

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



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 additions to an existing single-family dwelling, allegedly in violation of the *lot occupancy* (§ 403), *side yard* (§ 405), and *nonconforming structure provisions under subsection 2001.3* for the property at 1812-35th St., N.W., in the R-3 District, without requiring BZA approval.¹

HEARING DATE: **October 17, 2006**
DECISION DATE: **November 14, 2006**

DECISION AND ORDER

INTRODUCTION

Advisory Neighborhood Commission 2E (“ANC 2E” or “Appellant”) filed this appeal with the Board of Zoning Adjustment (“BZA” or “Board”) on May 8, 2006, pursuant to 11 DCMR §§ 3100 and 3101, challenging the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (“DCRA”), to issue Building Permit 89770, dated March 9, 2006, to the property owner of 1812 35th Street, N.W., Washington, D.C., allowing alterations and an addition to convert a semi-detached house to a row dwelling.

Appellant alleged that issuance of the permit violated the lot occupancy (11 DCMR § 403), side yard (11 DCMR § 405), and non-conforming structure (11 DCMR § 2001.3) provisions of the Zoning Regulations.

A public hearing on the appeal was duly noticed and held on October 17, 2006. The Board closed the record on October 17th but for those additional filings that the Board specifically requested. Upon hearing from all the parties to the matter, the Board rendered its decision at the BZA’s Public Meeting on November 14, 2006, voting to grant the appeal. An

¹ The italicized language reflects grounds for the appeal that were not advertised, but which were raised in Appellant’s Supplemental Filing in Support of Appeal.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17519

EXHIBIT NO. 26

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explanation of the facts and law that support the Board's conclusion follows.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Notice of Appeal was filed on May 8, 2006, by ANC 2E. The Office of Zoning scheduled a public hearing on the appeal for October 17, 2006. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, the property owner, and DCRA. The Office of Zoning advertised the hearing notice in the *D.C. Register* at 53 DCR 31 (August 4, 2006).

Parties

The Appellant in this case is ANC 2E. The Appellant was represented by Laurie B. Horvitz, Esq., of Finkelstein & Horvitz, P.C. The owner of the subject property, 1812 35th Street Associates LLC (the "Owner"), was represented by Mary Carolyn Brown, Esq., of the law firm of Holland & Knight. As the property owner, 1812 35th Street Associates LLC, was automatically a party under 11 DCMR § 3199. Assistant Attorney General Stephanie Ferguson, Esq. represented DCRA.

Requests for Intervenor Status

Because this is an appeal, applications for party status are considered applications for Intervenor status pursuant to 11 DCMR § 3112.15. Pursuant to that provision, the Board "in its discretion and for good cause shown, may permit persons who have a specific right or interest that will be affected by the action on the appeal to intervene in the appeal for such general or limited purpose as the Board may specify."

Six individuals who reside near the subject property requested Intervenor status, as did the Citizens Association of Georgetown ("CAG"). The Board denied Intervenor status to Eugene and Joanne Scanlan, who live at 1806 35th Street, NW, and Danielle Berthelot, who resides at 1804 35th Street, NW because they did not attend the hearing and did not indicate how they would participate as a party in the case. Three other applicants who requested Intervenor status attended the hearing. Alexander and Deirdre Stancioff were treated as one applicant because they reside at the same address, 1814 35th Street, NW. The other applicant was Richard E. Schmidt, who resides at 1810 35th Street, NW.

Neither the Stancioffs nor Mr. Schmidt was prepared to address the legal questions on appeal, but instead were desirous of presenting factual evidence related to the resolution

of these issues. As their views were the same as those being advocated by the ANC, the ANC agreed to present their testimony as part of its case.

The Board also denied the Intervenor status request of Citizens Association of Georgetown ("CAG"), who opposed the establishment of a precedent that CAG determined would be harmful to its members and their properties. However, the harm flowing from an undesired precedent is general in nature and would be shared by any persons or groups who might disagree with the position taken by the Zoning Administrator in this matter. Additionally, the subject property is not located in Georgetown where CAG's members live. As with the Stancioffs and Mr. Schmidt, the Board found that CAG's interests would be protected and represented by the ANC who agreed to CAG's participation as part of its case.

