ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
ATTORNEYS AT LAW

SUITE 1200
1801 K STREET, N.W.
WASHINGTON, D.C. 20006-1307
TEL: 202-775-0725 FAX: 202-223-8604
www.rkmc.com

RICHARD B. NETTLER
JEANNINE RUSTAD
(202) 775-0725

June 30, 2004

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 Larry and Louise Smith and James Marsh and Mary Ann Snow**
206, 208 and 210 D Street, S.E. -- Square 763, Lots 26, 27 and 28

Dear Mr. Griffis:

In accordance with the Board's request at the conclusion of the June 22, 2004 hearing enclosed you will find the original and twenty (20) copies of the proposed findings of fact and order of the appellants in the above-referenced matter.

Sincerely,

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

Richard B. Nettler
Jeannine Rustad

Enclosures (as stated)
cc: Mary Ann Snow
Larry & Louise Smith
ANC 6B (w/encl.)
Lisa Bell, Esquire (by hand; w/encl.)
Richard L. Aguglia, Esquire (by hand; w/encl.)
Richard Nero (by email; w/encl.)
Gary Peterson (by email; w/encl.)

Word 45659662.1

BZA
Case No. 17085
Exhibit No. 56

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 56

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17085 of Larry and Louise Smith and Mary Ann Snow and James Marsh, pursuant to 11 DCMR §§ 3100 and §3101, from the administrative decision of the Zoning Administrator, et *al.* in the issuance of Building Permit Nos. B424724, B451616, etc., to Chris Doefler and/or Folger Park North, LLC, for the construction of three flats (two family dwellings). Appellants allege that the Zoning Administrator did not properly apply the provisions of subsection 405 regarding side yards. The subject premises are located in the CAP/R-4 zone district at 206, 208, and 210 D Street, S.E. (Square 763, Lots 26, 27 & 28).

HEARING DATES: January 27, 2004, February 24, 2004, May 18, 2004 & June 22, 2004
DECISION DATE: July 6, 2004

DECISION AND ORDER

Larry and Louise Smith and Mary Ann Snow and James Marsh filed an appeal with the Board of Zoning Adjustment on September 12, 2003, challenging, *inter alia*, the issuance by the Building and Land Regulation Administration of the Department of Consumer and Regulatory Affairs of Building Permit Nos. B451260, B451261 and B451262 on August 25, 2003, permitting the construction of a new two-family flats at 206 D Street, S.E. (Square 763, Lot 26), 210 D Street, S.E. (Square 763, Lot 28) and 208 D Street, S.E., (Square 763, Lot 27), respectively. After a public hearing, the Board granted the appeal.

Preliminary and Procedural Matters.

Parties. – Appellants, Larry and Louise Smith and Mary Ann Snow and James Marsh ("Neighbors"), were represented by Richard B. Nettler and Jeannine Rustad of Robins, Kaplan, Miller & Ciresi L.L.P.

Intervener, Folger Park North, L.L.C., the owner of the subject property, was represented by Richard Aguglia of Hunton & Williams.

The Department of Consumer and Regulatory Affairs ("DCRA") was represented by its senior counsel, Lisa Bell.

Notice of Appeal and Notice of Public Hearing. By memoranda dated _____, the Office of Zoning advised ANC 6B, the ANC commissioner for the single-member district within which the property is located, 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 February 24, 2004. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on _____, 2003, mailed the

appellant, Folger, ANC 6B and the Zoning Administrator notice of hearing. Notice of hearing was also published in the D.C. Register on _____, 2003, at __ DCR _____.

