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November 1, 2006

VIA HAND DELIVERY

Board of Zoning Adjustment
for the District of Columbia
441 4th Street, N.W., Suite 210S
Washington, D.C. 20001

Re: BZA Appeal No. 17519
1812 35th Street, N.W.

Dear Members of the Board:

On behalf of 1812 35th Street Associates, LLC, a party in the above-referenced case, we are submitting herewith its Proposed Findings of Fact, Conclusions of Law and Order, and a legal brief supporting dismissal of two of the three claims raised in the appeal.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Mary Carolyn Brown
Mary Carolyn Brown

By: Jeffrey T. Johnson*
Jeffrey T. Johnson*

cc: Gisela Garcia-Tunon
Andres Dan

*Admitted in Virginia only; supervision by principals of the firm
who are members of the D.C. Bar

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17519 Board of Zoning Adjustment
District of Columbia
EXHIBIT NO. 22 CASE NO. 17519
EXHIBIT NO. 22

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER of
1812 35TH STREET LLC
Submitted November 1, 2006**

APPEAL NO. 17519 of Advisory Neighborhood Commission 2E, pursuant to 11 DCMR § 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue Building Permit No. 89770, allowing conversion of an existing single family semi-detached dwelling into a row dwelling. Appellant alleges that issuance of the permit violated the lot occupancy (section 403) provisions of the Zoning Regulations and that the Zoning Administrator should have required BZA approval for the conversion. The subject property is located in the R-3 District at premises 1812 35th Street, N.W. (Square 1296, Lot 802).

HEARING DATE: October 17, 2006

DECISION DATE: November 14, 2006

DECISION AND ORDER

Advisory Neighborhood Commission 2E ("ANC 2E" or "Appellant") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") challenging the decision of the Zoning Administrator to issue Building Permit No. 89770 allowing conversion of an existing single family semi-detached dwelling into a row dwelling. The permit authorized the property owner, 1812 35th Street Associates, LLC (the "Owner"), to extend the second and third floors of the existing house to the south property line over the 2.5 foot side yard. Because the expanded dwelling would extend the full width of the lot, the Zoning Administrator determined that the house constituted a row dwelling entitled to 60% lot occupancy in the R-3 District.

In its initial appeal filed May 8, 2006, ANC 2E alleged that issuance of the permit violated the lot occupancy (section 403) provisions of the Zoning Regulations and that the Zoning Administrator should have required BZA approval for the conversion. In its prehearing submission filed October 3, 2006, the Appellant further alleged that the issuance of the permit violated the side yard provisions of section 405, and the nonconforming structure provisions of section 2001.3. The Owner moved for dismissal of the claims under sections 405 and 2001.3 as untimely, which the Board granted. The Board considered the merits of the remaining lot occupancy claim and held that proposed construction under the building permit lawfully converted the house to a row dwelling entitled to 60% lot coverage. Because the structures on the property would only occupy 48% of the lot after construction of the addition, the Board determined that the Zoning Administrator did not err in issuing the permit and the appeal was denied.

PRELIMINARY MATTERS

The Parties

The parties to the proceeding were ANC 2E, represented by Laurie Horvitz, Esq. of Finkelstein and Horvitz, PC; DCRA, represented by Stephanie Ferguson, Esq.; and the Owner, an automatic party pursuant to 11 DCMR § 3199.1, represented by Carolyn Brown, Esq., of Holland & Knight LLP.

The Board denied individual party status in support of the appeal to Deirdre Stancioff, Alexander Stancioff, Richard Schmidt, and the Citizens Association of Georgetown ("CAG") on the grounds that the interests of these parties would be adequately represented by ANC 2E.¹ The Board also denied individual party status to Danielle Berthelot, Eugene Scanlon, and Joanne Scanlon for failing to appear at the Board's public hearing. The Board routinely denies requests for party status when the individual seeking to be admitted as a party is not physically present at the public hearing.

Motion to Dismiss

At the hearing, the Owner moved to dismiss as untimely the Appellant's claim of error under the side yard provisions of section 405 and the non-conforming structure provisions of section 2001.3. The Owner argued that these claims were not raised until October 3, well after the requisite 60-day deadline for filing an appeal. In support of its motion, the Owner relied on the holding of the D.C. Court of Appeals in *Woodley Park Community Association v. D.C. Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). In that case, the Court held that three of the four claims raised by the appellants were untimely because the facts surrounding those claims were well-known to the appellants when the building permit was issued, yet they did not appeal the permit until a year later. With respect to the remaining claim, the Court held that the parking calculations had changed between the time of permit issuance and the issuance of a certificate of occupancy such that the parking challenge was timely. The Owner in the instant appeal asserted that ANC 2E was well aware of the dwelling's nonconforming status and the side yard claim, as evidenced by the previous disputes over construction on this property.

ANC 2E opposed the motion and DCRA took no position on the motion. The Board requested the parties to brief the issue and the *Woodley Park* case in particular. The parties filed their briefs on November 1, 2006. As discussed in greater detail below, the Board dismissed the Appellant's claims under section 405 and 2001.3 of the regulations.

¹ Because Deirdre and Alexander Stancioff reside at the same address, the Board treated their separately filed requests for party status as a single request (Tr. 5).