CAG also believed its participation as a party was necessary in order to preserve a right to appeal the Board's decision to the District of Columbia Court of Appeals, because ANCs are not authorized to appeal agency decisions to the courts. D.C. Official Code § 1-309.10(g) (2001). However, CAG's participation as a party in the case is not a prerequisite to its filing such an appeal. *See*, D.C. Official Code § 2-510.

FINDINGS OF FACT

1. The property that is the subject of this appeal ("Subject Property") is an existing one-family semi-detached dwelling located at 1812 35th Street, N.W. (Lot 802, Square 1296) in the R-3 zone district.
2. The Subject Property was built around 1910 and originally consisted of a one and one-half story masonry structure.
3. The original structure occupied approximately 31% of the lot and was within allowable lot occupancy limitations for one-family semi-detached dwellings in an R-3 zone, 11 DCMR § 403.3. However, its one side yard is non-conforming, in that its width is approximately 2.5 feet, thereby less than the 8 feet required by 11 DCMR § 405.9.
4. The Owner purchased the property in 2003, after a fire had destroyed the interior of the original dwelling.
5. On or about November 5, 2004, DCRA issued Building Permit No. B467431 allowing for an addition that increased the structure's lot occupancy to 43.75%, which is more than the 40% permitted for a one-family semi-detached dwelling. DCRA initially determined that the introduction of a trellis structure converted the semi-detached dwelling to a row dwelling, for which a lot occupancy of 60% is permitted, but

subsequently changed its position upon objections by Deidre O. Stancioff, an adjacent property owner.

7. DCRA then referred the Owner to this Board for special exception relief under 11 DCMR § 223, which was denied on grounds that the addition unduly affected the light and air of neighboring properties and was out of character and scale with the frontage along 35th Street. *Application No. 17327 of 1812 35th Street Assoc. LLC*, 52 DCR 8715 (2005).

8. On or about September 2, 2005, DCRA issued Building Permit No. B477090 to revise the addition permit (Building Permit No. B467431) to allow the Owner to extend the roof overhang on one wall to the property line. DCRA believed that because the overhang extended to the lot line, the structure could be classified as a row dwelling for zoning purposes.

9. The Board disagreed and reversed the DCRA decision to issue the revised permit. *Appeal No. 17310 of Deidre O. Stancioff*, 53 DCR 5097 (2006).

10. Having twice failed to convert the Subject Property to a row dwelling through proposing to cover the side yard with a trellis and then a roof overhang, the Owner has now opted to cover the side yard with an addition enclosed on the second and third floors, supported by four piers to be installed at the side lot line. (Plans at A-2 and A-3, Tab 2; Appellant's Supplemental Filing in Support of Appeal, Exhibit 18). The addition atop the piers is only accessible at the third floor and only large enough for limited storage. The interior of the space below the second floor is open and inaccessible from the interior of the dwelling. *See Plans, at A-2 and A-3, Tab 2, Appellant's Supplemental Filing in Support of Appeal, Exhibit 18.* It is essentially a covered passageway that is approximately two-feet wide and one story high.

11. Building Permit No. 89770, which authorized this construction, also stated that the work would "change [the] single famil[y] dwelling into a row house."

12. The Zoning Administrator approved the plans and application on March 8, 2006 and issued Building Permit No. 89770 on March 9, 2006. The Zoning Administrator determined that the application complied with the lot occupancy provisions because the new construction would eliminate the only side yard on the property, thus converting the semi-detached house to a row dwelling under the Zoning Regulations. *See, Tr. 10.17/06, pg. 585.*

13. The Zoning Administrator also premised his approval on his assessment that the addition served a functional purpose. *See, Tr. 10/17/06, pg. 587.*

14. Appellant filed this appeal on May 8, 2006. The Notice of Appeal claimed that the Zoning Administrator erred in permitting greater lot occupancy than what is permitted for a semi-detached dwelling, and, alternatively, for approving conversion to a row-dwelling where such conversion requires authorization by this Board.