Related Application. On September 16, 2003, a stop-work order was imposed on construction at the subject property on the basis that the individual lots violated the lot area and width provisions of the zoning regulations and, therefore, variances were needed for the development. Although DCRA never lifted the stop-work order, Folger continued with construction. On November 7, 2003, Folger filed BZA Application No. 17108 (the "Application") and, with the support of the Office of Planning ("OP"), requested an expedited hearing due to risk of adverse effects from winter weather on the partial construction. Although the basis for the expedited hearing was the risk of exposure of the partial construction, Folger resumed construction on or about October 1, 2003, a fact it did not disclose in requesting the expedited hearing. At the hearing in the matter, Folger testified that it was permitted to resume construction based on an indemnification agreement entered into with the District. However, there was no indemnification agreement. Rather, Folger proceeded with construction at its own risk. A hearing in BZA Application No. 17108 was scheduled for January 27, 2004.

On January 13, 2004, the Neighbors filed a motion for party status in Application No. 17108, as well as a motion to consolidate the Application with the instant appeal. At the January 27, 2004 hearing, the Board denied the motion to consolidate and ruled that it would hear the Application before the appeal. Upon Folger's request for a continuance, the hearing in the Application was continued to February 24, 2004.

In its report dated February 17, 2004, OP raised the issue that, in addition to the need for area variances from the lot width and area, an area variance may be necessary from the side-yard requirements. On February 23, 2004, the Neighbors supplemented their pleadings in the Application to include as a basis for denial of the requested variances the need for side yard variances. At the February 24, 2004 hearing, the Board recognized that compliance with the side-yards was at issue.

At its April 6, 2004 public meeting, the Board granted the relief requested in BZA Application No. 17108 on the grounds that (a) the subject property was unique due to its zoning history, (b) practical difficulty resulted from Folger's reasonable reliance on the District and consequent expenditures ($1.2 million at the time of the stop work order and $2.4 million at the time of the hearing); and (c) there would be no harm to the public good by granting the variances. A final written decision has not yet been issued in that matter. However, as the Application did not include a request for variances from the side yard requirements of the zoning regulations, the Board did not reach a decision on that issue. Instead, the Board stated that the need for this relief would be picked up by the Zoning Administrator in permit processing and sent back to the Board for relief, if needed.

Amendment of the Appeal. The Appeal, as originally filed, challenged: (1) September 30, 2002 approval and issuance of S.O. 009755 by DCRA subdividing previous Lot 4 and part of Lot 6 in Square 763 into Lots 26, 27 and 28; (2) issuance by BLRA of Permit No. 424724 on November 13, 2002, permitting the razing of the Pepco substation at 210 D Street, S.E., Lots 800, 801 and 802 in Square 763; (3) issuance by BLRA of Permit No. B451616 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 206 D Street, S.E., Lot 26 in Square 763; (4) issuance by BLRA of Permit No. B451615 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 208 D Street, S.E., Lot 27 in Square 763; (5) issuance by BLRA of Permit No. B451617 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 210 D Street, S.E., Lot 28 in Square 763; (6) issuance by BLRA of Permit No. B451260 on August 25, 2003, permitting the construction of a new two-family flat 206 D Street, S.E., Lot 26 in Square 763; (7) issuance by BLRA of Permit No. B451262 on August 25, 2003, permitting the construction of a new two-family flat 208 D Street, S.E., Lot 27 in Square 763; (8) issuance by BLRA of Permit No. B451261 on August 25, 2003, permitting the construction of a new two-family flat 210 D Street, S.E., Lot 28 in Square 763; (9) failure of DCRA to take action to compel the owner to remove obstructions (fence closing and construction trailer on) from north-south alley to the immediate east of the subject property; and (10) issuance of Public Space Permit for dumpster. By letter dated October 31, 2003, the Neighbors further amended their appeal to include the lifting of the stop work order by DCRA. However, it was noted in the letter that, despite numerous attempts, the Neighbors were unable to ascertain from DCRA whether or not the stop work order had, in fact, been lifted. After the April 6, 2004 decision in the Application, the Neighbors learned that the stop work order had not been lifted but, rather, that Folger had proceeded with construction at its own risk.[1] Accordingly, the Neighbors withdrew this basis for the appeal.