FINDINGS OF FACT

The Subject Property and the Building Permits

1. The subject property is an existing single-family dwelling located at 1812 35th Street, N.W. (Lot 801, Square 1296) in the R-3 District. The property is improved with a three-story semi-detached dwelling. The one-side yard along the south property line is 2.5 feet wide and does not comply with the provisions of the section 405. Because this nonconforming condition existed prior to May 12, 1958, it is a lawfully existing non-conforming side yard. 11 DCMR 2001.
2. Prior to 2004, the house was one and a half stories in height and occupied approximately 31% of its lot. In 2004, DCRA authorized the owner to undertake repairs, renovations and an addition to the house. Building Permit No. B461964, allowed for interim alterations and repairs to the house, which had been damaged by fire. The Owners obtained a second permit to build a three-story addition at the rear and another one and a half stories on top of the existing house, resulting in a three-story dwelling.
3. By vote taken November 8, 2005 in BZA Appeal No. 17310, the Board of Zoning Adjustment determined that the Zoning Administrator erred in the issuance of the second permit (No. B467431) because the construction exceed the permitted 40% lot occupancy for semi-detached dwellings in the R-3 District. Upon completion of the construction, the dwelling occupied 43% of the lot. The BZA decision became effective by order dated June 13, 2006.
4. As a result of the Board's November 2005 vote, the Owner developed plans to convert the house into a row dwelling, which is allowed to occupy 60% of the lot, instead of the 40% limitation that applies to semi-detached dwellings. By virtue of the conversion, the earlier construction that was deemed to be noncompliant would then conform with the lot occupancy requirements.
5. The proposed addition will be a three-story structure with roof that is built out to the side lot line on the south side of the property. The first floor will consist of an open pedestrian walkway and four concrete-masonry unit ("CMU") columns to support the upper levels of the addition. The second and third floors of the addition will be completely enclosed and are designed to match the exterior finishes of the existing dwelling. The interior space of the house will be expanded as a result of the addition.
6. On March 9, 2006, DCRA issued the building permit that is the subject of this appeal. The Zoning Administrator determined that the application complied with the lot occupancy provisions because the new construction eliminated the only side yard on the property, thus converting the semi-detached house to a row dwelling by definition under the Zoning Regulations. Section 199 defines a row house as "a dwelling with no side yards." Thus, the 48% lot occupancy proposed under the new permit would fall well below the 60% lot occupancy for dwellings in R-3 District.

7. On May 8, 2006, ANC 2E appealed the issuance of the permit to the Board. The ANC 2E alleged that (i) the BZA failed to give a "great weight" to the ANC; (ii) the construction would violate the lot occupancy limitations for semi-detached dwellings in the R-3 District; and (iii) the conversion to a row dwelling required special exception approval. In its prehearing statement filed October 3, 2006, ANC 2E enlarged the scope of its challenges to the permit to include alleged side yard violations (§ 405) and unlawful expansion of a nonconforming structure (§ 2001.3).

8. At the public hearing on this matter on October 17, 2006, the Owner moved to dismiss as untimely the Appellant's supplemental challenges with respect to sections 405 and 2001.3. With the consent of all parties, the Board held its decision on the motion to dismiss in abeyance and proceeded with the merits of the appeal. The Appellant presented three witnesses, none of whom addressed the legal question of the alleged error committed by the Zoning Administrator in approving issuance of the building permit. Instead, they testified as to the adverse effects the proposed construction would have on them and their property, and the negative precedent it would set for residential districts.

9. Bill Crews, the Zoning Administrator, testified that the proposed addition will form a common division wall because the four supporting piers and the structure above will be built out to the side lot line (Tr. 100-04, 123). He also noted that the addition will be fully integrated with the existing structure and will provide functional storage space on the third floor (Tr. 102-03). Finally, Mr. Crews observed that the first floor of the addition would be constructed so as to preserve pedestrian access between the front and rear of the property (Tr. 122-23).

CONCLUSIONS OF LAW

Motion to Dismiss

Timeliness is a threshold requirement of this Board's jurisdiction. *See Goto v. D.C. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In order to appeal an administrative decision to this Board, an aggrieved party must file an appeal within 60 days of the date on which it knew, or should have known, of that decision. The Board finds that the date triggering the 60-day filing requirement in this case was March 9, 2006, and that the appeal of the challenged permit on the grounds that it violated the lot occupancy requirements of section 403 was timely filed on May 8, 2006. The Board further finds, however, that the appeal is untimely with respect to the alleged violations of the side yard (section 405) and nonconforming structure (section 2001.3) requirements of the Zoning Regulations. The Appellant did not raise these additional issues until October 3, 2006—nearly seven months after the building permit was issued.

The Appellant's claimed inability to obtain building plans for the proposed construction provides no justification for extending the appeal period. First, the building permit authorized the "conversion of a single-family semi-detached dwelling into a row dwelling." This description of the proposed construction activity provided sufficient notice of the only factual predicate necessary to allege a violation of section 405 of the Zoning Regulations—i.e., that the

new row dwelling would, by definition, have no side yards. Second, the Appellant was fully aware that the existing structure on the subject property was nonconforming at the time the building permit was issued. That fact—combined with the Appellant's timely allegation of a lot occupancy violation—provides the factual basis necessary to allege a violation of section 2001.3. Finally, the physical specifications of the proposed addition have remained unchanged since the building permit was issued on March 8. Thus, there is no compelling justification for extending the appeal period in this case.

