

BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal of Advisory Neighborhood Commission
3E and Todd Boley

Case No. 17631

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**APPELLANT TODD BOLEY'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Appellant Todd Boley proposes that the Board make the Findings of Fact and reach
the Conclusions of Law set forth below:

FINDINGS OF FACT

1. The subject property is located on the north side of Fessenden Street, several lots to the east of 44th Street, and is now known as Premises 4319, 4319½, 4321 and 4321½ Fessenden Street, N.W. It is zoned R2.
2. Prior to subdivision in March 2006, the property consisted of two rectangular lots, each with one single-family house and a very deep, substantially wooded, backyard running toward the middle of Square 1655. Square 1655 has no alley access, which is unique to the neighborhood.
3. Dunn Whiskey, LLC ("Owner") arranged for the purchase of the two lots and for their subdivision into four lots.
4. Except for the panhandles described below, the four lots as shown on the subdivision are roughly rectangular in shape. The two smaller lots, Lots 19 and 20, are side by side in the front (south portion) of the property facing Fessenden Street. The two larger lots, Lots 17 and 18, are side by side in the back (north portion) of the property. Of the two

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front lots, Lot 20 is to the east and Lot 19 to the west. Of the two back lots, Lot 18 is to the east and Lot 17 to the west.

5. The subdivision shows a panhandle as part of Lot 18 extending from the rectangular portion of the lot to the west for approximately 36 feet, then turning south at a right angle and running 95 feet to Fessenden Street. The subdivision shows that panhandle with a 14 foot frontage on Fessenden Street. The subdivision also shows a panhandle as part of Lot 17 running south from the rectangular portion of that lot for 95 feet to Fessenden Street. The subdivision also shows that panhandle with a 14 foot frontage on Fessenden Street.

6. In connection with its application for building permits to construct a single-family, semi-detached, house on each of the four lots, Owner submitted to the Zoning Administrator within the Department of Consumer and Regulatory Affairs ("DCRA") a document entitled "Joint Driveway Parking Area and Use Easement" (the "Paper") stating it was "made" by Owner on October 26, 2006. Although in the body of the Paper it is referred to as an "Agreement," there is only one party to it, i.e., Owner.

7. The Paper purports to grant and convey from Owner to itself and any future owners of Lots 17, 18, 19 and 20 "a non-exclusive easement of ingress and egress exclusive parking use area and exclusive use area easement over and through the portion of the driveway, parking area and use area located on Lots 17, 18 and 19, for vehicular and pedestrian use as a driveway, parking area and use area easement, leading to and from Lots 17, 18, 19 and 20." More particularly, the Paper shows that the part of the panhandle running west from the rectangular portion of Lot 18 is to be used to provide ingress and egress access for the benefit of all four lots. The Paper further shows that a portion of Lot 18's panhandle (as shown on the subdivision) is to be used for parking for the benefit of Lot 17 and the

remainder of the panhandle, including its frontage on Fessenden Street, is to be used exclusively for the benefit of Lot 19. The Paper specifically provides that no present or future owner of Lot 18 shall have any right to use this exclusive use area that the Paper grants to Lot 19.

8. The Paper further provides that a portion of Lot 19 at the rear of the Lot measuring 19 by 27 feet (513 sq. ft.) is to be used for parking for Lots 17 and 18. If this parking area is considered to be part of Lot 19, the area of the Lot is 3,024 sq. ft.

9. The Paper further provides that the panhandle of Lot 17, including its frontage on Fessenden Street, all as shown on the subdivision, is to be used to provide ingress and egress access for the benefit of all four lots to and from the houses on Lots 17 and 18 and to and from twelve parking spaces some of which are located on Lots 19 and 20 and some on Lots 17 and 18.