In its prehearing statement dated February 10, 2004, the Neighbors withdrew as a basis for their appeal counts numbered 2, 9 and 10. In light of the Board's granting of the variances in BZA Application No. 17108, in their supplemental prehearing statement dated May 6, 2004, the Neighbors limited their appeal to the issuance of the building permits and clarified that the basis for the challenge of the permits for Lots 26 and 28 (Permit Nos. B451260 and B451261) was due to the property owner's failure to comply with the side yard requirements of the zoning regulations.

Motion to Dismiss. Folger moved to dismiss the appeal as untimely. Folger argued that: (1) the appeal itself was untimely; (2) the side yard issue was untimely; and (3) the Neighbor's were estopped from raising the side-yard issue. Relying principally on case law and regulations no longer in effect, DCRA concurred with Folger regarding the timeliness of the side yard issue.

---

[1] The Neighbors also learned at this time that, contrary to Folger's testimony in it's Application, there was no indemnity agreement between the District and Folger. Although Folger had submitted a proposed indemnification to the District, the proposal was not satisfactory to the District and, therefore, was not signed by the District.

The Board denied the motion to dismiss. With regard to the initial filing of the appeal, as the permits that are the basis of the appeal were issued on August 25, 2003, the filing date of September 12, 2003, was well within the sixty (60) day limitation of 11 DCMR § 3112.2(a). With regard to the side yard issue, the Board agreed that the zoning regulations only speak to the timely filing of an appeal and not the grounds for an appeal. Because the Neighbors timely appealed the issuance of the building permits, consistent with the Board's past procedure, the Board found that the supplementation of the appeal was permissible.

The Neighbors' Position. It is the Neighbors' position that BLRA erred in issuing the permits for Lots 26 and 28 (Permit Nos. B451260 and B451261) on the ground that the project proposed by the property owner does not comply with the side yard requirements of the zoning regulations and, therefore, an area variance is needed from those requirements.

DCRA's Position. It was DCRA's position that: (1) BZA Application No. 16811 of David and Janet Pritchard (April 2, 2002 and June 4, 2002) is not applicable to the instant matter because the houses being built are not semi-detached houses, as in Pritchard, but are townhouses; (2) the Zoning Administrator determined that a side yard variance was not necessary and, therefore, issued the building and foundation permits; and (3) section 405.6, not 405.3, applies in the instant matter.

Folger's Position. It is Folger's position that no side yard is needed, as DCRA had reviewed and approved the proposed development on seven (7) occasions. Folger further asserts that, due to the fact that Lot 26 is adjacent to a private right of way and Lot 28 is adjacent to a public alley, adequate light an air are provided, thus mitigating the need for a side yard.

ANC 6B. At its February 9, 2004 meeting, the ANC voted to support the appeal.

Persons in Support of the Appeal. The Capitol Hill Restoration Society ("CHRS") submitted a letter is support of the appeal. CHRS also noted the need for a side-yard variance.

Persons in Opposition of the Application. No persons testified in opposition the appeal.

Relevant Definitions.

The terms "one-family semi-detached dwelling", "row dwelling and "side yard" are terms of art in the zoning regulations and defined in section 199.1 as follows:

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

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

Dwelling, two-family - a dwelling used exclusively as a residence for two (2) families living independently of each other. A two-family dwelling is a flat.

Flat - a two-family dwelling.

Lot, corner - a lot fronting on two (2) or more streets at their junction, with the streets forming with each other an angle of forty-five degrees (459 up to and including one hundred thirty-five degrees (135°).

Lot, interior - a lot other than a corner lot or a triangular lot.

Lot, triangular - a lot fronting on two (2) streets at their junction, the streets forming with each other an angle of less than forty-five degrees (45°).

There is no definition for "townhouse" in the zoning regulations.

Summary of Evidence

1. The subject property is located at 206, 208 and 210 D Street, S.E., Square 763, Lot 26, 27 and 28 (the "Property"), previously known as 210 D Street, S.E., Lot 4 (assessment and taxation lots 800, 801 and 802) in Square 763. The Property is located in the Capital Hill Historic District.

