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November 7, 2006

VIA HAND DELIVERY

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

Re: BZA Appeal No. 17519

- Appellant's Written Response to Owner's Post-Hearing Submissions

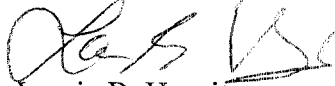
Dear Members of the Board:

On behalf of the Advisory Neighborhood Commission 2E ("ANC 2E"), the Appellant in the above-referenced case, we are hereby filing an original and twenty copies of the following documents:

Appellant's Written Response to Owner's Post-Hearing Submissions.

The case is scheduled for a decision on November 14, 2006.

Respectfully submitted,


Laurie B. Horvitz

Enclosures

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17519
EXHIBIT NO. 24

Board of Zoning Adjustment
District of Columbia
CASE NO. 17519
EXHIBIT NO. 24

CERTIFICATE OF SERVICE

I hereby certify that the foregoing letter and referenced documents were served on November 7, 2006, via first class mail, postage prepaid to the following:

Mary Carolyn Brown, Esq.
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2099 Pennsylvania Avenue, N.W., Suite 100
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Bill Crews
Zoning Administrator
D.C. Department of Consumer and Regulatory and Affairs
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Office of the General Counsel
Attn: Stephanie Ferguson
D.C. Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 9400
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Laurie B. Horvitz

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

**Appeal of Advisory
Neighborhood Commission 2E**

BZA Appeal No. 17519

**APPELLANT'S WRITTEN RESPONSE TO OWNER'S POST-
HEARING SUBMISSIONS**

I. Introduction

Pursuant to Sections 3121.6 and 3121.7 of the Zoning Regulations, the Advisory Neighborhood Commission 2E (hereinafter "ANC 2E" and "Appellant"), hereby provides a written response to the post-hearing filings of 1812 35th Street Associates, LLC ("Owner"). At issue is the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue Building Permit No. 89770 (the "Permit"). On November 1, 2006, the Owner filed a brief in support of its oral motion to dismiss and a proposed decision and order. The Appellant responds herein to the legal and factual assertions in those two post-hearing submissions by the Owner.

II. Argument

A. Motion to Dismiss

This appeal was filed in a timely manner, i.e., within sixty days of the pertinent administrative decision. Despite such circumstances, the Owner has moved to dismiss portions of the appeal on timeliness grounds. According to the Owner, a notice of appeal must articulate each and every theory and legal citation supporting its appeal. Such a position lacks merit. In its post-hearing submissions, the Owner does not provide any

citations which actually support the motion to dismiss. No cited authority requires an appellant to articulate every legal theory and regulatory citation in a notice of appeal.

In the BZA and judicial contexts, a notice of appeal merely commences the appellate process. By means of a notice, the appellant simply identifies the decision that is the subject of appeal. An appellant is not required to set forth all legal theories supporting its appeal. A BZA appeal notice merely places DCRA and the applicable developer on formal “notice” that the relevant permit is being challenged. The public hearing provides all parties with an opportunity to explore and develop the relevant factual and legal issues.

The Owner also misinterprets the legal principles which have governed the Board’s prior evaluation of the timeliness issue. Contrary to the Owner’s assertions, the timeliness of an appeal can be affected by the inability of an appellant to obtain plans for a permit. *See, e.g., Appeal No. 17310 of Deidre O. Stancioff*. In the instant case, the Appellant’s inability to obtain the latest set of plans had obvious bearing upon the ANC’s understanding of the proposed construction. Without the plans, it could not determine the practical or legal effect of the construction upon the nonconforming side yard and the nonconforming structure.

The Owner erroneously asserts that the scope of construction was evident from the permit itself. However, the building permit did NOT provide “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.” The permit did not, on its face, describe the manner in which the reclassification would be accomplished. Given the Owner’s past permits for a trellis and an eave, the ANC

could not determine from the text of the latest permit whether, for example, the side yard was being eliminated or a common division wall was being constructed. Such information was not set forth in the permit. Previously, DCRA had issued permits that purportedly (and erroneously) reclassified the dwelling as a row house without taking away the side yard. Accordingly, the ANC needed to review the latest plans in order to determine the impact, if any, of the new structure upon the pre-existing side yard.