While this Board enjoys "broad discretion to allow amendments to its appeals, derived from its power to control its docket," *Kalorama Citizens Association*, BZA Order No. 17109 (February 1, 2005), it may not properly hear appeals over which it has no jurisdiction. In *Woodley Park Community Association v. D.C. Board of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985), the D.C. Court of Appeals affirmed the general principle that an appellant may not leverage an appeal that is properly before the Board to establish jurisdiction over issues that were not initially appealed in a timely fashion. Under the rule established in *Woodley Park*, this Board must evaluate each zoning violation alleged in an administrative appeal separately to determine whether it is timely for jurisdictional purposes. This Board's jurisdiction over the appeal with respect to the lot occupancy issue does not necessarily confer jurisdiction over every other conceivable issue that the Appellant might decide to raise at some point during the proceedings.

Because there are no exceptional circumstances that substantially impaired the Appellant's ability to file an appeal in a timely fashion, we must dismiss the appeal with respect to the alleged violations of the side yard and nonconforming structure requirements of the Zoning Regulations.

Merits of the Appeal

In essence, this appeal raises two legal questions: first, do the Zoning Regulations prohibit the conversion of a semi-detached dwelling to a row dwelling, and second, if conversion is possible, is the proposed addition in this case sufficient to meet the definition of a row dwelling. (Tr. 55-74). The Appellant's other challenges regarding compliance with the side yard, lot occupancy and nonconformity provisions of the Zoning Regulations – notwithstanding the fact that the side yard and nonconformity claims were untimely – are subsumed within these two basic questions.

Conversion of a Semi-Detached Dwelling to a Row Dwelling

The Appellant argues that a semi-detached dwelling can never be converted to a row dwelling because the Zoning Regulations dictate that existing side yards are to be preserved in the R-3 District. (Tr. 55). In support of this argument, the Appellant cites the side yard provision of section 405.3, which provides that "[i]n the R-2, R-3, R-4 and R-5 District, 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." (Tr. 57-58). According to the Appellant, the Zoning Commission adopted this provision in 1970 under Order No. 17 to insure that side yards are provided in the R-3 District. (Tr. 62).

The Appellant also claims that section 405.8 demonstrates the Commission's intention to preserve any existing side yard in the R-3 District. That section provides that "[i]n 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." (Tr. 62). Finally, the Appellant cites section 320.1 establishing the R-3 District, which in its view, requires row dwellings to be mingled with one-family detached and semi-detached dwellings and, thus, demonstrates a clear intent in the Zoning Regulations to preserve existing semi-detached dwellings. (Tr. 62-63).

In contrast, both DCRA and the Owner assert that the Zoning Regulations do not in any way prohibit the conversion of a semi-detached house into a row dwelling. First, they point to section 320.1, which specifically allows row dwellings in the R-3 District. By definition, a row dwelling has no side yards. Thus, they argue, there can be no prohibition against eliminating a side yard in the R-3 District.

Section 405.3

DCRA and the Owner also assert that the provisions of section of 405 do not apply unless a side yard exists. They state that the side yard is eliminated by the proposed construction authorized under the challenged permit. A side yard is one type of several types of yards permitted – and in some instances required – under the Zoning Regulations. A yard is defined as "an exterior space, other than a court, on the same lot with a building or other structure. A yard required by the provisions of this title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as specifically provided in this title." See 11 DCMR § 199.1 ("yard"). A side yard is defined as a "yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure." *Id.* ("yard, side"). After construction of the addition, the house will span the full width of the lot and there will no longer be any "exterior space" open to the sky from the ground up between the house and the adjacent side lot line. While DCRA and the Owner concede that there will be an exterior passageway from the street to the rear of the property at the ground floor, the addition will span above the passageway. They argue that because area will not be open to the sky it does not constitute a yard or side yard.

Second, DCRA and the Owner cite the Board's decision in BZA Appeal No. 17310, wherein the Board acknowledged "that it is possible to convert a semi-detached dwelling into a row dwelling with an addition that extends to the side lot line." See *Appeal of Deirdre Stancioff*, BZA Appeal No. 17310, June 13, 2006, at 7. The Owner also cites the Board's decision in *Appeal of David and Janet Pritchard*, BZA Appeal No. 16811 (the *Pritchard* appeal) and subsequent decisions interpreting that order where the Board held that a semi-detached dwelling may converted to a row dwelling except in the limited circumstance where one side of the lot abuts an alley, thus precluding the possibility of constructing a common division wall with an adjoining house. See BZA Orders in Appeal Nos. 16935 and 17007.

In contrast, the Appellant claims that because the wall of the addition does not attach to the adjacent house to the south, it must be a "free-standing wall" and not a common division

wall. In support of this claim, the Appellant relies on the *Pritchard* decision. There, the Board held that conversion of a semi-detached dwelling to a row dwelling was precluded unless the addition to the semi-detached dwelling would share a common division wall with the adjacent property. Further, according to the Appellant, a "common division wall" is synonymous with a "party wall." As such, under *Pritchard*, the Appellant argues, the proposed addition could never comply with section 405.3 because a party wall under the building code is defined as a single wall that straddles the center of a property line for the mutual benefit of both property owners. Here, the wall of the addition will not benefit the adjacent property owner whatsoever. (Tr. 59-60).

The Appellant overlooks the fact that the Board already rejected this argument in *Appeal of Southeast Citizens for Smart Development*, BZA No. 16935 (2003). There, the Board held that because the Zoning Regulations define semi-detached dwellings to include structures where one side wall is a "lot line wall" – that is, "an enclosing wall constructed immediately adjacent to a side lot line" – *Pritchard* could not be interpreted as disallowing a semi-detached dwelling. Here, the Zoning Administrator correctly determined that the wall of the addition constitutes a common division wall because it would be constructed to the lot line of the abutting property, thus satisfying the provisions of section 405.3. (Tr. 103, 128-29).

