located at the southwest corner of 3rd and C Street on Capitol Hill, in the CAP/R-4 District. The property fronts on C Street, and also has a street address of 227 and 229 C Street. As a result of earlier remodeling, there is no longer an entrance on the 3rd Street side.

2. In the past, there were two, two-story buildings on the property. The first structure was originally a corner store built in the mid-1800s, fronting on 3rd Street. The second structure was built approximately 60 years later as an attached dwelling, fronting on C Street.

3. A previous owner subdivided the property and remodeled the structures in 1963 so that both structures are now one building, located on one lot. Each floor of the building consists of a separate, one-bedroom apartment unit.

4. The existing building is therefore a "flat," defined in 11 DCMR § 199.1 as a two-family dwelling.

5. The minimum lot width in an R-4 District for a flat is 18 feet, while the minimum lot area is 1,800 square feet. 11 DCMR § 401.3. The subject lot, rectangular in shape, is 55 feet wide along C Street and 31.14 feet deep along 3rd Street. With a lot area of 1,712.7 square feet, the property does not conform to the Zoning Regulations.

6. Under § 403.2, the maximum percentage of lot occupancy for a flat in an R-4 District is 60 percent. The existing flat, with 835.5 square feet lot coverage as shown in Exhibit 42, or 49 percent lot occupancy, complies with the Zoning Regulations.

7. Subsection 404.1 requires a 20-foot minimum depth of rear yard in the R-4 District. The flat has a 15.14-foot rear yard, which does not conform to the Zoning Regulations.

8. The Zoning Regulations define the term "side yard" in § 199.1 as "a yard between any portion of a building or other structure and the adjacent side lot line, except as provided elsewhere in this title." The wall of the building on the east side abutting 3rd Street is located on the lot line. The building therefore lacks a "side yard" along the 3rd Street side. However, under § 405.5, a side yard is not required along a side street abutting a corner lot.

9. The building has a 3.92-foot side yard on the west side.

10. Because the building has only one side yard, it is considered a "semi-detached" flat for zoning purposes. *See* 11 DCMR § 199.1 (definitions of "detached one-family dwelling" and "semi-detached one-family dwelling"; a "detached" dwelling is a dwelling completely separated from all other buildings and having two side yards, while a "semi-detached" dwelling has a wall on one side, which is either a party wall or a lot line wall, and one side yard).

11. Under § 405.3, a semi-detached flat in an R-4 District must have a side yard on the free-standing side. Under § 405.6, where a yard is provided in an R-4 District, it must be at least eight feet wide. Further, in the case of a building constructed before May 12, 1958, with a side yard less than eight feet, an addition may be made to the building provided the width of the side yard is not decreased and provided further that the width of the existing side yard is a minimum of five feet. 11 DCMR § 405.8. The existing side yard on the west side of the dwelling does not conform to §§ 405.3 and 405.6, and does not meet the minimum five-foot width requirement of § 405.8 for an addition.

12. The Board finds that the existing building is a "nonconforming structure" as defined in § 199.1 since it does not meet minimum lot area, rear yard, and side yard requirements.

**The Proposed Project and Variances**

13. The Brannons state that they are seeking variance relief to build a two-story addition to provide the extra living space they would like in order to start a family. The Brannons would convert the two-family flat, which they purchased as an investment property, to an owner-occupied, one-family dwelling.

14. The addition would be constructed along the west side of the building, where it would occupy the entire side yard; and at the rear of the building to the south, where it would occupy the entire rear yard for 25-feet of the width of the lot.

15. The Brannons would attach the addition to the wall of the building on the adjoining lot to the west at 225 C Street, S.E. They would also attach the addition to Mr. Dacy's building to the south at 305 3rd Street, S.E., by 18 inches.

16. Since the building with the addition would no longer have any side yards, it would be a "row dwelling" as defined in § 199.1.

17. The addition would be approximately 360 square feet in size on each floor.

18. The applicants would also construct a front porch, 37-feet wide and 5-feet deep.

19. Under § 401.3, a row dwelling in an R-4 District has the same minimum lot area and minimum lot width requirements as a flat in an R-4 District. Therefore, like the existing building, the building with the proposed addition would be nonconforming with respect to lot area.

