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July 23, 2007

VIA HAND DELIVERY

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

RECEIVED
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Re: BZA Appeal No. 17631
4319-4321 1/2 Fessenden Street, N.W.
(Square 1655, Lots 17-20)

Dear Members of the Board:

Enclosed please find original and 20 copies of the Owner's Proposed Order in the above-referenced matter.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: Mary Carolyn Brown
Mary Carolyn Brown

cc: Sam Dunn

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17631
EXHIBIT NO. 28

Board of Zoning Adjustment
District of Columbia
CASE NO. 17631
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CERTIFICATE OF SERVICE

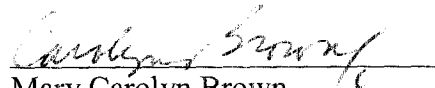
I HEREBY CERTIFY that a copy of the foregoing letter was served this 23rd day of July, 2007, by electronic and first-class mail, postage pre-paid, upon the following:

Benjamin W. Boley, Esq.
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Matthew LeGrant
Acting Zoning Administrator
D.C. Department of Consumer & Regulatory Affairs
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Washington, D.C. 20002
matt.legrant@dc.gov

Advisory Neighborhood Commission 3E
Lisner Home
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Attn: Polly King Evans, Administrator
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Mary Carolyn Brown

**PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER of
DUNN WHISKEY, LLC
Submitted July 23, 2007**

APPEAL NO. 17631 of Todd Boley and Advisory Neighborhood Commission 3E, pursuant to 11 DCMR § 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to issue permits for four semi-detached dwellings, alleging that issuance of the permits violates the lot dimensions, area requirements and parking requirements of sections 401.3, 401.6, 403.2, 404.1, 405.9, 2116.1, and 2117.4 of the Zoning Regulations at premises 4319, 4319½, 4321 and 4321½ Fessenden Street, N.W., Washington, D.C. (Square 1655, Lots 17-20) in the R-2 District.

HEARING DATE: July 10, 2007

DECISION DATE: July 31, 2006

DECISION AND ORDER

The Todd Boley and Advisory Neighborhood Commission 3E (the "Appellants") filed this appeal with the Board of Zoning Adjustment ("BZA" or "Board") challenging the decision of the Zoning Administrator to issue Building Permit Nos. 101587, 101584, 101588, 101585. The permits authorized the property owner, Dunn Whiskey, LLC ("Owner"), to construct four semi-detached dwellings.

In its initial appeal filed February 23, 2007, the Appellant alleged that issuance of the permits violated the lot occupancy (section 403), minimum lot dimension (section 401), rear yard (section 404), side yard (section 405), and off-street parking requirements (sections 2117, 2101 and 2116) by virtue of a common driveway easement. The Board considered the merits and held that no zoning requirements were violated. Because easements have never had an impact on any of the zoning regulations, the Board determined that the Zoning Administrator did not err in issuing the permits and the appeal was denied.

PRELIMINARY MATTERS

The Parties

The parties to the proceeding were Todd Boley, represented by Benjamin Boley, Esq. of Goodwin Proctor; ANC 3E, represented by Carolyn Sherman, the Single Member District representative for the area in which the property is located; DCRA, represented by Matthew Green, Esq.; and the Owner, an automatic party pursuant to 11 DCMR § 3199.1, represented by Carolyn Brown, Esq., of Holland & Knight LLP.

Motion to Dismiss

At the hearing, the Owner moved to dismiss as untimely the Appellant's claim of error under the lot width and street frontage provisions of section 401. The Owner argued that these claims were not raised until February 23, 2007, 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 the Appellants 3E, while unaware of the subdivision plat recording in the Spring of 2006, were well aware of Owner's plans and permit applications in the Fall of 2006, as evidenced by the previous disputes over construction on this property. ANC 3E opposed the motion and DCRA took no position on the motion. The Board allowed Appellant's lot width claims on account that they were appealing issuance of the building permits and not the subdivision plat recordings. As such, Appellant's appeal was ruled to be timely.