B. The Merits of the Appeal

The Owner also misinterprets applicable law with respect to the following matters.

Contrary to the Owner's assertions, Section 405.8 applies whenever an owner attempts to "decrease" a nonconforming side yard. The Owner has no basis with which to assert that DCRA may ignore this substantive regulation if the nonconforming side yard is (allegedly) being eliminated altogether. When appropriate, the special exception and variance proceedings provide owners with relief from the provisions of the zoning regulations. *See, e.g., Draude v. District of Columbia Board of Zoning Adjustment*, 582 A.2d 949 (D.C. 1990) (variance required to increase or extend existing nonconforming aspect of the structure). As this Board properly found in the *Pritchard* case, "[s]ubsection 405.8 is plainly intended to preserve side yards in existence prior to the effective date of the Zoning Regulations." *See Appeal No. 16811 of David and Janet Pritchard, Decision and Order*.

Contrary to the Owner's assertions, a "common" division wall cannot be created unilaterally by one owner's construction of an unattached, free-standing structure on his own property. There is no legal or persuasive reasoning which would permit this Board

to conclude that “two separate buildings” can create a “common division wall”. The Owner’s definition is inconsistent with the Zoning Administrator’s prior interpretation of the same terms. In the *Pritchard* proceeding, the Zoning Administrator testified that a “common division wall” is a “party wall” and that a party wall straddles the lot line. See *Appeal No. 16811 of David and Janet Pritchard, Decision and Order at n. 1*. The Owner’s definition of common division wall is also inconsistent with the Board’s findings in *Appeal No. 16935 of Southeast Citizens for Smart Development* (2003), which distinguished between lot line walls and common division walls. Notably, the Zoning Regulations expressly distinguish between lot line walls and party walls. The definition of a “lot line” wall is “an enclosing wall constructed immediately adjacent to a side lot line, **but not a party wall.**” 11 DCMR § 199.1 (emphasis added).

The Owner’s interpretation is inconsistent with principles articulated by the District of Columbia Court of Appeals almost a century ago. As that Court noted, a party wall must be “of mutual benefit” to the adjacent property owners. *Mann v. Boyts*, 47 App. D.C. 356 (1918). A wall that is “merely an injurious proturbance” to the lot line is not a party wall. *Smoot v. Heyl*, 227 U.S. 518 (1913).

In fact, the Owner’s proposed structure will not even include a lot line wall. No wall will be located on the ground floor of the structure. Instead, piers will support the overhanging second and third floor addition. Under these circumstances, there is no factual basis with which to conclude that the structure will add a lot line “wall” or a “common division wall”.

The Owner also misinterprets the *Pritchard* decision and subsequent decisions relating thereto. The Board has not authorized conversions of all semi-detached

dwelling into row dwellings “except in the limited circumstance where one side of the lot abuts an alley.” Instead, it is clear that conversion is prohibited in additional circumstances, including other occasions where the property owner is not constructing a common division wall. In the instant case, the Owner cannot construct a common division wall, in part because Mr. Schmidt’s dwelling already includes a lot line wall and the Owner’s property includes a nonconforming side yard that cannot be extended. Accordingly, the Owner cannot reclassify his dwelling as a row house.

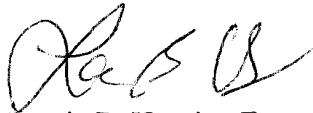
In its proposed order, the Owner seeks to extend the decision in *Southeast Citizens for Smart Development*, BZA No. 16935 (2003), to circumstances that are inapplicable. That case did not create an automatic entitlement of owners to convert every semi-detached dwelling into a row dwelling. Instead, that case related to the minimum zoning requirements for semi-detached dwellings, which expressly permit one “lot line wall”. 11 DCMR § 199.1.

Finally, the Appellant encloses a letter from counsel for Mr. and Mrs. Schmidt. The ANC incorporates herein the arguments advanced in that letter.

III. Conclusion

Accordingly, the Appeal should be granted.

