

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17631 of Advisory Neighborhood Commission 3E and Todd Boley, pursuant to 11 DCMR § 3100 and 3101, from the decision of the Zoning Administrator (“ZA”) to issue Building Permits Nos. 101584, 101585, 101587, and 101588/104443, allowing the construction of four (4) single-family semi-detached dwellings, allegedly not meeting driveway (§ 2116), parking (§ 2101), lot dimension (§ 401), and lot occupancy (§ 403), requirements, in the R-2 District, at premises 4319, 4319 ½, 4321, and 4321 ½ Fessenden Street, N.W. (Square 1655, Lots 17, 18, 19, and 20).

HEARING DATE: July 10, 2007
DECISION DATE: July 31, 2007

ORDER

PRELIMINARY MATTERS

On February 23, 2007, Advisory Neighborhood Commission (“ANC”) 3E and Todd Boley, an adjacent neighbor to the rear, (collectively, “Appellants”), filed this appeal with the Board of Zoning Adjustment (“Board” or “BZA”). The Appellants challenge the December 26, 2006 issuance of building permits¹ by the Department of Consumer and Regulatory Affairs (“DCRA”) to Dunn, Whiskey, LLC, (“property owner”), the owner of the property that is the subject of this appeal (“subject property”). Appellants allege that DCRA erred in issuing the building permits because the plans/permit application documents demonstrate violations of the Zoning Regulations.

The Board heard the appeal on July 10, 2007, and set a decision date of July 31, 2007. At its public meeting on July 31, 2007, the Board deliberated on the appeal and denied it, by a vote of 4-0-1.

¹Permit number 101588, issued for lot 19, was revised to reduce the footprint of the proposed building to comply with the maximum permitted lot occupancy in this R-2 zone district. The revision permit, number 104443, was issued on May 11, 2007, after the filing of this appeal. Because it is a revision to a permit being appealed, and because of the nature of the revision, the Board considers this appeal to apply to the revision permit as well as to the four originally-issued permits.

FINDINGS OF FACT

Background

1. The property that is the subject of this appeal is located in an R-2 zone district, in Square 1655, Lots 17, 18, 19, and 20, at addresses 4319, 4319 ½, 4321, and 4321 ½ Fessenden Street, N.W.
2. On March 20, 2006, the D.C. Office of the Surveyor approved the subdivision of two lots with street addresses 4319 and 4321 Fessenden Street, N.W. Each of these two lots was subdivided into two lots, resulting in Lots 17, 18, 19, and 20.
3. Lots 19 and 20 each have a 36-foot street frontage on Fessenden Street.
4. The bulk of Lots 17 and 18 are located behind Lots 19 and 20, but narrower “panhandle” strips of both Lots 17 and 18 run along the west side of Lots 19 and 20, reaching Fessenden Street and providing both lots 17 and 18 with 14-foot street frontages on Fessenden Street.
5. Each of these panhandles is encumbered by easements.
6. The easement over the panhandle of Lot 18 is for the exclusive benefit of Lot 19 and adds to its side yard.
7. The easement over the panhandle of Lot 17 is for the benefit of all of the lots and provides access from the street to the required parking space located on each of the four lots.
8. There is one easement on Lot 19 that provides Lot 18 with one additional parking space.
9. There is one easement that straddles Lots 18 and 19 which provides, on that part of the easement that is located on Lot 19, an additional two parking spaces for Lot 17.
10. Appellants make the following contentions with respect to the four easements:
 - a. The Access and Side Yard Easement² on Lots 17 and 18 should not have been counted toward their street frontage;

²For ease of reference, the easement referred to in Finding of Fact No. 6 will be called a “Side Yard Easement,” but the land encompassed within the easement is not part of the required 8-foot side yard on Lot 19. This side yard exists without the addition of the land within the easement, but the easement serves to provide the dwelling on Lot 19 with a greater amount of open space on its west side.