Significantly, the Board has limited the holding of *Pritchard* to the narrow facts of that case. In *Pritchard*, one side of the property abutted an alley and thus there was no adjacent structure with which to share a common division wall. In stark contrast, the Owner's property abuts lots occupied by single-family dwellings. Thus, the *Pritchard* decision is inapposite the present appeal. See *Pritchard*; see also, *Southeast Citizens for Smart Development*; accord *Application of Kathleen Peoples and Phillip Sedlak*, BZA Case No. 17007 (2003).

Section 405.8

Similarly, the provisions of section 405.8 do not apply to permits where a side yard is eliminated in its entirety. Rather, that section only applies in instances where an owner proposes an addition to a house with an existing nonconforming side yard of at least five feet in width. The Appellant contends, however, that section 405.8 can only be interpreted as requiring the preservation of nonconforming side yard and a prohibition against any side addition to a pre-1958 dwelling with a nonconforming side yard of less than five feet.

The Board finds no merit to the Appellant's argument. Section 405.8 is only implicated if a nonconforming side yard is being maintained. (Tr. 105-112). As noted in *Appeal of Judy and Clarke Brinckerhoff*, BZA Appeal No. 17066 (2006), the legislative history of section 405.8 included a report of the Municipal Planning Office, the predecessor agency to the Office of Planning, which describes the purpose and need for the new regulation. Included in the report were diagrams showing additions that would be permitted and not permitted under the new provision. There was no diagram proscribing the elimination of a nonconforming side yard in its entirety.

Section 2001.3

In fact, the Zoning Regulations specifically encourage the elimination of nonconformities. *See, generally*, 11 DCMR Chap. 20; *see also Sheridan-Kalorama Neighborhood Council v. D.C. Board of Zoning Adjustment*, 411 A.2d 959 (D.C. 1979). Moreover, the Appellant could not cite any provision in the Zoning Regulations that would preclude elimination of a nonconformity. In reviewing the permit application, the Zoning Administrator specifically examined the provisions of 2001.3(b). (Tr. 130-31). That section provides that an addition or enlargement to a nonconforming structure shall conform to the use and structure requirements, neither increase or extend the nonconformity, nor create any new nonconformity. The Zoning Administrator determined, however, that section 2001.3 is not implicated in this case because the construction eliminates the nonconforming side yard by converting the dwelling to a conforming row dwelling. We agree with the Zoning Administrator's determination and likewise conclude that section 2001.3 is not implicated here.

Conversions Permitted

Accordingly, based on the entire evidence of record, the legal arguments of the parties, and past precedent, the Board concludes that in those zone districts where row dwellings are permitted, a semi-detached or detached dwelling may be converted to a row dwelling as a matter of right so long as the dwelling shares a common division wall on at least one side. Here, the south wall of the addition will abut the adjacent house to the south at the property line. The Board concludes that when the walls of two separate buildings meet at a property line, it satisfies the test for a "common division wall" under section 405.3. Consequently, the house at 1812 35th Street may lawfully be converted to a row dwelling as a matter of right.

The holding is consistent with the purpose of that section, which was adopted to the preclude the construction of a semi-detached dwelling with the blank lot line wall facing the required side yard of the adjacent semi-detached dwelling, instead of having the two blank walls adjoining one another at the property line. Until the enactment of this provision, it was possible to construct a series of "semi-detached" dwellings that each had its required side yard at the south side of the lot, for example, so that none of the houses ever abutted one another. Instead, the blank lot line wall always faced the neighbor's side yard and never attached to a adjacent dwelling. *See* Legislative History of Zoning Commission Order No. 17 included in BZA Appeal No. 17066.

In concluding that conversions are permitted as a matter of right, the Board also rejects the Appellant's argument that such conversions require special exception or variance approval from the Board, and that without such proceedings the Appellant's rights have been abrogated. Matter-of-right construction by definition does not require zoning relief from the Board and thus the Appellant had no rights to a hearing that could have be denied.

Adequacy of Addition to Implement Conversion

The next question the Board must address is whether the proposed addition is sufficient to create a row dwelling. A dwelling is defined as a "building designed or used for human habitation." In turn, a building is defined as a "structure having a roof supported by columns or

walls for the shelter, support or enclosure of persons, animals, or chattel." Here, the proposed addition is a structure with a roof supported by columns for the shelter of humans. It expands the interior living space of the house, and provides a covered exterior passageway for the owners between the street and the rear of the property.

The Appellant suggests that this expansion is inadequate, claiming that the space is largely superficial and non-functional. It suggests that closets of less than two-feet deep shown on the third floor plan are simply not deep enough to be useable. The Board rejects this argument. First, there is no standard in the Zoning Regulations to suggest that an expansion must provide living space or functional purpose. While the Board's decision in Appeal No. 17310 recognized DCRA's position that a roof eave did not provide any living space or functional purpose, that order did not impose such a standard. Rather, the decision in Appeal No. 17310 simply held that an eave, which cannot extend more than two feet into a side yard, is insufficient to convert the a semi-detached dwelling into a row dwelling because the eave could not legally extend the fully required depth of the nonconforming side yard. Here, the standard is whether the expansion is a "structure having a roof supported by columns or walls for the shelter, support or enclosure of persons." Because the proposed addition has a roof supported by columns for the shelter, support and enclosure of persons, and because the addition extends to the lot line, the construction is sufficient to convert the semi-detached dwelling to a row dwelling. The Board's inquiry ends here. Nevertheless, the Board credits the testimony of the Zoning Administrator who recognized that two-foot deep closets can readily accommodate a multitude of storage needs. (Tr. 126).