2. Each lot has a lot width of sixteen feet (16'). Lot 26 has a lot area of 1,447 square feet; Lot 27 has a lot area of 1,529 square feet; and Lot 28 has an area of 1,529 square feet.

3. The proposed development (which is near completion), consists of three (3) flats. The flats on Lots 26 and 28 (206 and 210 D Street, S.E., respectively) do not adjoin another row house on one side. The flat on Lot 26 is adjacent to a private right of way that runs behind the adjacent properties facing 2nd Street. Lot 28 is adjacent to a public alley.

4. Square 763 is bounded by D Street S.E. to the south, 3rd Street S.E. to the east, C Street S.E. to the north, and 2nd Street S.E. 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 row houses, but also includes a 6-story apartment building facing C Street S.E., and a sport club and an American Legion building along D Street S.E. The square is served by an internal alley system with access from C Street, and normally from D Street, which has been closed due to the construction at the Property since approximately July 2003.

5. Larry and Louise Smith reside at 322 2nd Street, S.E. and Mary Ann Snow and Jim Marsh reside at 320 2nd Street, S.E. The Smith property backs directly on the subject property. There is a four-foot (4') right-of-way at the rear of the Smith Property. This private right-of-way is four feet (4') wide and runs behind and serves 318, 320, 322, 324 and 326 2nd Street, SE. The Snow/Marsh property backs to the right-of-way, which is adjacent to the subject property.

6. Folger purchased the Property on June 14, 2002. On April 2, 2003, Folger filed three separate applications for building permits for the Property. On the permit application for Lot 26 (206 D Street), which was filed by Elizabeth Johnson, the owner was listed as Folger Park North, LLC, with an address of 206 D Street (210 was crossed out). W.J. Maiden filed the applications for 208 and 210 D Street, S.E. (Lots 27 and 28, respectively). The address of the owner, Folger, was listed as 208 D Street (210 crossed out) and 210 D Street, respectively. On or about July 7, 2003, the applicant excavated the private right of way behind the Neighbors' properties.[2]

7. On July 25, 2003, three separate applications for plumbing permits were filed for each lot. The owner and address of the lot was listed as Chris Doefler, 210 D Street.

8. On August 25, 2003, building permits were issued for construction of flats on the Property – permit no. B454260 for Lot 26, B454262 for Lot 27, and B454261 for Lot 28.

9. Starting on or about July 7, 2003, the Neighbors began to investigate the nature of the proposed construction, as well as the approvals and permitting granted by DCRA. The Neighbors were repeatedly assured by DCRA that no building permit applications had been filed and that, once the permit applications were filed, they would undergo zoning review and, as the lots were substandard, referred to the Board for relief. The Neighbors were unable to obtain a copy of the plans for the proposed development from DCRA until August 14, 2003. By letter dated August 27, 2003, counsel for the Neighbors informed DCRA of the suspected zoning violations at the subject properties and requested a meeting with DCRA. On September 3, 2003, notice was sent to the Neighbors from DCRA acknowledging their letter and informing the Neighbors that they would receive a response within seven (7) business days. Rather than wait for a response, on September 12, 2003, the Neighbors filed the instant appeal. On September 16, 2003, a stop work order was issued on the basis that the lot width and area did not meet the requirements and, therefore, variances were need for the development. At the time of the issuance of the stop work order, the construction on the Property was approximately three (3') above grade.

10. Without explanation, construction at the subject properties resumed on or about October 1, 2003. Despite numerous attempts, the Neighbors were unable to get and answer from DCRA as to the status of the stop work order. It was not until after the April 6, 2004 decision in the

---

[2] The right of way runs parallel to the western border of the Property adjacent to 326-318 2nd Street. The right of way adjacent to 326-322 2nd Street is owned by those property owners and is a part of those lots.