FINDINGS OF FACT

The Subject Property and the Building Permits

1. The subject property is located in the R-2 District at 4319, 4319½, 4321 and 4321½ Fessenden Street, N.W., Washington, D.C. (Square 1655, Lots 20, 18, 19, and 17, respectively) ("Property"). Each lot contains a semi-detached dwelling. Two houses will front on Fessenden Street within Lots 19 and 20, while the other two houses will be located toward the interior of the square with street frontage to Fessenden through "pan-handle" shaped lots.
2. Owner purchased Lots 17, 18, 19 and 20 on March 23, 2006. The four lots were created by the prior owner out of former Lots 3 and 4, each of which was improved with a detached single-family dwelling. The two houses were demolished in order to construct the four semi-detached dwellings on the new lots.
3. The initial plans for the Property contemplate three parking spaces for each house by means of an interior parking court created by cross-easements on the four lots. The Zoning Regulations only require one parking space for each house. The parking layout was later modified as shown on the revised building plats (see BZA Record Exhibit 18, Tabs B and C). The required parking for Lots 17 and 18 – the dwellings to the rear of the Site – will be located in garages incorporated into the facades of the houses. Lot 18 will also have a second parking along the eastern portion of its lot. The required parking spaces for Lots 19 and 20 will be located in the respective rear yards of each lot. Lots 18 and 19 will also provide an additional two parking spaces each in their respective rear yards.

4. The owners of all four houses will access their parking spaces from Fessenden Street by one common driveway. The driveway is located on the panhandle portion of Lot 17, and portions of Lot 17, 18 and 19 at the interior of the Property.

5. In May 2006, Owner contacted ANC 3E to inform them that building permit applications and plans had been filed for the proposed dwellings. Over the next ten months, Owner and the Appellant, along with the Zoning Administrator and other area residents were in constant communication about the new development and exchanged dozens of emails.

6. In order to obtain the necessary building permits for new construction, Owner recorded a covenant on December 1, 2006, for a Storm Management Plan for the benefit of the District. On December 26, 2006 DCRA issued Permit Nos. 101587 (Lot 17), 101584 (Lot 18), 101588 (Lot 19) and 101585 (Lot 20), which are the subject of this appeal. The Zoning Administrator determined that the applications complied with the all zoning regulations.

7. DCRA notified Owner that the houses on Lots 19 and 20 may not comply with the 40% lot occupancy requirements. Owner modified its plans and DCRA issued revised permits on May 11, 2007, to meet the lot occupancy limitations.

8. On February 23, 2007, the Appellants filed the instant appeal. At the public hearing ("Hearing") on this matter on July 10, 2007, the Owner moved to dismiss as untimely the Appellant's challenges with respect to sections 401. The Board held that the challenges were timely and continued with the merits of the case.

9. Todd Boley, Carolyn Sherman of ANC 3E, [names of 2-3 other witnesses] testified as witnesses in support of the appeal. Their testimony addressed the size of the houses, the loss of trees, and the perceived adverse impacts the new houses would have on their property and the neighborhood, and the negative precedent it would set for residential districts. None of the witnesses addressed the legal questions raised by the appeal.

10. Matthew LeGrant, the Acting Zoning Administrator, testified as an expert in zoning matters at the hearing.¹ It was his professional opinion that the predecessor Zoning Administrator, Bill Crews, did not err in approving the building permit applications. The Zoning Administrator refuted all thirteen violations alleged by the Appellants. See Record Exhibit No. 25.

11. In a post-hearing submission requested by the Board, Appellant Todd Boley argued that shared driveways and similar access easements diminish the required lot dimensions and area requirements under zoning ordinances. Boley cited several cases from various jurisdictions outside the District of Columbia as well as a zoning law treatise that purported support this argument. However, these cases addressed the effect of private streets and alleys on

¹ Appellant Boley challenged the ability of the Zoning Administrator to testify as an expert witness, given the Zoning Administrator's vested interest in the outcome of the case. Boley later withdrew this objection in a post-hearing submission, arguing instead that the expert opinion of the Zoning Administrator should be weighed in light of his vested interest in the case.

lot dimensions and yard requirements, not shared driveway easements. See BZA Record Exhibit No. 24.