Pursuant to section 13 of the Advisory Neighborhood Commission Act (D.C. Code Ann. 1-309.10(d)(3)(A) (2001 ed.)), the Board has given "great weight" to the issues and concerns raised by ANC 2E in this appeal. However, as discussed herein, the Board concludes that the appeal is without merit.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **DENIED**.

Vote taken November __, 2006, on the motion to deny the appeal of the Advisory Neighborhood Commission 2E challenging the issuance of Building Permit No. 89770 issued to 1812 35th Street Associates LLC for an addition to the building at 1812 35th Street, N.W., Washington, D.C.

VOTE: _____

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

Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: _____

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 EFFECTIVE.

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**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEAL OF:

Advisory Neighborhood Commission 2E	)	
from the administrative decision of the	)	
Zoning Administrator, DCRA, to issue	)	BZA Appeal No. 17519
Building Permit No. 89770, allowing	)	
conversion of an existing single-family semi-	)	Hearing: October 17, 2006
detached dwelling into a row dwelling,	)	
allegedly in violation of the lot occupancy	)	
provision (§ 403) for the property at 1812	)	
35th Street, N.W., in the R-3 District.	)	

MEMORANDUM IN SUPPORT OF INTERVENOR'S MOTION TO DISMISS

**I.
INTRODUCTION**

During the October 17, 2006 public hearing of the Board of Zoning Adjustment ("BZA" or the "Board"), 1812 35th Street, LLC (the "Owner") moved to dismiss as untimely the appeal of Advisory Neighborhood Commission 2E ("ANC 2E" or the "Appellant") with respect to the issues of side yard (11 DCMR § 405) and nonconforming structure (11 DCMR § 2001.3). The Board has asked the parties to brief the issue of whether a timely appeal may be subsequently amended to include additional grounds of appeal, even when the alleged violations of the Zoning Regulations were fully apparent at the time the original appeal was filed. As set forth in greater detail herein, the District of Columbia Court of Appeals has clearly held in *Woodley Park Community Association v. D.C. Board of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985), that untimely amendments to an otherwise timely appeal must be dismissed in the absence of exceptional circumstances that substantially impaired the appellant's ability to raise such issues in the initial appeal. Because the factual basis underlying the alleged violations of the side yard and nonconforming structure provisions of the Zoning Regulations was fully apparent upon the

issuance of the building permit at issue, the appeal should be dismissed with respect to those two issues.

II. FACTS

The subject property is located at 1812 35th Street, N.W. (Lot 801, Square 1296) in the R-3 District and is currently improved with a three-story, single-family home. On February 15, 2006, the Owner applied for a permit to convert the existing semi-detached dwelling on the subject property into a row dwelling. The Owner intended to effect this conversion through the construction of a new addition along the southern lot line of the property. Because the addition would completely eliminate the existing structure's only remaining side yard, the building would become a row dwelling by definition. *See* 11 DCMR § 199.1 (defining a row dwelling as "a one-family dwelling having no side yards"). The Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. 89770 on March 9, 2006.

On May 8, 2006, the Appellant appealed the issuance of the building permit to the Board. The Appellant alleged that (1) the BZA failed to give "great weight" to the ANC; (ii) the construction would violate the lot occupancy requirements for semi-detached dwellings in the R-3 District; and (3) the conversion of the existing structure into a row dwelling required a special exception from the Board. On October 3, 2006, the Appellant filed a prehearing statement that included additional assignments of error. The statement alleged that the proposed addition violated the side yard (section 405) and nonconforming structure (section 2001.3) provisions of the Zoning Regulations. At the Board's public hearing on October 17, 2006, the Owner moved to dismiss the appeal with respect to the issues first raised in the Appellant's prehearing statement.

III. ARGUMENT

A. The Board Does Not Have Jurisdiction to Hear Untimely Appeals

Timeliness is a threshold requirement of the Board's jurisdiction: "if the appeal was not timely filed, the Board [is] without power to consider it." *Goto v. D.C. Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In order to appeal a decision of the Zoning Administrator to the Board of Zoning Adjustment, an aggrieved party must file the appeal within the time limits prescribed under section 3112.2 of the Zoning Regulations. In the absence of "exceptional circumstances," that provision essentially imposes three requirements with respect to the timing of BZA appeals: (1) all appeals must be filed within sixty days of *actual or constructive notice* of the decision being appealed; (2) an individual must be given at least sixty days from *the date of the decision appealed* in which to file an appeal; and (3) an appeal of a building permit will be barred if it is filed more than ten days after the new structure is under roof. The third requirement applies only in situations where an appellant does not immediately become aware of the decision that is being appealed.¹

Section 3112.2(d) provides that the Board may extend the sixty-day deadline only if two separate requirements are satisfied. First, the appellant must demonstrate that "[t]here 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." 11 DCMR § 3112.2(d)(1). Second, the Board must ensure that any extension of time

¹ The new regulation is not a model of clarity. Fortunately, the Zoning Commission's Notice of Final Rulemaking provides a concise explanation of the regulation's "under-roof" provision:

When an appellant seeks to file an appeal more than sixty (60) days after the date of the decision on the grounds that the appellant did not have notice or knowledge of the decision until some time after the date of the decision, the latest date an appeal can be filed is ten (10) days after the structure is under roof. The cap in paragraph (b) on the appeal period, however, does not relieve an appellant of the responsibility of filing a timely appeal, within sixty (60) days of actual or constructive notice or knowledge of the decision complained of.

