

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17971 of Outerbridge and Georgina Horsey, pursuant to 11 DCMR §§ 3100 and 3101, from a determination of the Office of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to allow a landing as part of a rear stair and a roof deck at a one-family dwelling by Building Permit Nos. B0902028 and B0905289, in the R-3 District at premises 3046 N Street, N.W. (Square 1209, Lot 854).¹

HEARING DATES: October 27 and November 3, 2009
DECISION DATE: December 1, 2009

DECISION AND ORDER

This appeal was submitted on May 15, 2009 by Outerbridge and Georgina Horsey (collectively, the "Appellant"), who challenge a decision made by the Zoning Administrator ("ZA") to issue Building Permit B0902028, on March 16, 2009, and amended Building Permit B0905289, on April 30, 2009, which allegedly allowed the addition of a second-story deck with stair to the ground and a separate third-story deck to a nonconforming structure devoted to a conforming use in the R-3 zone district at 3046 N Street, N.W. (the "subject property"). Following a public hearing, the Board of Zoning Adjustment ("Board") voted on December 1, 2009 to deny the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated May 19, 2009, the Office of Zoning ("OZ") provided notice of the appeal to the Office of Planning ("OP"); the ZA, at the Department of Consumer and Regulatory Affairs ("DCRA"); the Councilmember for Ward 2; and Advisory Neighborhood Commission ("ANC") 2E, the ANC in which the subject property is

¹ This case was advertised, based on the Appellant's submission, as an appeal "from a determination of the Office of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to allow additions to a one-family dwelling...." However, as discussed in this Order, the Board finds that neither project undertaken by the home owner was an "addition" to the dwelling for zoning purposes. Thus the caption was modified to reflect the actual type of construction authorized by the two building permits at issue.

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BOARD OF ZONING ADJUSTMENT
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located. Pursuant to 11 DCMR § 3112.14, on August 3, 2009 OZ mailed letters providing notice of the hearing to the Appellant, the ZA, and ANC 2E. Notice was also published in the *D.C. Register* on August 7, 2009. (56 DCR 6151).²

Party Status. Pursuant to 11 DCMR § 3199.1(a), parties in this appeal were the Appellant; the ZA, as the person whose administrative decision was the subject of the appeal; the owner of the property involved in the administrative decision; and the ANC for the area within which the subject property is located. The owner of the subject property did not participate in this proceeding, and the Board received no requests to intervene pursuant to § 3112.15.

Appellant's Case. The Appellant provided evidence and testimony from Outerbridge Horsey, who lives in a residence abutting the subject property and challenged the issuance of building permits that allowed construction of what the Appellant described as two decks on the rear exterior of the subject property – one on the main entry floor of the row dwelling with a stair leading to the ground level, and a larger deck one floor higher. According to the Appellant, both of the decks added “significant, useable, outdoor space to two levels of the property and thereby increase the intensity of use of the subject property and adding to the density, height and bulk of the subject property and will have substantial adverse impact [on] the privacy and quiet enjoyment of the garden” at the Appellant’s residence.

The Appellant alleged that the ZA erred in approving the permits in three respects:

- (1) The existing structure is nonconforming with respect to lot occupancy, and pursuant to § 2001.3(a) of the Zoning Regulations, no addition may be made to a nonconforming structure as a matter of right.
- (2) The upper deck addition increases the nonconforming aspect of the structure as it extends to within 19 feet of the rear yard line, thus exceeding the applicable lot occupancy limit (60%) by 10% or six feet, in violation of § 2001.2(b)(2), which specifies that an addition may not increase or extend any existing nonconforming aspect of a structure.
- (3) The structure comprising the lower deck and stair is essentially a deck that occupies a significant portion of the nonconforming rear yard and is not permitted by § 2503.4, which permits only the stairway and handrail.³ While the handrail, as a component of a stair, is specifically referenced in § 2503.4, a landing – which is a distinct building

² The Board regrets that the OZ apparently did not mail notice of the appeal or the hearing to the owner of the property that was the subject of this appeal, but appreciates the Appellant’s statement that all of the materials filed by the Appellant in conjunction with the appeal were served on the property owner. The Board finds that, especially in light of the denial of the appeal, any error in failing to mail notice to the property owner was harmless.

³ Pursuant to § 2503.4, “Stairs leading to the ground from a door located on the story in which the principal entrance of a building is located may occupy any yard required under provisions of this title. The stairs shall include any railing required by the provisions of the D.C. Building Code.”

element – is not allowed. Thus the landing may not occupy any yard required under the Zoning Regulations, especially a nonconforming rear yard, without a variance. Landings were intentionally excluded from § 2503.4 to prevent applicants from abusing the intent of the Zoning Regulations and making landings into a platform or deck and much larger than the minimal size required to serve a stair.

DCRA. DCRA provided evidence and testimony from the ZA, Matthew LeGrant. DCRA argued that the appeal should be denied because the ZA reasonably determined that the construction of a landing and roof deck did not expand the nonconforming nature or increase the lot occupancy of the subject property, and that the Appellant could not prove that the landing and rooftop deck were additions to the nonconforming structure that would have required zoning relief.

ANC. By letter dated October 2, 2009, ANC 2E indicated that, at a regularly scheduled meeting held on September 29, 2009, with a quorum present, the ANC adopted a statement supporting the appeal “in view of the fact that the proposed addition of a second story deck and a separate third story deck raises issues of lot occupancy, rear yard loss, number of stories on the property and the negative impact on adjacent properties.” (Exhibit 15).