Application that the Neighbors learned that the stop work order had not been lifted and that Folger had proceeded with construction at its own risk. The Neighbors further discovered that, contrary to Folger's testimony at the hearing in the Application, there was no indemnification agreement between the District and Folger allowing Folger to proceed with construction.

11. Subsequent to the issuance of the stop work order, Folger applied for area variances from the lot area and width requirements in BZA Application No. 17108. At its April 6, 2004 public meeting, the Board granted those variances, without reaching the issue of any side-yard requirements, which issue was raised by both OP and the Neighbors.

12. ANC 6B at its February 9, 2004 meeting unanimously voted to support the appeal.

FINDINGS OF FACT

Based on the evidence of record, the Board finds as follows:

1. The Board finds that Folger was previously issued building permits for the construction of three flats on the Property but that a stop work order was imposed by DCRA when it was brought to the attention of DCRA by the Neighbors that the Lots were substandard and that there was no basis for grandfathering the Property to be developed with three flats. The Board finds that Folger proceeded with construction after the issuance of the stop work order at its own risk.

2. In addressing the issues and concerns raised by the Office of Planning, the Neighbors and the CHRS, the Board finds that the Folger's proposal will result in the need for variances from the side yard requirements for Lots 26 and 28.

3. The dwelling on Lot 26 shares one common division wall with a flat on the adjacent lot to the east (Lot 27). The western side of Lot 26 coincides with the rear lot lines of three lots developed with row-dwellings fronting on 2nd Street, S.E. and a private right of away adjacent to the rear of two lots fronting on 2nd Street, S.E.

4. The dwelling on Lot 27 shares two common division walls – one with the flat on the adjacent lot to its west (Lot 26) and the other with the flat on the adjacent lot to its east (Lot 28).

5. The dwelling on Lot 28 shares one common division wall with a flat on the adjacent lot to the west (Lot 27). The eastern side of Lot 28 coincides with a public alley.

6. Lots 26, 27 and 28, which are rectangular in shape, only front on D Street, S.E.

7. The dwellings on Lots 26 and 28 (which are interior lots) are, therefore, classified as semi-detached (*ie.*, sharing only one common division wall) flats (two-family dwellings).

CONCLUSIONS OF LAW

The Appeal was Timely Filed.

Section 3112.2(a) provides that:

> An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

The administrative decision in the instant matter is the issuance of building permit nos. B451616, B451615 and B451617, which were issued on August 25, 2003. Given that the appeal was filed on September 12, 2003, it was clearly within the sixty (60) statute of limitations and, therefore, timely.

With regard to the supplementation of the appeal on May 6, 2004, this clarification was also permissible. In reviewing whether or not an amendment of an administrative appeal should be permitted, what is at issue is not prejudice to the opposing party in general. *Usery v. Marquette Cement Mfg.*, 568 F.2d 902, 907 (2nd Cir. 1977); *Albemarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000); *Simplex Time Recorder Co. v. Sec. of Labor*, 766 F.2d 575, 585 (D.D.C. 1985). Rather, prejudice is to be viewed as to whether the opposing party will be denied the opportunity in presenting his case. *Id.* As the May 6, 2004 clarification was filed prior to any hearing on the matter, there was no prejudice to Folger in presenting its case to the Board.

This conclusion is consistent with the zoning regulations regarding procedure in appeals before the Board. Section 3109 of the zoning regulations provides that the Office of Zoning, with approval by the Board, may adopt forms to ensure that adequate information is provided. The appeal form, as adopted by the Board, merely requires that an appellant state the decision appealed from and what the effect of that decision was. Thus, in the instant matter, it was sufficient to merely appeal the issuance of the building permits in violation of the zoning regulations. Similarly, section 3112.2(a) only speaks to the timely filing of an appeal – not the basis for that appeal. Recognizing the difficulty appellants often encounter in obtaining documentation from DCRA, the Board frequently lends flexibility to the amending of or adding issues to an appeal.