Zoning Commission Order and Notice of Final Rulemaking No. 02-01 (September 9, 2002).

"will not prejudice the parties to the appeal, as identified in § 3199.1 [of the Zoning Regulations]." 11 DCMR § 3112.2(d)(2). If either one of these requirements is not satisfied, then an extension may not be granted.

It is clear that an original appeal of the Zoning Administrator's decision in this case on the grounds of alleged side yard and nonconforming structure violations could not have been properly filed after May 8, 2006. The Appellant does not contend that there were any "exceptional circumstances" that would have justified a five-month extension beyond the filing deadline established in the Zoning Regulations. Rather, the Appellant argues that the Board may circumvent the jurisdictional requirement of timeliness by allowing post-hoc amendments to the original appeal for issues that the Appellant failed to raise prior to the filing deadline. As discussed below, however, belated amendments to an otherwise timely appeal are not exempt from the jurisdictional requirement of timeliness established in section 3112.2.

B. Amendments to an Appeal Must Satisfy the Same Timeliness Requirements as the Original Appeal

In adopting a fixed, two-month deadline for administrative appeals to the Board of Zoning Adjustment, the Zoning Commission was motivated largely by a desire to reduce the uncertainty that had been fostered by the ad hoc "reasonableness" standard of timeliness that had previously been applied by the Board. *See* Zoning Commission Notice of Final Rulemaking and Order No. 02-01 (September 9, 2002). The D.C. Court of Appeals has also commented on the value of establishing a fixed period during which appeals to the Board may be filed:

A rule designating a period after which the order, requirement, decision, or determination of the administrative officer is no longer subject to review is a salutary one. It provides a period after which the permittee knows that he may proceed safely in accordance with the permit. Where the permit is denied, it gives those opposing its issuance assurance that the applicant who has been denied a permit may no longer secure a review, and a possible reversal, by the board of appeals, and that their vigilance need no longer be maintained.

Waste Management of Maryland, 775 A.2d 1117, 1122 n.6 (D.C. 2001). The Court emphasized that such deadlines should be extended only in exceptional circumstances.

It is true that the "Board has broad discretion to allow amendments to appeals, derived from its power to control its docket." *Appeal of Kalorama Citizens Association*, BZA Appeal No. 17109 (February 1, 2005). However, the Board may not properly hear appeals over which it has no jurisdiction. There is no principled distinction between extending the deadline for filing an administrative appeal and allowing an appellant to amend an otherwise timely appeal long after the original filing period has lapsed; both actions undermine the primary justification for adopting a fixed deadline in the first place. Based on two decisions of the D.C. Court of Appeals, both new appeals and amendments to appeals must comply with the jurisdictional requirements of timeliness.

In *Woodley Park Community Association v. D.C. Board of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985), the D.C. Court of Appeals affirmed the general principle that an appellant may not leverage an appeal that is properly before the Board to establish jurisdiction over issues that were not initially appealed in a timely fashion. In *Woodley Park*, the owners of the Washington Sheraton Hotel applied for a building permit to construct a matter-of-right addition to the hotel's existing facilities. During negotiations with the hotel's owners, the Woodley Park Community Association (the "WPCA") argued that the proposed construction violated the height, setback, accessory use, and parking requirements of the Zoning Regulations for the R-5-B District. The building permit for the proposed construction was issued on October 6, 1978. Over the next eleven months, the WPCA made a number of unsuccessful attempts to convince the Zoning Administrator that the building permit violated the Zoning Regulations. In August of 1979, the hotel owners applied for a certificate of occupancy and submitted building plans that

significantly reduced the number of parking spaces indicated in the original plans. The Zoning Administrator approved this reduction in the number of required parking spaces and issued a certificate of occupancy on September 12, 1979. The WPCA filed an appeal with the Board on October 12, 1979—more than a year after the original building permit was issued.

The Board rejected the hotel owners' motion to dismiss the appeal as untimely. The Board held that because the building plans approved in the certificate of occupancy differed from those approved with the original building permit, the time period in which to appeal did not begin to run until the issuance of the certificate of occupancy. Because WPCA filed its appeal just one month after the certificate was issued, the Board concluded that the appeal was filed within a reasonable time. This decision clearly relied upon an implicit assumption that an appeal that is timely with respect to one issue is necessarily timely with respect to every issue raised.

The Court of Appeals reversed the Board's decision, holding that the BZA should have dismissed the appeal as to height, setback, and accessory use. Because the alleged violations of these provisions did not change between the time the building permit was issued and the filing of the appeal, the Court held that an appeal on those issues was untimely:

[B]y October 6, 1978—the date the full building permit was issued—the [appellant] had full actual notice of the aspects of the building project relating to height, setback, and use. Nevertheless, one year elapsed between the issuance of the building permit and the filing of the appeal on October 12, 1979. ... On this factual record, we conclude that as to height, setback, and use, the one-year delay from the issuance of the building permit to the filing of the appeal was not reasonable.

Id. at 637. The Court affirmed the Board's decision with respect to the parking issue, however, noting that the appeal was filed just one month after the Zoning Administrator approved a dramatic reduction in the number of parking spaces required for the project. Importantly, the Court did not hold that the Board's jurisdiction over the appeal as to the parking issue conferred

any kind of "supplemental jurisdiction" over the other issues in the appeal. Thus, based on *Woodley Park*, each zoning violation alleged in an administrative appeal must be viewed independently to determine whether it is timely for jurisdictional purposes.