- b. The two Parking Space Easements on Lot 19 should not have been counted toward its lot area; and
 - c. The entire Access Easement should not have been recognized as providing access to the required parking spaces.
11. Appellants make the following contentions that are unrelated to the easements:
- a. Even if an easement could create access to required parking spaces, the route may still not be recognized as providing access because it is shared;
 - b. The parking spaces on Lot 19 cannot serve other lots;
 - c. Even if the Access and Side Yard Easement Areas could be counted toward the street frontage of Lots 17 and 18, their street frontage widths would be substandard;
 - d. The proposed external staircases to be constructed on each lot unlawfully intrude into a required side yard;
 - e. The bay windows on the dwellings on Lots 19 and 20 cause an overage in lot occupancy on those two lots;
 - f. The storm water management equipment will encroach on the width of the driveway; and
 - g. The depth of the rear yard of Lot 19 is less than required.

Notice

- 12. On May 19, 2006, a principal of property owner, Dunn, Whiskey, LLC, notified ANC 3E that he had filed building permit applications for the four subject lots and offered to meet with the ANC to discuss them.
- 13. Between May, 2006, and October 4, 2006, the property owner, ANC 3E, and several neighbors, including the Appellant, Mr. Boley, exchanged correspondence and held meetings concerning the property owner's proposed project.
- 14. In this correspondence and during these meetings, the subdivision plans and several issues of zoning compliance were discussed.
- 15. The subdivision plat was available for inspection in the Office of the Surveyor at Book 200, Page 90, since its recordation on March 20, 2006, but it is merely a recordation of the subdivision and does not depict the siting of the dwellings on the lots, nor the arrangement of the driveway, drive aisle, or parking spaces on the lots.

16. The four building permits being appealed were issued on December 26, 2006. (*See also*, footnote #1, herein.)
17. This appeal was filed on February 23, 2007.

The Proposed Project

18. On March 23, 2006, just after the two original lots were subdivided into Lots 17, 18, 19, and 20, the property owner purchased them in order to construct four semi-detached single-family dwellings on them, with one dwelling on each lot.
19. On December 26, 2006, DCRA issued four building permits to allow construction of the four single-family semi-detached dwellings. Permit number 101585 was issued for Lot 20 (4319 Fessenden Street), permit number 101588 was issued for Lot 19 (4319 1/2 Fessenden Street), permit number 101584 was issued for Lot 18 (4321 Fessenden Street), and permit number 101587 was issued for Lot 17 (4321 1/2 Fessenden Street). (*See also*, footnote #1, herein.)

Dimensional requirements

20. Both Lots 19 and 20 have an area of 3,024 square feet. Lot 17 has an area of at least 5,000 square feet, and the rectangular portion of Lot 18 (not including the "panhandle") has an area of approximately 4,200 square feet. Each lot complies with the Zoning Regulations' mandatory lot area minimum of 3,000 square feet. *See*, 11 DCMR § 401.3.³
21. Each lot also has a lot width of at least 30 feet, as required by 11 DCMR § 401.3.
22. Each of the dwellings to be sited on the four lots will have one side yard of eight feet in width, per 11 DCMR § 405.9, and therefore will meet the definition of "dwelling, one-family, semi-detached" contained in 11 DCMR 199.1.
23. The plans show that within each of the required side yards will be an areaway - an opening to the ground below-grade - with a below-grade stairway built into the foundation of the structure providing access to the basement.
24. The dwellings on Lots 19 and 20 will have rear yards of approximately 37 feet, and the dwellings on Lots 17 and 18 will have rear yards of approximately 27 feet, all of

³Including the panhandles, lot 17 has a total lot area of 5,363 square feet, and lot 18 has a total lot area of 6,234 square feet. Exhibit No. 20, attached exhibit B2.

which comply with the Zoning Regulations' requirement of a 20-foot rear yard. *See*, 11 DCMR § 404.1.

25. There is no front yard requirement in this R-2 district.
26. The four semi-detached dwellings will all have lot occupancies of less than the 40% maximum permitted in this R-2 zone, including those on Lots 19 and 20, which have bay windows that project into the public space. *See*, 11 DCMR § 403.2.
27. The four semi-detached dwellings will all be three stories and less than the 40-foot height maximum permitted in this R-2 zone. *See*, 11 DCMR § 400.1.
28. The 14-foot wide panhandle strip of Lot 18 will contain the storm water management equipment for the subject property, but is subject to the Side Yard Easement, a perpetual use easement for the benefit of Lot 19, to which it runs adjacent.