Recognizing that limited information is required with the filing of an appeal, section 3112.10 of the zoning regulations requires that:

> No later than fourteen (14) days before the date of the hearing for the appeal, the appellant shall file with the Board any additional statements, information, briefs, reports (including reports or statements of expert and other witnesses), plans, or other materials

> that the appellant may wish to offer into evidence at the hearing. Any map, plan, or other document or matter readily available to the general public need only be fully referenced and the source given by the appellant in place of filing a copy.

As indicated above, the Neighbors filed their prehearing statement in the instant appeal on February 10, 2004. On May 6, 2003, the Neighbors, realizing that they had only filed a statement on the side yard issue in the Application, supplemented their prehearing statement in the instant matter to incorporate their briefing on the side yard issued filed in the Application case three (3) months earlier. As a supplemental statement, there was no requirement that the statement be filed fourteen (14) days in advance of the hearing. Regardless, even if section 3112.10 applied to supplemental statements, section 3100.5[3] allows the Board to waive requirements such as filing deadlines.

As to whether the supplement was permissible or if it was barred by the statute of limitations, as argued by Folger and DCRA, as the side yard issue arises out of the same set of circumstances and facts – or rather, from the building permits appealed from – the supplement relates back to the original filing, which was well within the period of limitations. *See Simplex Time Recorder Co. v. Sec. of Labor*, 766 F.2d 575, 585 (D.D.C. 1985)(as amendment arose under same transaction or occurrence as original citation in administrative matter, the amendment related back to the date of the original pleading and was, therefore, timely).

There is a Need for Side Yards for Lots 26 and 28.

1. <u>BZA Application No. 16811 of David and Janet Pritchard is Decisive on the Issue of the Need for Side-Yards for Semi-Detached Homes</u>.

DCRA's position was that Pritchard is inapplicable to the instant matter as Pritchard involved a semi-detached home, whereas this matter involves "townhouses". However, as illustrated below, the dwellings in questions are, in fact, semi-detached flats. Moreover, while "semi-detached" is a term of art in the zoning regulations, as is "row house", "townhouse" is not a term of art.

As the two end homes (Lots 26 and 28) only adjoin another flat on one side, they are semi-detached units. Given that these lots are interior, not corner, lots, they must comply with the side yard requirements. *See* 11 DCMR § 405.3. Specifically section 405.3 provides that:

---

[3] Section 3100.5 provides that:

> ...the Board may, for good cause shown, waive any of the provisions of this Chapter, if, the judgment of the Board the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

> 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.) While this provision is arguably in conflict with section 405.6,[4] 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. That is, subsection 405.3 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 provided another instance in which sections §§ 405.6 and 405.9[5] apply.

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 and June 4, 2002). 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."

---

[4] 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, 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.

[5] These sections reference §§405.1 and 405.2, which are not applicable to a flat in the R-4 District.

> Moreover, the last clause of the sentence, in requiring "a side yard on each resulting free-standing side," refers to each[6] one of potentially two freestanding sides. 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 "[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.

In BZA Appeal No. 16811, the Zoning Administrator 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. However, Subsection 405.3, 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. As these regulations were in place prior to the adoption of § 405.3, section 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 (8') 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. However, the Board noted that subsection 401.3 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.

---

[6] 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).

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.

In the instant matter, the lots created by Folger were substandard at only sixteen feet (16') wide. Folger argued that subdividing the subject property into two (2) twenty-four foot (24') wide lots would have resulted in structures that were unusually wide for the neighborhood. However, this argument ignored the fact that, with eight foot (8') side yards, the resulting structures would only have been sixteen feet (16') wide, and, as such, entirely consistent with the surrounding neighborhood.

Similarly, 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. 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.

The dwelling at issue in Brannon had a 3.92-foot side yard on its west side and was, therefore, considered a "semi-detached" flat. The applicant proposed to construct an addition along the west side of the building occupying the entire side yard. The addition was to be attached to the wall of the building on the adjoining lot to the west. The result of the addition would be to eliminate the side yard for approximately one-half the width of the lot.