12. The Owner, on the other hand, argued in its written submission to the Board and at the hearing that driveway easements do not diminish the required lot dimensions or area requirements of residential construction. The Owner pointed to long-standing interpretations by the Zoning Administrator and BZA where such shared driveways were recognized as solving access issues for properties, including the Rosedale property in Cleveland Park. There, the Zoning Administrator approved the creation of ten new lots and the construction of ten new single-family dwellings, with parking for each house accessed by a shared driveway from Newark Street over one of the lots with a panhandle-shape. The entire width of the panhandle from Newark Street to the interior of the square is encumbered by the access easement. A second lot in that subdivision, Lot 21, is also encumbered by an access easement for its entire 20-foot width. Record Exhibit No. 18.

13. The Owner also submitted information suggesting that the Board has routinely recognized the benefit of driveway easements across adjoining project to provide access to required parking spaces, and that such easements have not affected the lot dimensions or area requirements of the encumbered property. *See, for example*, BZA Order No. 13235, May 15, 1985, at 2 (adjoining properties on separate lots encumbered by paved easement area to provide shared driveway access and maneuvering space for parking spaces; easement created exceptional condition for variance test to allow a rear deck); order in BZA Application No. 13223, July 28, 1980 at 2 (parking spaces to new residential development to be accessed by easement over adjoining lot not owned by applicant); order in BZA Application No. 12591, August 1, 1878 (new residential development in R-5-A District to provide access to parking space via easement for shared driveway).

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 December 26, 2007, the day the permits were issued, and concludes that the appeal challenging compliance with lot occupancy (section 403), rear yard (section 404), side yard (section 405), and off-street parking requirements (sections 2117, 2101 and 2116) by virtue of a common driveway easement, was timely filed on February 23, 2007.² The Board further concludes that, even though the minimum lot dimensions

² The Board notes that the Appellants did not allege violations of the rear yard (section 404) and the side yard (section 405) until June 25, 2007, nearly six months after the building permits were issued. However, because these alleged violations all stem from the same permits, the Board concludes that these additional challenges to be timely. *Cf. Woodley Park Community Association v. D.C. Board of Zoning Adjustment*, 490 A.2d 628, 637 (D.C. 1985) (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).

and street frontage requirements under section 401 were established when the subdivision plat was recorded in March 2006, and even though those dimensions did not change as a result of the building permits, those lot dimension approvals were nevertheless governed by the building permits so that the portion of the appeal challenging compliance with section 401 was also timely.

Merits of the Appeal

In essence, this appeal raises three legal questions: (1) whether portions of lots encumbered by access easements may be included in determining compliance with lot size requirements or parking requirements; and (2) whether parking spaces are properly located on the lots.

Easement Analysis under Zoning Regulations

Appellants cite the easements on the Property for causing ten of the thirteen claimed violations listed in their appeal. See Record Exhibit No. 15, at 3-6. They contend that private easements must be excluded when determining compliance with lot size requirements, and rely on several cases from other jurisdictions to support this claim. Record Exhibit No. 24. The Board is unpersuaded by this argument for several reasons.

First, the building permits only authorized construction of four semi-detached houses and accessory parking, and do not control the shape or configuration of the lots. The lot dimensions were established and set by the subdivision plat, which was recorded in the Surveyor's Office almost nine months before the building permits were even issued. Because the building permits do not control lot dimensions, and only the building permits were challenged, this issue is not properly before the Board. That is, if the Board were to find that the lot dimensions did not comply with zoning by virtue of the access easements, the only remedy would be to order rescission of the subdivision plat, which is not before it. Revocation of building permits would not have any effect on the lot dimensions.

Second, the precedents cited by the Appellant are not controlling in this jurisdiction for the obvious reason that the zoning ordinances they interpret are not the D.C. Zoning Regulations. There is no indication that subdivision requirements in these other jurisdictions are the same as the District's requirements, and there is no way of knowing whether these jurisdictions follow the long-standing practices of this Board. Moreover, these cases are readily distinguishable from the instant appeal. For example, in *Loveladies Property Owners Ass'n v. Barnegat City Service Co.*, the appellants challenged a new residential subdivision where easement strips were reserved for private streets. Here, the Appellants are challenging the building permits, not the subdivision, and the easement for the Fessenden Street houses provide driveway access, not street access for an entire development that can be accessed by anyone in the general public. In *Sommers v. Mayor and City Council of Baltimore*, the issue to be decided was just as much controlled by the date a nonconformity was established as the easement question. In *Kefauver v. Zoning Board of Appeal*, the court was likewise interpreting private street easements for *front yard* requirements, whereas the District does not have any area requirements for front yards. Similarly, in the other cases cited by the Appellants, the courts were interpreting subdivisions, not building permits, or