10. Among the parking spaces Owner has located on the back lots is at least one sited in front of the house on Lot 18.

11. The Acting Zoning Administrator testified that he had reviewed the issuance of the building permits and concluded that they were issued correctly and that Owner's development complied with the Zoning Regulations as a matter of right. He testified further that in concluding that the building permits had been issued correctly, he considered the Paper solely to show that the development included requisite means of ingress and egress to the two back lots and to the parking spaces at the rear of the two front lots and that he did not consider anything in the Paper in connection with determining compliance with other Zoning Regulations, including lot size, frontage and parking requirements, because "easements" don't affect how adherence to those requirements is determined. That is, except for reliance on the creation of a common driveway on what was the panhandle to Lot 17 and a part of the

panhandle for Lot 18, the Acting Zoning Administrator ignored the Paper, which he testified was the right and proper thing to do. He relied instead upon the characteristics of the lots as set forth on the subdivision plat, even though the Paper made plain that the use of the property would be substantially at variance with those characteristics.

12. The Acting Zoning Administrator further testified that he did not look into or consider whether the Paper legally created "easements."

13. The building permits here challenged were issued on December 26, 2006. The Appellants filed their appeal on February 23, 2007.

14. Appellant Todd Boley's homestead abuts the subject property to the north. The buildings that Owner is constructing on the two back lots, Lots 17 and 18, extend to approximately 20 feet from Appellant Boley's property. The buildings Owner is constructing are large structures that tower over Appellant Boley's swimming pool, which is located close to the property line on the south of his property. The size of Owner's buildings adversely affects Appellant Boley's enjoyment of his property by reason of their impact on the light and air previously available in and around his swimming pool and backyard and because, instead of looking from his property to a substantially wooded area to the south, the view now is of Owner's imposing structures.

15. Other neighbors also provided evidence to the effect that Owner's development is inconsistent (because, among other things, of its size and parking arrangements) with the characteristics of the Square, engenders significant storm water runoff problems, destroys considerable greenery and creates a density in the Square that is new and detrimental to the quality of life in the neighborhood.

16. Despite Owner's knowledge of the filing of this appeal on February 23, 2007, Owner proceeded with the construction of the buildings on the property. In consequence, those houses are now substantially built and are likely to be completed before year end 2007.

CONCLUSIONS OF LAW

1. The appeal in this case by the Appellants from the issuance of the building permits was timely filed and is within the Board's jurisdiction to hear and determine.

2. The "Joint Driveway Parking Area and Use Easement," referred to above as the "Paper," granted and conveyed rights from Owner to itself and accordingly is not an "easement." See Leonard A. Jones, A Treatise on the Law of Easements §835 (2003) ("No person can have an easement in land which he himself holds"); Hefazi v. Stiglitz, 862 A.2d 901, 912 (D.C. Ct. of App. 2004) (applying same principle to prescriptive easements); Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land §3:11 and n.2 (2001) (stating, "[I]t is axiomatic that a landowner cannot obtain an easement in the landowner's own property" and citing more than a dozen cases supporting that statement).

3. The Paper expressly delineates the uses the Owner will make of the property, uses considerably different from those that could be reasonably inferred from the lot lines shown on the subdivision. Accordingly, the Paper must be viewed as redefining those lot lines for zoning purposes, and compliance by Owner with the Zoning Regulations must be determined on the basis of how the Owner represented to DCRA in the Paper the Owner would use the property. Otherwise, developers may unilaterally through "easements" in name only avoid multiple zoning requirements.

4. Even if the Paper could be properly viewed as creating real easements for zoning purposes, they may not here be ignored. See, e.g., Loveladies Property Owners Ass'n v. Barnegat City Service Co., 60 N.J. Super. 491, 159 A.2d 417 (1960); Sommers v. Mayor

and City Council of Baltimore, 215 Md. 1, 135 A.2d 625, 627 (1957); Kefauver v. Zoning Board of Appeal, 151 Conn. 144, 195 A.2d 422 (1963).

5. DCRA knew prior to issuing the building permits that the property would be developed and used in a manner violative of at least those zoning requirements relating to frontage, parking and minimum lot size. DCRA claims that this information was correctly ignored, except to the extent it enabled Owner to claim compliance with ingress and egress requirements, because the information was provided in a document labeled "Easement." Nothing in the Zoning Regulations countenances such an arbitrary approach for determining compliance with them.