Respectfully Submitted,



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(301) 951-8400

Counsel for Appellant ANC 2E

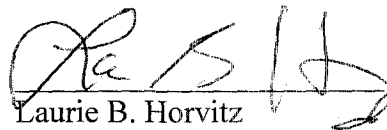
CERTIFICATE OF SERVICE

I hereby certify that the foregoing documents was served on November 7, 2006,
via first class mail, postage prepaid to the following:

Mary Carolyn Brown, Esq.
Holland & Knight
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006-6801

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November 6, 2006

Chairman Geoffrey Griffis
Board of Zoning Adjustment
441 Fourth Street, N.W.
Suite 200
Washington, D.C. 20001

RE: BZA Appeal No. 17519 - Appeal of Advisory Neighborhood Commission 2E
(Subject Property: 1812 35th Street, N.W. (Square 1296, Lot 802))

Dear Chairman Griffis:

We write with regard to BZA Appeal No. 17519, in which ANC 2E appeals from the issuance by DCRA of Building Permit No. 89770 to allow the Owner of 1812 35th Street, N.W. to convert the existing single family semi-detached dwelling into a row dwelling. The existing dwelling has been renovated previously in violation of the applicable Zoning Regulations and prior orders of the BZA. Rather than comply with the law, the Owner has continued to try and manipulate the process to manufacture an after-the-fact rationale to allow the unlawful structure to remain.

Our clients, Richard E. Schmidt and Margaret R. Schmidt, own and reside at 1810 35th Street, N.W., next door to the Subject Property. Mr. Schmidt made a specific request for party status on this appeal, which was rejected by the Board. Respectfully, this decision was incorrect and Mr. Schmidt reserves his right to appeal from that determination. *See, e.g., York Apartments Tenants Ass'n v. District of Columbia Zoning Comm'n*, 856 A.2d 1079, 1083-1085 (D.C. 2004). As a party owning and residing property *next door to* the Subject Property, Mr. Schmidt can assert, and did assert, issues personal to him with respect to this appeal, he meets all of the requirements to have standing to protect his interests, and he was entitled to party status to permit him appropriate procedural and substantive means to protect his interests. *See id.*

Respectfully, the BZA should take all of the relevant interests and issues into account in deciding this appeal on all of the arguments presented by those opposing the Owner's longstanding effort to avoid the application of the Zoning Regulations and prior BZA Orders. Similarly, the Owner's suggestion that certain issues were not appealed in a timely manner should be rejected summarily. This Board has never required the level of formality that the

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Owner suggests applies to this appeal. Although the Owner concedes that this appeal was timely filed on May 8, 2006, it argues for a limitation on the presentation of arguments and evidence going beyond those expressly and completely set forth in the initial filing. The rules governing this Board do not impose such extensive requirements, nor do they validate the Draconian consequence of dismissal of the appeal under these circumstances. The Board decides these issues on the merits, not by applying overly formalistic pleading requirements and dismissing cases on technicalities.

In advancing the motion to dismiss, the Owner is essentially making an “estoppel” claim with respect to the basis for this appeal. A right of appeal encompasses all matters considered in the earlier proceedings. *See York Apartments Tenants Ass’n, supra*, 856 A.2d at 1085. The Owner does not and could not claim any unfairness in the fact that it is being called to account for *all* of its violations of the Zoning Regulations, and it does not deny that these provisions have been argued at length with respect to the Subject Property during this longstanding process. Where no unfair prejudice can be shown, the Board has not dismissed appeals – even where the issue ultimately decided on appeal was different from the grounds asserted initially. *See Appeal No. 17085 of Louise and Larry Smith and Mary Ann Snow and James Marsh* (February 28, 2005) (denying motion to dismiss, where original grounds for appeal had all been dismissed as moot and only the additional challenge raised after original appeal filing remained for resolution).

The issue involved in this case is simple. The Owner took the risk of completing a renovation without complying with the Zoning Regulations or obtaining approval for the noncompliance. Since then, the Owner has engaged in a series of efforts to thwart the applicable requirements to the detriment of Mr. Schmidt and others, and to avoid prior BZA rulings adverse to the Owner.

The latest iteration of this effort is the ruse that an almost totally – if not completely – nonfunctional extension of the upper portion of the dwelling, although not creating a common division wall, creates a “row dwelling” as a matter of right, negating the Owner’s violation of the applicable lot occupancy limitations. The Owner’s position flies in the face of reason as well as the plain language of the Zoning Regulations.