The principle established in *Woodley Park* was implicitly adopted in the Court's decision in *Mendelson v. D.C. Board of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994). *Mendelson* involved an administrative appeal of a decision to issue building permits for the construction of two single-family homes. DCRA issued the original building permits on August 11, 1988. In March of 1989, the Woodland-Normanstone Neighborhood Association (the "Association") sent two letters to DCRA arguing that the permits violated the rear yard, side yard, use, and height requirements of the Zoning Regulations. DCRA issued a temporary stop-work order, but issued revised building permits on April 4, 1989. The Association filed an appeal of the permits with the BZA on May 26, 1989—less than two months after the revised permits were issued, but more than nine months after issuance of the original permits. The Board dismissed the appeal as untimely, holding that the Association had constructive notice of the alleged zoning violations when construction on the property commenced in August 1988.

While the D.C. Court of Appeals reversed the dismissal for inadequate findings in the Board's decision, it indicated that the appeal was indeed untimely with respect to the side yard, use, and height issues. Because the revised building permits substantially modified the rear yard specifications in the original plans, the Court held that the subsequent appeal of that issue was filed within a reasonable period of time—i.e., within two months after the revised permits were issued. With respect to the remaining issues, however, the Court held that the Board's failure to make an explicit finding of fact that the alleged zoning violations were in no way modified by the revised building permits required a remand on the issue of timeliness:

[T]he Board failed to make the findings of fact necessary to support an implicit underpinning of its ruling, viz., that revisions to the plans approved with the issuance of the April 1989 permits did not affect lot width, side yard, use, or height specifications. ... We note that, facially, the April 1989 permits do not appear to modify the original provisions concerning side yard, lot width, use, or height. The BZA, however, made no finding of fact with respect to this contested matter.

Id. at 1094. The Court's opinion in *Mendelson* in no way suggests that the appeal in that case was timely with respect to any issue other than the alleged rear yard violation; on the contrary, it suggests that the dismissal of those issues would have been entirely proper but for the Board's failure to make the requisite findings of fact.

The Court's decisions in *Woodley Park* and *Mendelson* clearly indicate that each alleged zoning violation in an administrative appeal must be evaluated separately to determine whether the Board may properly exercise jurisdiction over that issue. If one accepts this general principle, then it necessarily follows that the Board does not have jurisdiction in the present appeal over the issues of required side yards and nonconforming structure. The factual basis of these alleged violations has remained unchanged since the original building permit was issued on March 9, 2006.

C. Earlier Decisions of the Board Are Fully Consistent with this Approach

At first glance, it might appear that some of the Board's earlier decisions are at odds with this limitation on the ability of appellants to amend otherwise timely appeals. Upon closer examination, however, it becomes evident that many of these cases are distinguishable on the facts and are in no way inconsistent with the general principle discussed above.

In the *Appeal of Mildred Rodgers Crary*, BZA Appeal No. 16405 (December 28, 1999), the owner of a single-family home in the Wesley Heights Overlay ("WHO") / R-1-A District received five separate building permits between January 29, 1998 and October 5, 1998. These

permits collectively authorized a substantial amount of new construction on the subject property, including a new porch, garage, and two-story rear addition. A neighbor appealed three of the building permits to the BZA on September 18, 1998. During the Board's hearing on February 17, 1999, the appellant moved to amend the original appeal to include two additional building permits. The Board granted the motion to amend the appeal; it rejected the property owner's motion to dismiss the appeal and the subsequent amendments as untimely.

Although none of the building permits were appealed within sixty days of their issuance, the Board held that the piecemeal nature of the construction on the subject property constituted an "exceptional circumstance" that substantially impaired the appellant's ability to file a timely appeal:

The Intervenor submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of the Intervenor's construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole. The Appellant has alleged violations of the zoning regulations, such as failure to comply with lot occupancy and setback requirements, that pertain to the full extent of the work performed on the Intervenor's property, rather than merely concerning the individual components of the project. The Board is not persuaded that the first permit put the Appellant on notice of all the work to be done on the Intervenor's property or, therefore, that the work allegedly violated the Zoning Regulations.

Id. at 5. The Board's decision was upheld by the D.C. Court of Appeals in *Sisson v. D.C. Board of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002) (noting that exceptional circumstances existed "precisely because circumstances beyond [the appellant's] control impacted the timeliness of her filing").

The deadline for filing an appeal of an administrative decision with the BZA is not necessarily sixty days after the issuance of the decision itself; rather, an appeal must be filed within sixty days after the appellant had *notice or knowledge*—either actual or constructive—that

the decision had been rendered. The Court of Appeals has pointed out the importance of this distinction, noting that "the time for filing an appeal commences when the party appealing is *chargeable with notice or knowledge* of the decision complained of." *Woodley Park*, 490 A.2d at 636 (emphasis added).

In the *Crary* appeal, the appellant could not have appreciated the full scope of the construction activity on the subject property—and whether such activity violated the Zoning Regulations—until all of the building permits had been issued. For that reason, the Board held that the relevant administrative decision for determining timeliness was the issuance of the final building permit. Here, the Appellant has attempted to allege violations of the side yard and nonconforming structure provisions of the Zoning Regulations nearly seven months after the issuance of the building permit. Moreover, there is no persuasive justification for the Appellant's delay in raising these issues. As noted above, the factual basis supporting the Appellant's allegations was fully apparent at the time the original building permit was issued on March 8. The physical specifications of the proposed addition have remained unchanged throughout this appeal. Because there are no exceptional circumstances warranting an extension of time, the Board should dismiss these issues as untimely.

