DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL OF:

Larry and Louise Smith and Mary Ann Snow from the Administrative Decision of DCRA On Permits B454260 thru B454262

BZA Appeal No. 17085

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEAL NO. 17085 of Larry and Louise Smith and Mary Ann Snow, pursuant to 11 DCMR § 3100 and 3101, from the decision of the Department of Consumer and Regulatory Affairs to issue foundation permits B451615 thru B 451617, issued May 23, 2003 and building permits B454260 thru B454262, issued August 8, 2003, to Folger Park, LLC for construction at 206-210 D Street, S.E., Washington, D.C.

HEARING DATES: January 27, February 24, May 18, June 22, 2004

DECISION DATE: July 6, 2004

I. ***PROPOSED FINDINGS OF FACT***

1. On May 23, 2003, the Department of Consumer and Regulatory Affairs (DCRA) issued three (3) foundation permits, B451615 thru B 451617, to Folger Park, LLC for construction of three townhouses at 206-210 D Street, S.E.

2. On August 8, 2004, the Department of Consumer and Regulatory Affairs (DCRA) issued three (3) building permits B454260 thru B454262 to Folger Park, LLC ("Folger" or "Owner") to construct three town houses at 206-210 D Street, N.W., located in a CAP/R-4 District.

3. On September 12, 2003, Larry and Louise Smith and Mary Ann Snow filed this appeal with the Board of Zoning Appeal (BZA) challenging the Acting Zoning Administrator, Mr. Denzil Noble, Administrator of the Building and Land Regulation Administration (BLRA) of DCRA, decision to issue foundation and building permits to Folger Park.

4. In its appeal, Appellant alleged that: 1) the approval and issuance of S.O. 009755 by the D.C. Surveyor approving the subdivision and creating Lots 26, 27 & 28; 2) the issuance of a raze permit for the Pepco substation at 210 D Street, S.E., Lots 800, 801 and 802 in Square 763; 3)-5) issuance of foundation permits for 206-210 D Streets, S.E.,

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B451615 thru B 451617; 6)-8) issuance of building permits for 206-210 D Streets, S.E., B454260 thru B454262; (9) failure to take enforcement action against Folger for obstructions in the north-south alley; and (10) issuance of public space dumpster. The appeal did not include Folger's failure to obtain a side yard variance.

5. On September 16, 2003, DCRA issued a stop work order on the basis that the lots failed to meet the area and width requirements of the zoning regulations. DCRA requested that Folger cease construction and immediately apply for a special exception variance from the BZA. Construction continued subject to the submission of the BZA variance application for lot area and lot width.

6. In response to DCRA's request, Folger requested an expedited hearing on its application for a special exception variance. BZA Appl. No. 17108. On February 24, 2004, the BZA held a hearing on Folger's application.

7. On February 10, 2004, Appellants filed a Pre-Hearing Statement and a response to Folger's Motion to Strike Appeal (included in the Application for an Area Variance). In that Statement, Appellant withdraws three of its claims (Nos. 2, 9 & 10) but did not supplement its appeal with a challenge to the Zoning Administrator's alleged failure to request a side yard variance.

8. On February 17, 2004, the Office of Planning provides its report on the area variance request by Folger. OP recommends approval of the project with 'legal' non-comforming lots. Among the conclusions stated in the Executive Summary (Section III), it states, "[f]urther confusing the issue is that an additional variance *may* be required for side yard, although OP feels the zoning regulations are not entirely clear on the matter." In Section IX, entitled Possible Additional Zoning Relief Required, OP discussed the potential need for a side yard variance and the inconsistencies within the zoning regulations on this point. The report concludes a side yard variance such be issued because "[t]he presence of the easement area to the west and that alley to the east lessen potential impacts on neighboring properties."

9. At the February 24, 2004 hearing, the BZA reviewed the application materials submitted by Folger which included the report from the Office of Planning, dated February 17, 2004 in support of the area variance.

10. On April 6, 2004, the Board grants the area variance thereby approving the completion of the Folger project.

11. On May 10, 2004, Folger filed a Motion to Dismiss the Appeal, based upon the fact that the issues were moot in light of the variance. Folger also argued that, because Appellant had not filed a timely appeal of these issues, it should be precluded from raising them.

12. On May 6, 2004, the appellant moved to amend its appeal. In light of the Board's decision to grant the application, the appellant amended its appeal to add a new issue –

the failure to obtain a side yard variance because the project does not comply with side yard requirements.

13. On May 18, 2004, the Board heard arguments regarding the issue of timeliness and whether an appeal can be amended at any time.

14. On June 2, 2004, Folger filed a Brief requesting that the side yard appeal be dismissed because it was untimely.

15. On June 7, 2004, DCRA filed a Statement regarding the time to file a supplement to an appeal and argued the appellants' new appeal was untimely.

16. On June 22, 2004, without a hearing on the filings, the Board denied the request of Folger and DCRA to dismiss the new appeal as untimely. The Board requested that the parties submit Proposed Findings of Fact and Conclusions of Law pertaining to the side yard issue.

17. The three townhouses at 206-210 D Street, S.E., extend from lot line to lot line. The westernmost lot borders the alley and the easternmost lot abuts, in a perpendicular fashion, up against the rear lot of a corner property. No common division walls exist on the exterior lots.