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. 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. 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.

2. Provision of Light and Air Not at Issue in the Instant Appeal.

Both DCRA and Folger have argued that, as adequate light and air are provided for Lot 26 and 28 and the surrounding properties, there is no need for a side-yard for these properties. Specifically, Folger argued that "the rationale behind a side yard is completely satisfied in this case." June 22, 2004 TR at p. 9. However, while these facts may be relevant to an application for side-yard variances, they do not bear any relevance in the applicability of section 405.3. Thus, these facts are irrelevant to the decision of whether or not to grant the appeal. Furthermore, there is nothing in the zoning regulations that allows a property owner to use private property of another or public property to satisfy its open space requirements, such as the side yard requirement.

3. DCRA's Arguments are not Persuasive.

DCRA argued that the appeal should be denied because: (1) the Zoning Administrator determined that a side yard variance was not necessary and, therefore, issued the building and foundation permits; and (2) section 405.6 of the Zoning Regulations, not 405.3, applies in the instant matter.

With regard to the first argument, it is the decision of the Zoning Administrator in issuing the permits, thus determining that no side yards were required, that is the subject of this appeal. Therefore, it is for the Board to determine whether or not the Zoning Administrator misinterpreted the zoning regulations in issuing the building permits. What the Zoning Administrator determined is not binding on the Board and is in direct conflict with the Board's prior decisions. As explained above, it is the Board's conclusion that side yards are required for Lots 26 and 28.

With regard to DCRA's second argument, both sections 405.3 and 405.6 apply. Consistent with our decisions in *Pritchard* and *Brennan*, section 405.3 provides that a semi-detached flat must provide a side yard on the side that does not adjoin a common party wall. Determining that a side yard must be provided, section 405.6, as well as 405.9, set forth the necessary width of such side-yard. The lack of reference to section 405.3 in section 405.6 can only be deemed as an inadvertent omission, as section 405.3 was adopted subsequent to section 405.6.

ANC Great Weight

The Board is required to give "great weight" to issues and concerns raised by the affected ANC. D.C. Official Code §§ 1-309.10(d) and 6-623.04 (2001). The Board has seriously considered the report of ANC 6B, in which the ANC unanimously voted to support the Neighbors' appeal

CONCLUSION

Based on the record before the Board and for the reasons stated above, the Board concludes that the appeal was timely filed. The Board further finds that an area variance from 11 DCMR § 405.3 is needed for Lots 26 and 28.

It is therefore **ORDERED** that the appeal be **GRANTED**.

VOTE: 5-0-0 (Geoffrey H. Griffis, David A. Zaidain, Ruthanne Miller and _____, to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each voting Board member has approved the issuance of this Order denying the application.

APENDIX A

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.

405.5 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.

405.9 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.

3100.5 Except for §§ 3100 through 3105, 3121.5 and 3125.4, the Board may, for good cause shown, waive any of the provisions of this chapter if, in the judgment of the Board, the waiver will not prejudice the rights of any party and is not otherwise prohibited by law.

3109.1 The director shall, following approval of the Board, issue and revise appeal and application forms and instructions to ensure presentation of adequate information for the understanding and processing of appeals and applications.

3110.4 Except as otherwise provided by law, whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, for good cause, be extended or reduced by the Board with notice to all parties.

3112.2 Any person aggrieved by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board as follows:

(a) An appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.

(b) If the decision complained of involves the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof, the following subparagraphs shall establish the latest date on which an appeal may be filed:

(1) No appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof. For purposes of this subparagraph, the phrase "under roof" means the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place; and

(2) The provisions of paragraph (b) of this subsection shall not relieve an appellant of the jurisdictional requirement in paragraph (a) of this subsection of filing a timely appeal.

(c) Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.

(d) The Board may extend the sixty- (60) day deadline for the filing of an appeal only if the appellant demonstrates that:

(1) There are exceptional circumstances that are outside of the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board: and

(2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.