private roads, not driveways, or zoning ordinances that specifically excluded easements for lot dimension calculations, where the District's Zoning Regulations do not have such a provision. Consequently, these cases are of little, if any, value in analyzing the instant appeal.

Instead, the Board must rely solely on the long-standing interpretations of this jurisdiction, its Zoning Administrator and the Board's past decisions. Here, both the Zoning Administrator and this Board have held that driveway easements that are only accessible to the properties they serve do not diminish the required dimensions for lots or yards. The most compelling precedent is the Rosedale development, which clearly approved a common driveway over a panhandle-shaped lot to provide access to ten houses on ten different lots. In fact, the Board has routinely recognized the benefit of driveway easements across adjoining project to provide access to required parking spaces. At no time has the presence of those easements affected the lot dimensions of the encumbered property. *See, for example*, BZA Order No. 13235, May 15, 1985, at 2 (adjoining properties on separate lots encumbered by paved easement area to provide shared driveway access and maneuvering space for parking spaces; easement created exceptional condition for variance test to allow a rear deck); order in BZA Application No. 13223, July 28, 1980 at 2 (parking spaces to new residential development to be accessed by easement over adjoining lot not owned by applicant); order in BZA Application No. 12591, August 1, 1978 (new residential development in R-5-A District to provide access to parking space via easement for shared driveway). Because the Zoning Administrator's approval of the building permits for the Fessenden Street houses is consistent with these long-standing interpretations of this jurisdiction, he committed no error. *See Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (1975)(while the Board is not bound by past decisions, it must consider in its deliberations long-standing interpretations of the Zoning Regulations which have had precedential effect); *see also* BZA Order No. 17109, November 8, 2005 (history of interpretation of "exterior walls" by Zoning Commission, the Zoning Administrator, NCPD, and BZA is sufficient basis for BZA to continue to apply that definition).³ We now turn to each of the alleged violations.

Section 401.6

The Appellant urges that four different violations occurred under section 401.6 when DCRA issued the building permits. Record Exhibit 15 at 3, 4. Each one of these claims is dependent upon easements being considered during the analysis. However, as Mr. LeGrant testified at the hearing, easements do not play a role in the Zoning Regulations. The Board agrees and concludes that the easements do not diminish lot frontage and therefore, Lots 17 and 18, both with fourteen feet of street frontage, do not violate section 401.6.

For the same reasons, a storm water management facility on the lots has no bearing on the minimum lot dimensions of the subdivision. First, the majority of the storm water management features are underground. Second, even those features at ground level do not in any way interfere with lot lines established through subdivision any more than fences, retaining walls, sheds or other structures do. Additionally, Appellant's claim that the driveway established by the easement violates section 401.6 misses the mark. Driveways are not mentioned and do

³ This BZA decision has been appealed to the D.C. Court of Appeals on other grounds; a decision is pending.

not apply to section 401.6. Instead, they apply under section 2117.8 and require a width of twelve feet. Because the driveway in Lot 18 meets this requirement, no violation occurred.

Similarly, the Appellant misinterprets the regulation under his fourth claim relating to section 401.6. Appellant urges the Board to measure frontage once the common driveway turns east. Record Exhibit No. 15, at 3. The lot frontage, by definition, cannot be measured at the interior of the Property. Instead, this dimension is measure at the street and easements play no role. The Board concludes that at the street, Lots 17 and 18 have lot frontage of fourteen feet and thus, do not violate section 401.6.