Description of Easements

29. There are four easements within the project, three of which are germane to this appeal.

The Access Easement

30. A common driveway, providing vehicular access from Fessenden Street to all four lots, runs over the 14-foot wide panhandle strip of Lot 17. At the front of the rectangular portion of Lot 17, this common driveway narrows to approximately 11 feet and turns right to run between the front of Lots 17 and 18 and the back of Lots 19 and 20. At its turning point, the common driveway will be joined by an 11-foot-wide paved strip of Lot 18, forming together a common drive aisle of approximately 22 feet in width.
31. The dwellings on Lots 17 and 18 will each have an attached garage providing one parking space on each lot.
32. The common driveway/drive aisle leads to these two garages as well as to one parking space in the rear yard of Lot 20 and three parking spaces in the rear yard of Lot 19.
33. A "Joint Driveway Parking Area and Use Easement" ("Easement Agreement") will be entered into by the owners of all four semi-detached dwellings to regulate the use and maintenance of the common driveway/drive aisle. *See*, Exhibit No 15, Attachment No. 7.

34. The easement created by the Easement Agreement is a perpetual non-exclusive ingress and egress easement for the benefit of all four lots.
35. The Easement Agreement specifies that the common driveway and parking area will be paved and maintained and will remain unobstructed. See, Id.
36. Within the area of the panhandle of Lot 18 will be located the largely subsurface storm water management equipment for the property.
37. Consistent with the Easement Agreement, this equipment will not obstruct the common driveway area.

The Two Parking Space Easements

38. There are two parking space easements on the property. One is located entirely on Lot 19 and covers a 9 x 19-foot parking space designated for the use of lot 18. A second easement straddles Lots 18 and 19, and provides, on the 18 x 19-foot part of the easement located on Lot 19, two parking spaces for the benefit of Lot 17. The Lot 18 portion of this easement is not involved in this appeal.

The Side Yard Easement

39. A fourth easement is located over the panhandle of Lot 18 and consists of a narrow swath of land that runs parallel to the western side lot line of Lot 19. This easement is for the exclusive benefit of the owner of Lot 19, and increases the area of his side yard.

CONCLUSIONS OF LAW

Timeliness

The property owner argued that the appeal was untimely as to any lot area, lot width, and/or shared driveway issues because the Appellants knew of the filing of the subdivision plat as early as May, 2006, and at least by October 2, 2006, and yet did not file the appeal until February 23, 2007, beyond the requisite 60-day period within which to file an appeal with the Board. See, 11 DCMR 3113.2. The property owner further argued that there were no exceptional circumstances outside of the Appellants' control which prevented them from filing the appeal within the 60-day period. See, 11 DCMR § 3112.2(d).

The Appellants countered that they were not appealing the filing of the subdivision plat, but were appealing the issuance of the four building permits, which were issued on December 26, 2006. They argue, therefore, that their February 23, 2007 filing of the appeal falls within the 60-day window.

The Board agrees with the Appellants that the "decision complained of" and appealed here is the issuance of the four building permits. Even if the Appellants could have appealed the earlier filing of the subdivision plat, they were entitled to wait and appeal the issuance of the permits. A similar argument was rejected by the District of Columbia Court of Appeals in *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 430 (D.C. 2006). In that case, it was argued that the BZA appeal should have been filed within 60 days after the ANC appellant became aware that DCRA had issued a "concurrence letter", not within 60 days after a building permit based upon that letter was issued. The Court disagreed, stating:

Because the issuance of a building permit requires the DCRA to comply with the public notice and other requirements set forth in the zoning regulations, we hold that a party ... may wait to appeal until the DCRA takes official action by issuing the permit, regardless of whether or not that party has appealed (or tried to appeal) from any earlier interlocutory "administrative decision." As the BZA explained, section 6-641.07 (f) of the Code recognizes three types of appealable zoning-related decisions:

- (1) those granting or refusing building permits; (2) those granting or withholding certificates of occupancy; and (3) "other administrative decisions.

We agree with the BZA that each type of decision is separately appealable.

