HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

RICHARD L. AGUGLIA
DIRECT DIAL: 202-955-1634
EMAIL: raguglia@hunton.com

FILE NO: 64929.000002

July 2, 2004

By Hand

D.C. Office of Zoning
2004 JUL -2 AM 11:57

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 and James Marsh (the "Neighbors")
206 and 210 D Street, S.E./Square 763, Lots 26 and 28

Dear Chairperson Griffis and Fellow Board Members:

On June 30, 2004, I filed a brief on behalf of the intervenor property owner Folger Park North, LLC in this case in opposition to the Neighbors' appeal that a side yard variance was required. After review of the transcript of the June 22, 2004 hearing, it appears that the Board desired any opposition to be in the form of proposed findings of fact and conclusions of law and an order. Accordingly, I have reformatted the Opposition brief timely filed on June 30, 2004 as proposed findings of fact, conclusion of law and order. Since the revision is purely procedural, there is no prejudice to any other party and I respectfully request that the Board accept this proposal.

Sincerely,

Richard L. Aguglia

Richard L. Aguglia
RLA/csg

cc: By Hand
Richard Nettler, Esq.
Jeannine Rustad, Esq.

BZA
Case No. 17085
Exhibit No. 58

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 58

HUNTON& WILLIAMS

By Mail
ANC 6B
c/o Julie Olson and David Sheldon, Esq.

Office of Planning
c/o Joel Lawson and Jennifer Steingasser

DCRA General Counsel's Office
c/o Lisa Bell, Esq.

Alger Stoneburner

Chris Doerfler

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 — 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 (the "Neighbors"), pursuant to 11 DCMR § 3100 and 3101, from the decision of the Department of Consumer and Regulatory Affairs to issue foundation permits B451615 through B451617, issued May 23, 2003 and building permits B454260 through B454262, issued August 8, 2003, to Folger Park North, 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

PROPOSED FINDINGS OF FACT

1. On May 23, 2003, the Department of Consumer and Regulatory Affairs (DCRA) issued three (3) foundation permits, B451615 through B451617, to Folger Park North, LLC ("Folger Park") for construction of three flats on Lots 26, 27 and 28 in Square 763 at 206-210 D Street, S.E. The subject properties are zoned CAP/R-4.

2. On August 8, 2003, the Department of Consumer and Regulatory Affairs (DCRA) issued three (3) building permits, B454260 through B454262 to Folger Park to construct three flats on Lots 26, 27 and 28 in Square 763 at 206-210 D Street, S.E.

3. On September 12, 2003, the Neighbors filed this appeal with the Board of DCRA's issuance of these building permits to Folger Park based on lack of alleged lot size and lot width. 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 for the subject properties from the Board.

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

5. On April 6, 2004, the Board 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 in this case on that day

which Appeal was not consolidated with Folger Park's Application. The Appeal hearing was then continued to May 18, 2004.

6. 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 (but not Lot 27) based on Section 405.3 of the zoning regulations and the *Pritchard* case.

7. 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, related to the subject properties. 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.

8. On June 22, 2004, over Folger Park's and DCRA'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.

9. 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.

10. While ANC 6B, at its February 9, 2004 meeting, voted to support the Neighbor's Appeal in this case as well as Folger Park's Application in Case No. 17108, the new side yard objection was never presented by the Neighbors to the ANC at that meeting for a vote since the Neighbors did not raise it until May 6, 2004.

PROPOSED CONCLUSIONS OF LAW

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. 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, 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. 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 this 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]

---

[1] Office of Planning, 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 Office of Planning's calculations, the end units would only be 6.75 foot wide buildings, because of the height of the existing structures. Office of Planning stated in that report at 7:

(continued...)

In addition, the Neighbors have waived any appeal with respect to the validity of the subdivision for the three record lots (26, 27, 28).

Finally, the purpose of a side yard set forth in *Pritchard* has been met, as recognized by the Office of Planning in its report, 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.

4. **Any ambiguity in the zoning regulations is resolved in favor of Folger Park based on the facts of this case.**

The Board notes that, if the Neighbors had raised the side yard issue in September, 2003, with their other objections, Folger Park could have requested a similar variance in its November 2003 application based on zoning history and the Board could have resolved that issue at the February 2004 hearing on the application in Case No. 17108.

Given the ambiguity in the zoning regulations regarding this issue, the Board will take each lack of side yard objection case on an *ad hoc* basis to determine whether a side yard is required with deference to DCRA's decision to issue permits; lack of lot size and width sufficient to accommodate a side yard; the sufficiency of light, air and privacy for adjoining lots; and the date of the objection in relation to the issuance of building permits and prejudice to the permit holder. Under the facts of this case, the Board finds that no side yard is required and thus no side yard variance is needed.

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 Neighbors' appeal.

_____
Geoffrey H. Griffis, Chairman

Vote:_____

" . . . 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."