15. Later, in its pre-hearing statement filed October 3, 2006, Appellant alleged that the approved construction violated the applicable side yard requirement of § 405 and represented the unauthorized expansion of a nonconforming structure (§ 2001.3). *See*, Exhibits 3 and 18.

16. Mr. Schmidt, the adjacent neighbor to whose property the proposed addition would attach, testified that extension of the owner's structure to the side lot line would make maintenance of the siding on his house impossible on the north face; would restrict airflow necessary for the evaporation of condensation; would make access to utility lines, such as telephone and cable, difficult; and would interfere with television reception. *See*, Tr. 10/17/06, pgs. 535 - 537.

CONCLUSIONS OF LAW

Motion to Dismiss

At the hearing, the Owner's attorney moved to dismiss the errors first alleged on October 3, 2006, claiming that this date was more than 60 days after the Appellant knew or should have known of the decision complained of, and therefore these issues were untimely raised.

The District of Columbia Court of Appeals has repeatedly held that, if a BZA "appeal was not timely *filed*, the Board was without power to consider it." *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980) (emphasis added); *accord*, *Waste Management of Maryland, Inc. v. District of Columbia Board of Zoning Adjustment*, 775 A.2d 1117, 1122 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure provide that an "appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2 (a). The owner does not dispute that this appeal was timely *filed*, but claims the Board nevertheless lacks the jurisdiction to hear errors alleged after that 60-day period expires. The Board disagrees.

The Owner equates the time by which an appeal must be filed with the time by which amendments to an appeal may be made. While the Board's rules expressly address the former, they are silent as to the latter.

The Board has previously ruled that additional legal grounds for an appeal raised after the initial filing of a timely appeal are permissible amendments not subject to the 60-day time requirement. *See Appeal of Louise and Larry Smith and Mary Ann Snow and James Marsh, BZA Appeal No. 17085* (February 28, 2005). In that appeal the Board denied a motion to dismiss a legal claim raised after the initial filing of the appeal where Intervenor had ample notice of the claim.

The Appellant's initial submission noted in sufficient detail the administrative decision that was the subject of the appeal. Accordingly, as in *Snow, supra*, there was no surprise or prejudice to the Intervenor from allowing an additional legal theory to be espoused after the filing of the appeal.

Finally, the Appellant specifically put Appellee and Intervenor on notice that it anticipated supplementing the appeal when relevant documentation became available, expressly noting its difficulty in obtaining the complete record regarding the issuance of the permit. *See Statement in Support of Appeal, Exhibit 3, pg. 2.* An appellant is not required to espouse every possible legal theory when it files an appeal within the 60-day time period, particularly when all relevant documentation is not available.

THE MERITS OF THE APPEAL

The Positions of the Appellant, Appellee and Intervenor

The Appellant maintained that the Building Permit was issued in violation of the zoning regulations because it authorized improvements which: (1) exceeded the permissible lot occupancy for semi-detached dwellings under §403, (2) improperly decreased a nonconforming side yard under § 405, (3) unlawfully expanded the prior nonconforming structure under § 2001.3, and (4) circumvented the special exception and variance procedures of this Board. The Appellant cited in support of its position 11 DCMR §§ 403, 405, and §2001.3. The Appellant also disputed the Owner's legal entitlement to convert the semi-detached dwelling into a row house and further challenged the adequacy of the particular improvements to accomplish that intended result.

The Owner and DCRA contended that row dwellings are a matter of right in an R-3 zone and that the Building Permit lawfully authorized such a conversion. They asserted that because the proposed addition would extend to the side lot line, the existing nonconforming

side yard would be removed and result in the reclassification of the dwelling from a semi-detached dwelling to a row dwelling. The Zoning Administrator further testified that his conclusion that a permissible reclassification occurred was also premised on his assessment that the addition served some structural purpose.

The Appeal is Granted

The Board finds that the Building Permit was issued in error. The alterations and additions authorized by the Building Permit are not allowed as a matter of right and did not cure the deficiencies found by the Board in Appeal No. 17310 and Application No. 17327.