894 A.2d at 430.

Based upon this clear precedent, the appellants' knowledge of the subdivision did not obligate them to appeal that administrative decision. Rather, their time for filing this appeal began on the day they knew or should have known that the subject building permits were issued. Those permits were issued on December 26, 2006, and the Appellants filed their appeal 57 days later – on February 23, 2007. The appeal was timely filed.

The Merits of the Appeal

The Appellant sets forth 13 issues on appeal, several of which overlap. The resolution of the majority of these 13 issues depends on the Board's determination of whether land area that is encumbered by an easement may be included in the calculation of lot area and street frontage and recognized as providing access to required parking spaces.

The Board will address these questions first, and then will address Appellants' numerous contentions that do not turn exclusively on the determination of easement-related questions.

Uses allowed by easements and compliance with the Zoning Regulations

Appellants generally assert that the Zoning Administrator erred in disregarding the easements on the subject property in determining compliance with the Zoning Regulations. Accordingly, the initial issue to be decided is whether easements generally are properly considered in determining compliance with the Zoning Regulations.

Easements are valid and time-honored legal tools used to permit use or access. *See, e.g., Restatement of the Law, Third, Property (Servitudes)*, The American Law Institute, Introduction (2000).⁴ However, the District of Columbia Zoning Regulations are silent as to whether they are to be considered in determining zoning compliance. In addition, there is no District of Columbia Court of Appeals' decision addressing this issue. Accordingly, the Board entertained testimony from the Acting Zoning Administrator on past practices as well as from the parties on the impact of the easements and on court cases in other jurisdictions.

The Acting Zoning Administrator testified that the long standing past practice in the District of Columbia has been to determine compliance with the Zoning Regulations without regard to easements. This Board gives weight to that interpretation. *See, e.g., Smith v. D.C. Board of Zoning Adjustment*, 342 A.2d 356, 359 (D.C. 1975). (The Board must give weight to the long-standing interpretation of the Zoning Administrator.)

In addition, this Board itself has recognized easements in its past proceedings and granted applications which included their establishment. *See, e.g., BZA Order No. 12591* (Application of Hunt and Bartolucci) (August 1, 1978). The Acting Zoning

⁴"Servitudes (*i.e.*, easements) have been known since ancient times." They are "extensively used to provide the underlying structure of real-estate developments that include shared amenities or facilities and services financed by assessments against individual owners, as well as for individual and neighborhood land-use restrictions...." *Id.*

Administrator's interpretation is also in accordance with court decisions in other jurisdictions, specifically discussed below.

Accordingly, based on the above and the discussion below with respect to lot area, the Board determines that it is proper to consider compliance with the Zoning Regulations without regard to easements.

The inclusion of the easements in the calculation of lot area and street frontage

Appellants contend that the portion of Lot 19 that is encumbered by the two Parking Space Easements may not be included in its lot area and that the portions of Lot 17 and 18 that are respectively encumbered by the Access and Side Yard Easement may not be included in their street frontage. The Board disagrees.

Appellants cite cases that hold that the land area subject to an easement cannot be counted toward the determination of minimum lot area.⁵ However, the Board finds these authorities unpersuasive because they involve either another jurisdiction's specific regulation or ordinance that the land area subject to an easement may not be counted toward the determination of minimum lot area,⁶ or publicly-traveled streets or alleys, which, in some cases, had been established and used for years.⁷

A different conclusion results when an easement serves narrower private purposes. See *Metzenbaum v. City of Carmel-by-the-Sea*, 234 Cal.App.2d 62, 44 Cal. Rptr. 75 (1965). In *Metzenbaum*, the local Zoning Board granted a use permit to establish three building sites on a property. Two of the sites could only be reached by private roadway easements established over a part of each site, which then connected to a longer private easement running along the south side of the third site. The calculation of lot area for each of the lots included the land area within the easements. Without the inclusion of the easements, the lots would be substandard. As with the District's zoning regulations, the California ordinance was silent as to whether easement area was to be included or excluded from determinations of lot area.