Conversion to a row dwelling under these circumstances requires *both* construction to the lot line *and* creation of a common division wall. Anything less leaves a nonconforming side yard or court, leaving unresolved the lot occupancy violation and creating a further violation by decreasing the existing nonconforming side yard or the creation of a nonconforming court.

A “row dwelling” cannot be created under these circumstances without a common division wall. Here, there is admittedly no such common division wall with the existing structure owned by Mr. and Mrs. Schmidt. The Owner admits that if there were any space at all between the wall and the lot line, the proposal would be prohibited. It says, however, that it plans to extend the upper portions of the existing structure to the lot line, leaving an unfinished

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“open pedestrian walkway” below. This so-called “open pedestrian walkway” is no different from the roof extension proposed and rejected by the BZA previously. The claim that it qualifies as a “dwelling” is incorrect on its face. It is an open area of separation between the two structures. The Owner proposes to create neither a common division wall nor a lot line wall, but instead some sort of extension of the upper part of the structure, leaving an unfinished area below constituting the “open pedestrian walkway.”

The absence of a common division wall means that there is space between the two dwellings – the Owner’s and the Schmidts. This space implicates the purposes of the side yard requirements: “The side yard regulations as a whole are designed to ensure the provision of an adequate amount of separation between structures.” *Appeal No. 16811 of David and Janet Pritchard* (October 15, 2002) at 9. Where, as here, the separation is insufficient, then matter of right construction is not permitted. Currently, it is undisputed that the space between 1810 35th Street, N.W. and 1812 35th Street, N.W. is a side yard. Boxing it in with an extension of the upper portions of the dwelling reduces the side yard or converts it to a nonconforming court, but does not eliminate it altogether. Whether the space is called an “open pedestrian walkway,” a “side yard,” or a “court,” it is noncompliant. The existing nonconforming use may be changed, but it is not eliminated. Matter of right construction is prohibited: “a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.” *See id.* at 8. The situation involved in *Appeal No. 16935 of Southeast Citizens for Smart Dev.* (September 26, 2003) is not involved here, because not even a lot line wall is being proposed by the Owner given the “open pedestrian walkway.”

Instead of attempting to proceed as a matter of right, the Owner has to seek special exception or variance approval: “A property owner seeking to construct an addition that will convert a semi-detached dwelling to a row dwelling under circumstances where it is not possible to construct a common division wall may apply to the Board for a special exception or variance, as appropriate.” *See Pritchard* at 10 (footnote omitted). The Owner in this instance did that – and the request was denied. The Owner should have respected the validity of the Board’s Order. Instead, it simply tried to find another way to ignore the BZA’s authority.

The Owner attempts to convert this issue into one involving the question of whether “a semi-detached dwelling can [l]ever be converted to a row dwelling.” This is not the question before the BZA. Rather, the question is whether the lack of a common division wall means that conversion to a row dwelling has not been accomplished. The Zoning Regulations do not authorize the creation of a “row dwelling” without a common division wall, and to read these provisions otherwise is to ignore their plain meaning. No amount of verbal prestidigitation from the Owner can avoid the clear import of the Zoning Regulations.

ANC 2E’s opposition to the Owner’s position is also notable. ANC 2E’s recommendation is entitled to great weight. The requirements of D.C. Code § 1-309.10 are quite explicit, and require that the Commission’s recommendation be given great weight, including a

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Chairman Geoffrey Griffis

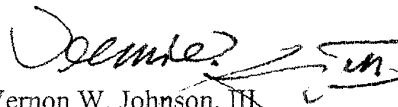
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written explanation stating "with particularity and precision the reasons why the Commission does or does not offer persuasive advice under the circumstances." See D.C. Code § 1-309.10(d)(3)(B) (which further requires a statement of "specific findings and conclusions with respect to each issue and concern raised by the Commission" and specific support for the position ultimately taken).

Mr. Schmidt respectfully requests that the BZA follow the recommendation of ANC 2E and sustain Appeal No. 17519.

Sincerely,



Vernon W. Johnson, III

cc: Laurie B. Horvitz, Esq.
Mary Carolyn Brown, Esq.
Bill Crews
Stephanie Ferguson, Esq.
Office of the Attorney General, Land Use, Public Works and Utilities Section
Ellen McCarthy