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By Hand

Mr. Geoffrey Griffis
Chair, Board of Zoning Adjustment
441-4th Street, N.W., Room 210
Washington, D.C. 20001

Re: BZA Case No. 17085
Appeal of Larry and Louise Smith and Mary Ann Snow
James Marsh (the "Neighbors")
206 and 210 D Street, S.E./Square 763, Lots 26 and 28

Dear Chairperson Griffis and Fellow Board Members:

Pursuant to the Board's request on June 22, 2004, for a response to the Neighbors' lack of side yard objection to the granting of building permits for Lots 26 and 28 in Square 763 (206 and 210 D Street, S.E.), I have the following comments on behalf of the intervenor-property owner, Folger Park North, LLC:

BRIEF BACKGROUND

1. On September 12, 2003, the Neighbors filed an appeal with the BZA of DCRA's issuance of building permits to Folger Park based on lack of alleged lot size and lot width. BZA Case No. 17085. DCRA, however, granted the relief sought by the Neighbors administratively on September 30, 2003 and required Folger Park to seek the applicable variances for lot size and width.

2. On November 7, 2003, Folger Park filed an application with the BZA for lot size and width variances. BZA Case No. 17108. The Board held a hearing on the application on February 24, 2004.

3. On April 6, 2004, the BZA granted Folger Park's request for a variance based on the zoning history of the subject properties as an exceptional situation resulting in practical difficulties. The Board was unable to reach the Neighbors' Appeal on that day which

BZA
Case No. 17085
Exhibit No. 55

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 55

Appeal was not consolidated with Folger Park's Application. The Appeal hearing was then set for May 18, 2004.

4. On May 6, 2004, the Neighbors raised for the first time in their Appeal the alleged need for a side yard variance for Lots 26 and 28 based on Section 405.3 of the zoning regulations and the *Pritchard* case.

5. On May 18, 2004, the Neighbors withdrew their objections for the alleged need of the lot size and width variances, including objection to the subdivision plat. Folger Park objected to the late filing of the side yard appeal. The Board then asked for briefs on the "timeliness" issue of the Neighbors' side yard objection and set the case down for further hearing.

6. On June 22, 2004, over Folger Park's objection inter alia that the Neighbors' May 6th, 2004 side yard variance objection was untimely, the Board ruled that such objection was timely and set the July 6, 2004 public meeting date for a decision as to whether the Neighbors' Appeal should be granted or denied on the merits.

7. As Lot 27 (208 D Street, S.E.) has a common division wall on either side of its improvements, it is not the subject of the Neighbors' side yard appeal. See Counsel for the Neighbors letter of May 6, 2004 (the Applicant needs a side yard variance for the two end units, page 1).

ARGUMENT

1. **Lots 26 and 28 are not subject to a side yard requirement as provided for under § 405.6 and § 405.9 of the zoning regulations.**

   Section 405.6 of the zoning regulations states that except as provided in § 405.1 and § 405.2, a side yard shall not be required in an . . . R-4 . . . District. The two subject lots are in the CAP/R-4 District. An exception to this rule is provided in § 405.1 and .2 for one-family detached and one-family semi-detached dwellings.

   However, the subject lots are not one-family detached or one family semi-detached dwellings but are flats or two-family dwellings.

In addition, the summary table for side yards in the R zone in § 405.9 of the zoning regulations indicates that in an R-4 zone, no side yard is required except as provided under §§ 405.1, 405.2, and 405.6. See attached Exhibit A for reference. No mention is made in this summary of the requirements for a side yard under § 405.3, discussed *post*, for construction in an R-4 zone.

2. **Lot 28 (210 D Street, SE) abuts a 15 foot alley which is the equivalent of a side street exempt under § 405.5 of the zoning regulations.**

Section 405.5 of the relevant zoning regulations provides as follows:

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

The purpose of a side yard is to allow an adequate amount of separation between structures for light, air and privacy (Appeal No. 16811 of David and Janet Pritchard). By analogy, this Board has held that a 12 foot separation between dwellings is sufficient light and air for purposes of a variance from a side yard requirement. (Application of the Quadrant Corporation in BZA Case No. 14553, May 4, 1988 at 4). In that case, the Board also found that a 15 wide alley on the other side of the building (12 ft. on one side and 15 ft. on the other) was sufficient for light, air and privacy.

Lot 28 is adjacent to a 15 foot wide alley, as shown in Photograph No. 1 attached hereto as Exhibit B, which is the equivalent of a side street. In addition, Lot 28 is not adjacent to the Neighbors' property which is at the other end of the block. See Photograph No. 2 attached hereto as Exhibit C. As such, Lot 28 meets the essential requirements of Section 405.5 as a corner lot [end unit] on a side street [alley].

3. **Reliance by the Neighbors solely on Section 405.3 of the zoning regulations is misplaced and the *Pritchard* case is distinguishable.**

Section 405.3 of the zoning regulations states as follows:

> 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, it shall have a side yard on each resulting free-standing side.