The court in *Metzenbaum* determined that the inclusion of the easements in the lot area calculation was reasonable under the facts presented, citing the discretion of local zoning

⁵See, e.g., *Lidke v. Martin*, 31 Colo.App. 40, 500 P.2d 1184 (Colo. Ct. App. 1972) and *Loveladies Property Owners Ass'n., Inc., v. Barnegat City Service Co., Inc.*, 60 N.J.Super. 491, 159 A.2d 417 (N.J. Supr. Ct., App. Div. 1960).

⁶See, e.g., *Lidke v. Martin*, 31 Colo.App. 40, 500 P.2d 1184 (Colo. Ct. App. 1972) and *Loveladies Property Owners Ass'n., Inc., v. Barnegat City Service Co., Inc.*, 60 N.J.Super. 491, 159 A.2d 417 (N.J. Supr. Ct., App. Div. 1960).

⁷See, e.g., *Mudge v. Precinct of Haverhill Corner*, 133 N.H. 881, 587 A.2d 603 (Sup. Ct. N.H. 1991), *Kefauver v. Zoning Board of Appeals of Town of Newtown*, 151 Conn. 144, 195 A.2d 422 (Sup. Ct. Err. Conn. 1963), and *Sommers v. Mayor and City Council of Baltimore*, 215 Md. 1, 135 A.2d 625 (Ct. App. Md. 1957).

authorities to address the many varying situations which arise. *Id.*, at 65-66. The California court was directed to many of the same cases that concluded otherwise as was this Board, but the Board agrees with the California court that “they deal with different ordinances, other communities, and distinct fact situations.” *Id.*, at 65.

As will be explained below, the Board finds the three types of easements involved here (Access, Parking Space, and Side Yard) share the same or similar characteristics with the easement considered by the California Court of Appeals.

a. The inclusion of the Parking Space Easements when calculating the area of Lot 19.

As noted in the Findings of Facts, there are two parking space easements on Lot 19, one of which extends to Lot 18. Both of the easement areas represent separate parking areas, one of which is for the benefit of Lot 18 and the other two for the benefit of Lot 17. Each easement may only be used for the purpose of parking the motor vehicles belonging to the lots to which the parking spaces are assigned. As such, neither serves any public purpose. This is precisely the type of easement recognized by the California Court of Appeals as being properly included within lot area.

Because the Board concludes that the easement areas are included in the calculation of the lot area of the four subject lots, each lot, including Lot 19, has at least the requisite minimum lot area of 3,000 square feet. Accordingly, the lot occupancy of the dwelling on Lot 19 is slightly less than the mandated maximum of 40% - calculated by the Zoning Administrator as 39.34%.

b. The inclusion of Access and Side Yard Easements when calculating the street frontage of Lots 17 and 18.

Although the *Metzenbaum* decision concerned lot area, its analysis also warrants a conclusion that the Access and Side Yard Easements were properly included within the calculation of the street frontage of Lots 17 and 18.

The Side Yard Easement on the Lot 18 panhandle is an exclusive easement that may be used only by the owner of lot 19. It serves no public purpose and although the Driveway Easement on Lot 17 is non-exclusive, it is nevertheless for the benefit of, and intended only for the use of, the four lots which it serves. It is not intended to service the public and is not situated so as to permit through-access to any other public, or private, street or way.

In summary, the Board rejects the Appellants' argument that all easements should be excluded from the computation of lot area and street frontage. Such an interpretation would lead to the artificial exclusion of land area from the computation of zoning requirements. For not only would the easement areas be excluded from the computation from the lot area and street frontage of the lots where they exist, but they could not be included within the land area of the lots they serve, because, obviously, they are not within the footprint of those lots. Thus the square footage they represent would simply be lost. While that may make sense when the easement is for the benefit of the public, it becomes illogical when the easement is intended for private use.

Accordingly, the Board finds no violations of the Zoning Regulations with respect to the computation of lot area and street frontage. The Board agrees with the Acting Zoning Administrator, and upholds his interpretation that the land areas within easements do count toward calculations of dimensional requirements of the Zoning Regulations.

The recognition of the Access Easement as providing access to required parking.