6. Zoning Regs. §401.6 requires that each lot have a street frontage of at least 14 feet. The Paper provides that the street frontage for Lot 18, as shown on the subdivision, is to be used exclusively for the benefit of Lot 19. In consequence, Lot 18 has no street frontage in violation of §401.6.

7. The Paper shows that the frontage for Lot 17 as shown on the subdivision will be used as part of a common driveway to provide ingress and egress to numerous parking spaces not only on Lot 17 but also on Lots 18, 19 and 20. Section 401.6 requires each lot to have 14 feet of street frontage, not to share those 14 feet of frontage with other lots. The use of the street frontage of Lot 17 as shown on the subdivision to provide ingress and egress, both vehicular and pedestrian, for all four lots violates §401.6.

8. DCRA claims that because the purposeful elimination of the frontage for Lot 18 and for Lot 17 is set forth in what the Paper calls an "easement," such elimination may be ignored for zoning purposes. That position is untenable.

9. Zoning Regs. §2116.1 requires "all parking spaces to be located on the same lot with the building they are intended to serve." The Regulation in express terms refers to

all parking spaces, not, as DCRA claims, just the single parking space per dwelling unit required by §2101 of the Regulations. Where the Zoning Commission wanted to refer to "required" parking spaces in the Zoning Regulations, it knew very well how to do so. See Zoning Regs. §2116.4. Section 2116.1, however, says "all parking spaces," not "all required parking spaces." The Paper shows that Lot 18 shall have one and Lot 17 three parking spaces on what the subdivision shows as Lot 19. This location of non-required parking spaces violates §2116.1.

10. Zoning Regs. §2116.2(b) bars any parking space, not just the one "required" parking space specified in §2101, on any "open area" of a lot that is not a "rear yard" or a "side yard." Owner has provided for parking spaces in open areas of Lots 17 and 18 that are not within the rear or side yards of those lots. This violates §2116.2(b).

11. Zoning Regs. §401.3 requires a minimum lot size of 3000 sq. ft. The Paper shows that more than 500 sq. ft. on what the subdivision shows as Lot 19 will be used for parking for Lots 17 and 18. In consequence, Lot 19 fails to meet the minimum lot size requirement in violation of §401.3.

12. Zonings Reg. §403.2 requires that the building on Lot 19 occupy no more than 40% of the Lot. The Paper shows that more than 500 sq. ft. on what the subdivision shows as Lot 19 will be used for parking for Lots 17 and 18.. In consequence, the portion of Lot 19 occupied by the building is at least 45%. This violates §404.2.

13. As noted above, DCRA's claim that because the purposeful shrinkage of Lot 19 is the consequence of what the Paper calls an "easement," such shrinkage may be ignored for zoning purposes is untenable.

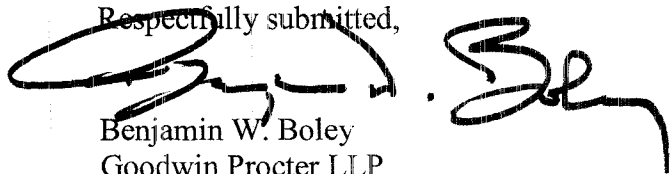
14. DCRA claims that because the purposeful diminution of Lot 19 is provided for in what the Paper calls an "easement," such diminution may be ignored for zoning purposes. That position is untenable.

15. Because of these violations of the Zoning Regulations, the issuance of the building permits from which this appeal has been taken was done in error. Owner is not entitled to build its development on the property as a matter of right under the Zoning Regulations.

16. In light of this conclusion, we need not consider Appellant Boley's other allegations of error and have not done so.

17. Because Owner's development is not in compliance with the Zoning Regulations, work upon it should stop immediately, to be continued only if and when Owner is successful in obtaining a variance or special exception from this Board.

Respectfully submitted,



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July 23, 2007

Certificate of Service

I hereby certify that the foregoing Appellant Todd Boley's Proposed Findings Of Fact And Conclusions Of Law was served on the following persons by First Class, United States mail, on July 23, 2007:

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