A similar issue was presented in the *Appeal of the Kalorama Citizens Association*, BZA Appeal No. 17109 (November 8, 2005). In that case, the Kalorama Citizens Association ("KCA") appealed a DCRA decision to issue building permits authorizing the construction of a five-story apartment building in the R-5-D District. DCRA issued the initial building permit for the project on March 11, 2003. In September of 2003, the KCA wrote two letters to the Administrator of the Building and Land Regulation Administration of DCRA asserting that the proposed project violated the Height Act of 1910 and the maximum FAR for the site. KCA also

submitted a Freedom of Information Act ("FOIA") request to obtain the building plans submitted with the application for the building permit. On October 6, 2003, DCRA issued a revised building permit for the project, which reduced the height of the proposed building and clarified the FAR calculations presented in the original permit. Ten days later, DCRA issued a second revised permit reflecting a minor modification to the roof structure of the proposed building. On October 17, 2003, DCRA finally provided KCA with copies of the building plans for the proposed project. These plans, however, did not include a height certification for the building's modified roof. DCRA also failed to provide KCA with FAR worksheets for the original and revised plans.

KCA filed an appeal of the first and second revised permits with the BZA on November 10, 2003. On February 12 and 16, 2004, DCRA provided KCA with additional documents covered by KCA's earlier FOIA request. On March 2, 2004, KCA moved to amend its appeal to include the original building permit. The Board granted the motion to amend, but also held that the relevant administrative decision for determining jurisdictional timeliness was the issuance of the original building permit. Although KCA's original appeal was filed more than eight months after DCRA issued the first permit, the Board held that exceptional circumstances had substantially impaired KCA's ability to file a timely appeal:

KCA could not file a good faith appeal until it had some reason to believe the Zoning Regulations were violated. Given these facts, KCA did not have reason to believe the project was problematic until the framing of the structure was completed in mid September 2003. Even then, it could not tell the precise height and bulk of the Project without access to the plans supporting the permit application. Although its September 10, 2003 letter indicates some level of concern, DCRA's resistance to providing the necessary information made the filing of a timely appeal impossible.

Id. at 7. Because KCA had no way of knowing whether the construction on the subject property violated the Zoning Regulations, the time during which KCA could file a timely appeal did not begin to run until DCRA disclosed the information indicating the existence of such violations.

Kalorama Citizens Association should not be read to imply that an appellant's inability to obtain building plans necessarily constitutes an exceptional circumstance justifying an extension of the deadline for a timely appeal. On the contrary, the Board has noted that mere difficulty in obtaining information from DCRA is insufficient to constitute a substantial impairment of the ability to file a timely appeal. *See Appeal of Henry P. Sailer, et al.*, BZA Appeal No. 17054-A (October 15, 2004) (holding that the difficulty of obtaining information from DCRA did not substantially impair the appellant's ability to file an appeal in a timely fashion); *Appeal of Nebraska Avenue Neighborhood Association*, BZA Appeal No. 17127 (June 2, 2005) (holding that the appellant's difficulties in obtaining information from DCRA did not constitute "exceptional circumstances outside of its control that impaired its ability to file a timely, good faith appeal with respect to the [building] permit").

Kalorama Citizens Association is inapposite to this case. The claimed inability of the Appellant to obtain plans for the proposed addition would have had no bearing on the Appellant's ability to identify the alleged side yard and nonconforming structure violations that were finally raised on October 3. First, the challenged building permit authorized the "conversion of a single-family semi-detached dwelling into a row dwelling." This description of the proposed construction activity provided sufficient notice of the only factual predicate necessary to allege a violation of section 405 of the Zoning Regulations—i.e., that the new row dwelling would, by definition, have no side yards. Second, the Appellant was fully aware that the existing structure on the subject property was nonconforming at the time the building permit was issued. That

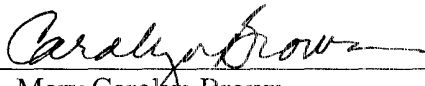
fact—combined with the Appellant's timely allegation of a lot occupancy violation—provides the factual basis necessary to allege a violation of section 2001.3. Whether the Appellant was able to obtain a copy of the building plans for the proposed addition is completely irrelevant to the issue of whether the Appellant had actual or constructive notice of DCRA's alleged violation of the Zoning Regulations.

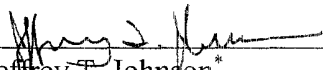
IV. CONCLUSION

WHEREFORE, based on the foregoing, the Board should dismiss the portions of the appeal alleging violations of the side yard and nonconforming structure provisions of the Zoning Regulations on the grounds of untimeliness.

Respectfully submitted,

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November 1, 2006

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CERTIFICATE OF SERVICE

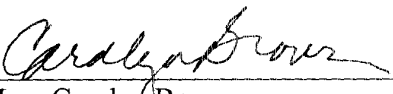
I HEREBY CERTIFY that a copy of the foregoing Memorandum in Support of Intervenor's Motion to Dismiss was served this 1st day of November, 2006, via first-class mail, postage prepaid, upon the following:

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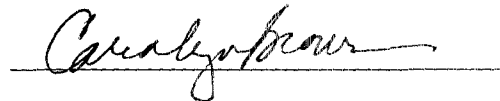
I HEREBY CERTIFY that on this 1st day of November, 2006, a copy of the foregoing letter, brief and Proposed Findings of Fact, Conclusions of Law and Order were served by first class mail, postage pre-paid, on the following:

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A handwritten signature in cursive script, appearing to read "Carolyn Brown", is written over a horizontal line.