Although the Appellants phrase this argument in terms of "ignoring" the four easements when determining parking access, it is no different from the arguments they make with respect to the street frontage of Lot 17. There as here, Appellants claim that the mere existence of an easement precludes it from serving any purposes pertaining to zoning compliance.

Again the Board must disagree for the reasons stated above. In requiring access to required parking, the Zoning Regulations do not specify the type of property interest that must be held. It could be held in fee, easement, or leasehold. Thus, the existence of the ingress and egress easement over the panhandle of Lot 17 violates no Zoning Regulation and the area within the panhandle is competent under the Regulations to provide the required access to the parking spaces for Lots 19 and 20.

Depth of Rear Yard not affected by Parking Easement

The Appellants also claim that the depth of the rear yard of Lot 19 is slightly less than the required 20 feet due to the presence, within that rear yard, of the parking easements for the benefit of Lots 17 and 18. Again, the Board disagrees with the Appellants because easement areas are not deducted from lot/yard size calculations. That is especially clear here because parking spaces are specifically permitted in rear yards, with no deduction of yard area required. *See*, 11 DCMR § 2116.2(b)(1). *See also*, Finding of Fact No. 24.

Non-Easement Related Issues

1. Use of Shared Driveway to Access Required Parking Spaces.

Appellants contend that § 2117.4 mandates that each required parking space be accessible via its “own” driveway, and that the shared access provided by the one driveway to all four lots violates this provision. *See*, Exhibit No. 15, at 4-5. Section 2117.4 does not specify that each required parking space must be accessible by its own individual driveway. It merely states that “each required parking space ... shall be accessible from improved streets and alleys via graded and unobstructed private driveways.” 11 DCMR § 2117.4. This has been the long-standing interpretation of the Zoning Administrator and is consistent with Board precedent. *See*, BZA Order No. 12591, *supra*. Accordingly, 11 DCMR § 2117.4 has not been violated in this case as each required parking space is accessible from an improved street via a graded and unobstructed private driveway.

2. Location of Parking Spaces under Section 2116.

The Appellants also allege violations of subsections 2116.1 and 2116.2(b). Subsection 2116.1 states, that “Except as provided in Sections 214 , 510, 708, 730., 743.2(d), 753.2(c) , 761.2, 804.1, 926, 2116.5 and 2117.9 (c) .all parking spaces shall be located on the same lot with the buildings or structures they are intended to serve.” 11 DCMR § 2116.1. Each dwelling on the subject property has a parking space on the same lot which is intended to serve that dwelling. Lot 19 contains an additional parking space that by easement is for the benefit of Lot 18 and two additional parking spaces that by easement are for the benefit of Lot 17.

The Acting Zoning Administrator testified that because each lot has at least one off-street parking space for the house it serves, it complies with the required parking set forth in Section 2101.1. He further stated that no provision of the regulations prohibits allowing additional off-street parking spaces beyond the requirement and that it is instituted in the Office of the Zoning Administrator to look at this situation in the context of required parking. Appellants argue that Section 2116.1 refers to “all” parking spaces, not just to required parking spaces.⁸

⁸ The Board notes that Section 2118.9 states : “Except where otherwise indicated, whenever the word “all” is followed by the words ” parking spaces” in the same sentence, the parking requirements as specified shall apply to all parking spaces whether or not the spaces are required by this chapter. The requirement shall also apply to both accessory parking spaces and parking spaces that are constructed as a principal use unless otherwise specified.”

The Board concurs with the Acting Zoning Administrator's interpretation that 2116.1 does not prohibit a one family dwelling from providing additional parking spaces by easement for the benefit of another lot. While 2116.1 does refer to "all" parking spaces, the word "all" is preceded by the phrase "Except as provided in sections 214, 510, 708, 730., 743.2(d), 753.2(c), 761.2, 804.1, 926, 2116.5 and 2117.9." The Board finds that the Zoning Administrator's interpretation that Section 2116.1 applies only to required spaces in the context of one family dwellings is consistent with the long-standing practice in the Office of the Zoning Administrator, the regulatory scheme and common sense.