The structure at issue is presently a one-family semi-detached dwelling because it has a side yard on one side and a lot line wall on the other. 11 DCMR § 199.1. As a result of improvements made in 2004, the structure's lot occupancy exceeds the 40% maximum permitted for that use. To remedy this noncompliance, the applicant attempted to convert the structure to a row dwelling for which a lot occupancy of up to 60% is permitted. The Zoning Regulations define "dwelling, row" as "a one-family dwelling having no side yards." 11 DCMR § 199.1. The question, therefore, is whether the Property Owner has succeeded in lawfully eliminating the one side yard.

While the Appellant advanced several theories in support of the Appeal, the Board determined the case on the basis of 11 DCMR § 405.8. Section 405.8 provides: "In 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 (5 ft.)." (Emphasis added.)

In the instant case, the original structure was built before 1958 and an addition was proposed that would decrease the width of the nonconforming side yard (2.5 feet) to less than five feet – to zero feet.

DCRA and Owner argued that the proposed decrease in the side yard to zero would eliminate the nonconforming side yard, and therefore, the provision would no longer apply. They also argued that their interpretation would be in accordance with the general policy to encourage the elimination of nonconformities. The Board appreciates the logic of that view on its face, but finds that the alternative interpretation, that a decrease to zero is still a decrease within the meaning of the regulation, is more in accordance with the language of the regulation, as well as the Zoning Commission's intent as gleaned from its legislative history.

In enacting § 405.8 in 1976, the Zoning Commission amended the zoning regulations to remove from review by the Board a category of side yard cases that the Zoning Commission determined would generally not result in adverse impacts and would therefore not require the Board's review. *See* Memorandum from Ben W. Gilbert, Director, Municipal Planning Office to D.C. Zoning Commission, Subject: Zoning Commission Case No. 76-10, dated July 6, 1976, recommending approval of the proposed amendments on grounds that the proposed amendments would expedite the BZA process without adverse impacts; that they would remove from BZA review "cases which are relatively routine, uncontroversial and in about all cases, are approved by the Board." Memorandum at 2.

The Memorandum further states with respect to the proposed side yard amendment:

The proposed amendment would allow an extension or an addition to be made to the pre-1958 buildings in residential districts provided two conditions are satisfied as follows:

1. The width of the existing yard is not decreased.
2. The width of the existing side yard is at least five feet.

Id at 3.

The subject property fails to meet both of these conditions. The existing width of the side yard is 2.5 feet and the addition would decrease its width to zero.

The Board notes that the evidence in this case shows that a decrease in the side yard to zero would have adverse impacts on the neighboring property to which the proposed addition would attach. (*See* Finding of Fact 15.) That evidence supports the conclusion that this scenario was not contemplated in the category of cases which the Board "routinely granted...after determining that there would be no adverse impact." *Id.* at 6.

Accordingly, the Board concludes that the Zoning Administrator erred in issuing the revised permit because it authorized construction in violation of the lot occupancy limitation for a semi-detached dwelling under §403 and in violation of the prohibition against decreasing a nonconforming side yard set forth in § 405.8.

For reasons discussed above, the Board grants the appeal. It is hereby **ORDERED** that:

- a. The **motion to dismiss** portions of the appeal as untimely is **DENIED**.

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VOTE: 4-0-1 (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II and Michael G. Turnbull to deny the motion to dismiss; Curtis L. Etherly, Jr. not present and not voting)

Vote taken on November 14, 2006.

b. The **motion to grant** the appeal that the permit was issued in error is **GRANTED**.

Vote taken on November 14, 2006.

VOTE: 3-1-1 (Ruthanne G. Miller, John A. Mann II and Michael G. Turnbull to grant the appeal; Geoffrey H. Griffis opposed; Curtis L. Etherly, Jr., not present and not voting)

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

A majority of the Board approved the issuance of this Order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: OCT 25 2007

PURSUANT TO 11 DCMR § 3125.6, THIS 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 FINAL.