18. Side yards are not required at 206-210 D Street, S.E. project because the development consists of new construction and multiple rowhouse dwellings.

II. ***PROPOSED CONCLUSIONS OF LAW***

1. 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 a yard is provided, it shall be at least three inches (3 ins.) wide per foot of height of building, but not less than eight feet (8ft.) wide. 11 DCMR § 405.6 (Feb. 2003).

2. A one-family detached home or a one-family semi-detached home located in a R-4 District that includes a side yard are required to meet the size requirements outlined in this provision. 11 DCMR §§ 405.1, 405.2 (Feb. 2003). A one-family detached dwelling must meet the side yard requirements for R-1 District. A one-family semi-detached home must meet the side yard requirements of an R-2 District. *Id.*

3. The terms one-family detached dwelling, one-family semi-detached dwelling, rowhouse dwelling are terms of art in the zoning regulations. These terms are defined in the Zoning Regulations as:

(a) A flat is defined as two-family dwelling;

(b) A one-family, semi-detached dwelling is defined as a one family dwelling where the wall on one (1) side of either a party wall, or lot line wall, having one (1) side yard;

(c) A one-family, detached dwelling is defined as a one family dwelling completely separated from all other buildings and having two (2) side yards; and,

(d) A row dwelling is a one-family dwelling having no side yards. 11 DCMR § 199.1 (2003).

4. The Folger Park is a multiple dwelling development in an R-4 District. As such, Section 405.3 doesn't apply because it consists of three buildings not two.

5. Since side yard was not required, then Section 405.6 applies to the Folger project.

6. The Zoning Administrator has concluded that a side yard is not required in a multiple rowhouse dwelling of three units where the common division was exists on one side and the exterior walls run to the lot lines.

7. The Appellants' reliance of the *Pritchard* case is not controlling. The *Prichard* case is easily distinguished from Folger development. The key factual elements at issue in the *Pritchard* involve an existing single family row house and construction of an addition. The addition or extension of the row house eliminated the side yard expanding the unit from lot line to lot line addition. In that instance, a one family semi-detached dwelling became a row house. In this case, the Folger development consists of new construction of three rowhouses. The units extend from lot line to lot line with exterior walls abutting an alley and the rear yard of a corner lot. In this way, Section 405.3 does not apply since it includes two-unit multiple buildings. BZA Appeal No. 16811

8. The Zoning Administrator has concluded that the side yard variance is not required pursuant to 11 DCMR § 405.6.

9. The Zoning Administrator is charged with the implementation of the Zoning Regulations.

10. The Board of Zoning Adjustment (BZA) is authorized to hear appeals by any person aggrieved by any decision of the "Inspector of Buildings" [or Zoning Administrator] granting or refusing a building permit or other administrative decision based upon the zoning regulations or a zoning map. The Board, however, has not found any reversible error in the determinations made by DCRA in issuing three (3) foundation permits B451615 thru B 451617, and three (3) building permits B454260 thru B454262 at issue in this case.

11. The Board will not interfere with the Zoning Administrator's interpretation or substitute its own judgment where the Zoning Administrator's interpretation is reasonable and there has been no abuse of discretion.

ORDER

Based on the record taken as a whole, including the testimony and evidence of record including the building permit applications, plans and all documentation submitted by the parties to this appeal, the Board concludes that DCRA did not error in issuing the permits. Accordingly, the Board denies the appeal.

_____
Geoffry H. Griffis, Chairman

Vote: _____

Respectfully submitted,

_____
Lisa A. Bell, Esquire
Attorney for Appellee
D.C. Department of Consumer &
Regulatory Affairs
941 N. Capitol Street, NE
Washington, D.C. 20002.

Certificate of Service

I hereby certify that a copy of the foregoing was served by first class mail on this 1st day of July 2004, on the following parties and counsel:

Richard Nettler, Esquire — Appellant's counsel
Robins, Kaplan, Miller & Ciresi, LLP.
1801 K Street, N.W.
Washington, D.C. 20006;

Richard Aguglia, Esquire — Counsel for the Permit Holder
Hunton & Williams
1900 K Street, N.W.
Washington, D.C. 20006

_____
Lisa A. Bell, Esq.

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D.C. OFFICE OF ZONING
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ORDER

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Geoffry H. Griffis, Chairman

Vote: _____

Respectfully submitted,

Lisa A. Bell, Esquire
Attorney for Appellee
D.C. Department of Consumer &
Regulatory Affairs
941 N. Capitol Street, NE
Washington, D.C. 20002.

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Robins, Kaplan, Miller & Ciresi, LLP.
1801 K Street, N.W.
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Richard Aguglia, Esquire — Counsel for the Permit Holder
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DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS - Office of the General Counsel

Fax

To:	Chairman Board of the Zoning Adjustment	**From:**	Lisa A. Bell Senior Counsel
Fax:	727-6072	**Page(s):**	6, INCLUSIVE
Phone:	727-6311	**Date:**	July 1, 2004
Re:	BZA Appeal No. 17085	**CC:**	

Attached is the Department of Consumer and Regulatory Affairs' Proposed Findings of Fact and Conclusions of Law.

GOVERNMENT OF D.C.
CRAA/BOARD
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