Section 2117.4

The Appellant claims that none of the lots contain their own parking via a driveway because the easement is shared by all lots, resulting in two separate violations. *Id.* at 4, 5. However, we credit the testimony of Mr. LeGrant, who stated that the regulation does not require each lot to have its own driveway. The numerous cases cited above demonstrate the BZA's long-standing recognition of a need for single driveways to serve required parking for multiple single-family dwellings. The Board concludes that no violation occurred with regards to section 2117.4. Lots 19 and 20 have access to their respective parking spaces and do not violate section 2117.4.

Section 401.3

Appellant argues that Lot 19 does not meet the minimum lot size requirement of 3000 square feet because the easement area should not be considered. *Id.* at 5. The Appellant was unable to cite any provision in the Zoning Regulations that excludes easement areas from the lot area calculations. In fact, as Mr. LeGrant testified at the hearing, the Zoning Regulations do not prohibit including easement areas in lot dimensions. We agree. Driveway easements do not factor into lot dimension calculations and, therefore, are not subtracted from lot area. Lot 19 has a lot area of 3,024 square feet and thus is fully compliant with section 401.3.

Section 404.1

We similarly reject Appellant claims that the easement area should be subtracted from the rear yard measurement for Lot 19 under section 404.1. We agree with the expert testimony of Mr. LeGrant that the driveway easement has no effect on rear yard depth and, as such, Lot 19 does not violate section 404.1.

Section 403.2

The Board also disagrees with Appellant claim that Lot 19 violates the percentage of lot occupancy in section 403 twice because both the easement and the bay window are factors. *Id.* at 6. The easement does not diminish the size of Lot 19. Additionally, Zoning Regulations consider the bay window public space and, therefore, it is not included in the building area. The building on Lot 19 occupies 39.4% of the lot, meeting the 40% maximum requirement.

Section 405.9

The Board similarly rejects the Appellants' argument that the outside stairway to the basement causes the side yard in each lot to violate section 405.9, *id.* at 6, which requires side yards to be at least eight feet wide. Once again the Appellant fails to establish the source of his claim. As testified at the Hearing by Mr. LeGrant, Zoning Regulations do not require, and interpretation has never allowed, stairways used in this instance to be subtracted from side yard measurements. The side yard measures eight feet in width and does not violate section 405.9.

Location of Parking Spaces Under section 2116

Appellants also allege that the Zoning Administrator erred in finding that the parking spaces violated section 2116.1 of the regulations. See Record Exhibit 15, at 5. That section provides that "all parking spaces shall be located on the same lot with the building or structure it is intended to serve." Similarly, the Appellant claims that the parking spaces are impermissibly located in the front yards of houses on Lots 17 and 18 at the rear of the Property in violation of section 2116.2. *Id.* That section provides that parking spaces shall be located either in (i) a garage or carport; (ii) the rear yard or (iii) side yard, and shall not be located "in the area between the building line and lot line abutting the street."

Here, the Board concludes that all required parking spaces are located on the same lot with the building or structure it is intended to serve. Both required spaces for Lot 17 and 18 are located in garages incorporated into the facades of the houses. The required spaces for Lots 19 and 20 are located in the rear yard of each house. Therefore, the Zoning Administrator did not err in finding that the building permits complied with section 2116.1.

Similarly, the Board agrees with the Zoning Administrator's interpretation and concludes that the parking space located in front of the house on Lot 18 does not violate 2116.2. This space is not located "in the area between the building line and lot line abutting the street." The southern line of Lot 18 does not demarcate public and private property, nor does it relate to a building restriction line. Accordingly, the Board concludes that the additional parking space on Lot 18 does not violate the provisions of section 2116.2.

Conclusion

Accordingly, based on the entire evidence of record, the legal arguments of the parties, and past precedent, the Board concludes that the Zoning Administrator did not err in approving the four building permits. In concluding that issuance of the permits was valid, the Board also rejects the Appellant's argument that such issuance should consider easements and their effects on the Zoning Regulations.

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

Vote taken July __, 2007, on the motion to deny the appeal of the Todd Boley and the Advisory Neighborhood Commission 3E challenging the issuance of Building Permit Nos. 101587, 101584, 101588 and 101585 issued to Dunn Whiskey, LLC for construction of four semi-detached dwelling units at the R-2 District at 4319, 4319½, 4321 and 4321½ Fessenden Street, N.W., Washington, D.C. (Square 1655, Lots 17-20).

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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