20. With 1264 square feet lot coverage, as stated in Exhibit 42, the addition would have a 74 percent lot occupancy. Since the maximum percentage of lot occupancy under § 403.2 for a row dwelling in an R-4 District is 60 percent, the project requires a 14 percent variance.

21. The addition also requires a variance from the minimum rear and side yard requirements, since it would eliminate the existing rear yard for approximately one-half the width of the lot, as well as the existing side yard for the full depth of the building.

22. Finally, the addition requires a variance from § 2001.3(b) and (c) relating to additions to nonconforming structures, since the addition would not conform to lot area, lot occupancy, rear yard, and side yard requirements and would increase the nonconforming rear yard aspects of the existing structure and create a new nonconformity with respect to lot occupancy.

23. Both the existing two-family dwelling and the proposed one-family dwelling are matter-of-right uses in the CAP/R-4 District.

**Extraordinary or Exceptional Conditions of the Property**

24. The property is somewhat unusual in that two smaller structures have been combined into one building.

**Practical Difficulties**

25. The applicants are requesting zoning relief based on their desire to convert a two-family rental property to an owner-occupied, one-family dwelling and their personal preferences for a larger home with an improved interior circulation pattern.

26. The applicants currently enjoy full economic use of the property as a rental property, notwithstanding the elongated floor plan and the fact that there is a split floor level, with two or three steps, on each floor.

27. The Board finds that the difficulties faced by the applicants, which involve their personal preferences, are not "unduly burdensome" and do not rise to the level of "peculiar and exceptional practical difficulties" required for variance relief.

## CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. Mr. and Mrs. William F. Brannon are seeking area variances from the maximum percentage of lot occupancy requirements of 11 DCMR § 403, the minimum rear yard and side yard requirements of §§ 404 and 405, and the provisions of § 2001.3, which limits additions to nonconforming structures, in order to construct an addition to a flat and convert the flat to a one-family dwelling in a CAP/R-4 District. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the subject property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Bd. of Zoning Adjustment,* 579 A.2d 1164, 1167 (D.C. 1990).

In reviewing a proposed variance to determine whether it meets the three-prong test, the Board is required under D.C. Code § 1-309(d) (2001) to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. In this case, the ANC's written report, while expressing support for the application, did not provide the Board with the reasons for its recommendation or specify any issues or concerns.

With respect to the variance test, the Board concludes that the property is somewhat unique given its internal configuration. However, with respect to the second test, the Board concludes that the Brannons failed to demonstrate that they would encounter practical difficulties if the Zoning Regulations are strictly applied. The Brannons identified as practical difficulties the amount of interior living space that would be available if they converted the flat to a one-family dwelling without variance relief, the elongated floor plan of the dwelling, and the split floor levels within the building. They would prefer a larger home, with an improved interior circulation pattern, in which to raise a family.

The Brannons have not shown that alternative methods of combining the two units to create a one-family dwelling are unnecessarily burdensome or rise to the level of "peculiar and exceptional practical difficulties" required for variance relief. As in *Barbour v. District of Columbia Board of Zoning Adjustment,* 358 A.2d 326, 327 (D.C. 1976),

> The fact that an expansion requiring a variance is personally preferable to other methods not requiring variances does not constitute a unique property situation. Further, this case does not present a situation where no use could be made of the property absent a variance, as in *A.L.W., Inc. v. District of Columbia Board of Zoning Adjustment,* [338 A.2d 428 (1975)].

Here the Brannons could combine the two units into a one-family dwelling without variance relief, or alternatively, continue the two-family rental use of the property. Since the Brannons have not met the practical difficulty prong of the variance test, it is not necessary to reach the question of whether the requested variances would result in substantial detriment to the public good or the zone plan.

For the reasons stated above, the Board concludes that the applicants have not met their burden of proof. It is hereby **ORDERED** that the application is **DENIED.**

**VOTE: 3 – 2 –0** (Carol J. Mitten, Anne M. Renshaw, and Sheila Cross Reid (by absentee vote), to deny; Geoffrey H. Griffis and Susan Morgan Hinton, opposed).

**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 26 2001

PURSUANT TO 11 DCMR § 3125.6, THIS 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.

MS

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Office of Zoning

**BZA APPLICATION NO. 16709**

As Director of the Office of Zoning, I hereby certify and attest that on SEP 26 2001, a copy of the foregoing Decision and Order in BZA Application No. 16709 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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