Subsection 2116.2(b) states that off-street parking spaces must be located either in a rear or side yard. 11 DCMR § 2116.2(b). Appellants contend that there will be parking spaces in the front yards of the dwellings on Lots 17 and 18. There is, however, no front yard requirement in this R-2 district and the parking spaces in question are actually located in the rear yard of Lot 19, although their physical placement is in front of Lots 17 and 18. Further, as pointed out by the Zoning Administrator, the Zoning Regulations do not prohibit parking in "front yards," but prohibit parking spaces "between a building line and lot line abutting a street." See, 11 DCMR § 2116.4. The subject property will not have any parking spaces in this prohibited area.

3. The Effect of the External Staircases on Side Yard Width.

The Appellant claims four violations of the 8-foot side yard requirement of § 405.9 because each of the four semi-detached dwellings has an exterior stairway built into its foundation, leading to the basement, which occupies approximately half of the 8-foot side yard width. Pursuant to § 2503.2 of the Zoning Regulations, "[a] structure, not including a building, no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under" this Title. The exterior stairways in question here are structures, but are located entirely below grade, no part of which is more than four feet above grade, therefore, pursuant to § 2503.2, they are permissible within the side yard and do not diminish the width of the yard.⁹

4. Width of Street Frontages of Lots 17 and 18.

The Appellants also make the argument that the "frontage" of each of the rear lots

⁹There was discussion during the hearing of the construction of retaining walls along the sides of the areaways, but retaining walls do not constitute an encroachment on a side yard, because they are permitted in yards, with no stated height limitation, pursuant to § 2503.3. The size of a retaining wall and the amount of earth it retains may have some bearing on a determination of whether it is permitted in a yard, but here, the ZA testified that: "[t]here is nothing in the plans or my site visit that presented evidence to me that any retained earth structure [that] exceeded four feet in height exists or is approved here." BZA Transcript of July 10, 2007, at 347, lines 6-10.

narrows to less than the required 14 feet after the panhandles turn to create the drive aisle. "Frontage," as pointed out by the Zoning Administrator, is "measured along the street" pursuant to § 401.6. The frontage of lots 17 and 18, measured along the street, is 14 feet, in compliance with the regulation. There is no requirement in the regulation that this 14-foot measurement continue for the length of the lot.

5. Bay Windows and Lot Occupancy.

Appellant alleges that the bay windows on the dwellings on Lots 19 and 20 cause the dwellings' lot occupancies to increase to over 40%. The Board agrees with the Zoning Administrator's determination that "[t]he cited bay window feature projects into the public space of Fessenden Street and is not counted as part of the subject lot's occupancy calculation." (Emphasis in original.) See, Exhibit No. 25 at 6.

6. Width of Driveway and Effect of Storm Water Management Equipment.

Appellants allege that the driveway established by the access easement over the panhandle of Lot 17 appears to be only 13 feet wide because the storm water management equipment will encroach upon the width of the driveway. The storm water management equipment is located in the panhandle of Lot 18 and the Board finds nothing in the record to show that it intrudes into the panhandle of Lot 17, where the driveway is located. Moreover, the equipment is largely underground and will not interfere with the use of the driveway, as ensured by the Easement Agreement. Therefore, the storm water management equipment does not encroach into the required 14-foot driveway width. See, 11 DCMR § 2117.8(c)(2).

Great Weight

Pursuant to 11 DCMR § 3115.2, the Board is required to give "great weight" to issues and concerns raised by the affected ANC. See also, D.C. Official Code § 1-309.10(d). Great weight means acknowledgement of these issues and concerns and an explanation of why the Board did or did not find the ANC's views persuasive. The Board, in this order, has addressed all the issues raised by ANC 3E, but, as explained thoroughly above, did not find the ANC's arguments persuasive.

For the reasons stated above, the Board concludes that the Appellants did not meet their burden of demonstrating that DCRA and the Zoning Administrator erred in issuing building permits Nos. 101584, 101585, 101587, and 101588/104443, and in consequently allowing the construction of two flats on the subject property. Therefore, it is hereby **ORDERED** that this appeal be **DENIED**.

VOTE: 4-0-1 (Ruthanne G. Miller, Curtis L. Etherly, Jr., Marc D. Loud, John A Mann II to deny; No Zoning Commission member participating or voting.)

Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 07 2008

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 FINAL.