The Neighbors, relying on the *Pritchard* case, argue that Lots 26 and 28 do not meet the common division wall requirements of this section and therefore a side yard variance is required. However, the *Pritchard* case involved a *one-family semi-detached* dwelling in the R-4 District where a minimum lot area of 3,000 square feet and a minimum lot width of 30 feet is required. Accordingly, the Board in *Pritchard* was not faced with the issue in this case, that is, where the lot size is insufficient to accommodate a side yard.

In our case, the two "end" flats would only be 8 feet wide if an eight foot side yard is required as the lot width is only 16 feet for each lot in issue, making those lots useless for building purposes.[1]

We expect the Neighbors to argue that Folger should have applied to build only two flats and provided the side yard required under Section 405.3. However, the Neighbors have waived that argument in withdrawing their objections to the validity of the subdivision for the three record lots (26, 27 and 28) in this case which was the basis of issuing the building permits for the subject property. Further, in the April 6th hearing on case 17108, the Board specifically included approval of the subdivision as part of the variance.

Finally, the purpose of a side yard set forth in *Pritchard* has been met, in that there is sufficient separation between buildings to afford the Neighbors light, air and privacy, that is, 30 feet between the Neighbors and Lot 26 and 15 feet between the adjacent commercial office building and Lot 28. See Exhibit D.

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[1] OP, in its February 17, 2004 report to the Board in this case, noted the same lot size and width problems in providing a side yard. (Report at 2). Under OP's calculations, the end units would only be 6.75 foot wide buildings, because of the height of the existing structures. OP stated in that report at 7:

> " . . . requiring the full side yard of about 9.25 feet would result in buildings of less than 7 foot 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."

4. **The Board should resolve any ambiguity in the zoning regulations in favor of Folger based on the facts of this case.**

We respectfully submit that, if the Neighbors had raised the side yard issue in September, 2003, with their other objections, the Board could have resolved any possible side yard issue in favor of Folger Park based on the zoning history of the case, that is, seven (7) written government appeals over thirteen (13) months culminating in the issuance of building permits with substantial construction completed, without any indication from DCRA or, for that matter, the Neighbors, that a side yard variance might be required.

Further, Folger would have had the opportunity to present evidence of light, air and privacy on each side of each unit sufficient to justify a variance.

We suggest that the Board should take each lack of side yard objection case on an *ad hoc* basis to determine whether a side yard is required under conflicting regulations, with deference to DCRA's decision to issue permits; lack of lot size and width sufficient to accommodate a side yard; the existence of light, air and privacy; and the date of the objection in relation to the issuance of building permits and prejudice to the permit holder. Folger meets all of these tests for a determination by this Board that no side yard is required and thus no side yard variance is needed.

Respectfully submitted,

HUNTON & WILLIAMS LLP

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A

404 REAR YARDS (R)

404.1 A rear yard shall be provided for each structure located in a Residence District, the minimum depth of which shall be as set forth in the following table:

ZONE DISTRICT	MINIMUM DEPTH OF REAR YARD
R-1-A, R-1-B	25 feet
R-2, R-3, R-4, R-5-A	20 feet
R-5-B, R-5-C, R-5-D	4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 15 feet.
R-5-E	3 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but not less than 12 feet.

404.2 In the case of a through lot or a corner lot abutting three (3) or more streets, the depth of rear yard may be measured from the center line of the street abutting the lot at the rear of the structure.

404.3 In the case of a lot proposed to be used by a public school or a public recreation and community center that abuts or adjoins along the rear lot line a public open space, recreation area, or reservation, the required rear yard may be reduced or omitted.

404.4 In the case of a building existing on or before May 12, 1958, an extension or addition may be made to the building into the required rear yard; provided, that the extension or addition shall be limited to that portion of the rear yard included in the building area on May 12, 1958.

SOURCE: § 3304 of the Zoning Regulations, effective May 12, 1958; as amended by Final Rulemaking published at 39 DCR 8305, 8307 (November 13, 1992); and Final Rulemaking published at 47 DCR 9741-43 (December 8, 2000), incorporating by reference the text of Proposed Rulemaking published at 47 DCR 8335, 8368-69 (October 20, 2000); as amended by Final Rulemaking published at 50 DCR 10137 (November 28, 2003).

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, 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 (1) 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 or a public recreation and community center 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:

ZONE DISTRICT	MINIMUM WIDTH 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 405.6
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 under §§ 405.1, 405.2, and 405.6.

SOURCE: § 3305 of the Zoning Regulations, effective May 12, 1958; as amended by: Zoning Commission Order No. 17, dated November 17, 1970, published at 17 DCR 305 (November 30, 1970); Final Rulemaking published at 39 DCR 8305, 8307 (November 13, 1992); and Final Rulemaking published at 47 DCR 9741-43 (December 8, 2000), incorporating by reference the text of Proposed Rulemaking published at 47 DCR 8335, 8369 (October 20, 2000); as amended by Final Rulemaking published at 50 DCR 10137 (November 28, 2003).

B



Subject on left, alley, sports club on right

C



SUBJECT PROPERTY

D



Neighbors on left; subject on right