FINDINGS OF FACT

1. The subject property of this appeal is located at 3046 N Street, N.W. (Square 1209, Lot 854). The site is zoned R-3.
2. The property is improved with a three-story, one-family row dwelling that is nonconforming with respect to lot occupancy and rear yard.⁴ The existing lot occupancy is approximately 70%, where a maximum of 60% is permitted as a matter of right. 11 DCMR § 403.2. The rear yard is approximately 19 feet deep, where a minimum of 20 feet is required. 11 DCMR § 404.1.
3. The main entrance to the dwelling on the subject property is reached by a staircase leading from the sidewalk up to the front door. In the rear, the cellar and main floor of the dwelling extend 10 feet further back into the rear yard than do the higher floors. The cellar has a door at grade level, causing the rear extension to appear as a two-story rear addition and the dwelling to appear to have four stories.⁵

⁴ The Appellant asserted that the row dwelling on the subject property has four stories and therefore is nonconforming with respect to stories. The Board does not agree, and finds that the row dwelling has three floors above a cellar, and thus is not nonconforming with respect to height.

⁵ The Appellant referred to two “decks” at the subject property as the “second story deck” or “lower deck,” which DCRA described as a stair landing, and a “third story deck” or “upper deck,” which was built on the roof of the rear extension and is accessed via the second story of the dwelling (one floor above the main floor). For purposes of this order, the Board will refer to the “second story deck” or “lower deck” as the “landing” and the “third story deck” or “upper deck” as the “roof deck.”

4. The Appellant lives in a row dwelling in the 1200 block of 31st Street, N.W., directly south of the subject property. The rear yards of the two properties abut each other.
5. The owner of the subject property undertook two projects affecting the back of the residence.
 - (a) A spiral staircase, formerly leading from a single door at the rear of the main entry floor of the dwelling down to the rear yard, was taken out. That door and a series of windows were replaced with two fixed door panel windows flanking new French (or double) doors, which provide access to a landing and a staircase leading to the ground level. The landing projects out four feet and extends approximately two-thirds of the width of the dwelling. (That is, the landing extends from the new rear stairs, primarily constructed parallel to the side lot line on the west side of the property, 36 inches wide, to the new rear entry door approximately 10 feet to the east of the stairs.) The landing and staircase both have a railing.
 - (b) On the second floor (one story above the main floor) a window overlooking the rear extension of the dwelling was replaced with a door to provide access to a new deck created on the roof of the extension. The new roof deck also extends the width of the dwelling, but does not extend beyond the 10-foot depth of the existing rear extension of the dwelling, and thus is approximately 20 feet wide and 10 feet deep. A railing was installed along the edges of the deck not abutting the dwelling.
6. Building Permit B0902028 was issued on March 16, 2009 to allow “exterior work on rear of building. New landing and stair. New roof, roof deck, doors, windows, and wood panels as noted on set.” As noted on the permit application, the stair would replace an existing stair.
7. Building Permit B0905289 was issued on April 30, 2009 as a permit revision to allow removal of “part of stair landing at the rear of the building.” The landing, as originally proposed, would have extended across the rear of the dwelling for its entire width. Pursuant to the revised permit, the size of the landing was reduced by approximately 30 % from the size originally approved so as not to extend past the French doors.
8. The Board credits the testimony of the ZA in describing the alteration of the property owner’s original plans, which led to the issuance of the revised permit, as a reduction in size with the result of making the landing area a size consistent with a landing and not a deck.
9. Noting that a “landing” must function as a landing – that is, the area must logically connect to a path of travel that leads to a doorway – the ZA testified that he considers each application on a case-by-case basis, and that his office would not approve a “landing” large enough to contain areas not related to the path of travel on grounds that the particular project “would grow to be a deck structure” rather than merely a functional landing.
10. The appeal challenging issuance of the two permits was filed May 15, 2009.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by the Zoning Act, D.C. Official Code § 6-641.07(g)(2) (2008 Repl.), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by any administrative officer in the administration of the Zoning Regulations. 11 DCMR §§ 3100.2 and 3200.2. In an appeal, the Board may reverse or affirm, in whole or in part, or modify the decision appealed from. 11 DCMR § 3100.4.

Based on the findings of fact, the Board was not persuaded by the Appellant that an error occurred in the decision of the ZA to issue the building permits. The construction authorized by the permits – a rear stair with a landing, consistent with § 2503.4, and a roof deck – did not require zoning relief. Neither project constituted an “addition” within the meaning of the Zoning Regulations that would have enlarged the nonconforming structure in violation of § 2001.3.

With regard to the landing, the Board concludes that a landing is an element of a stair and thus falls within the ambit of § 2503.4, which permits “stairs leading to the ground from a door located on the story in which the principal entrance of a building is located” to occupy any yard required under the Zoning Regulations. The fact that the provision mentions “railing” and not “landing” does not, as the Appellant contends, require a finding that landings are necessarily excluded from the provision, particularly when stairs are generally required, under the Construction Code, to have a landing or floor at the top and bottom of every stair. A landing is an integral part of the functional utility of the stairway, connecting the stairs to a door or providing a floor at the bottom of the stairs. The Board agrees with DCRA that a landing is a component of a stairway and thus can occupy a required yard when the landing functions to connect an access door on the main level of the house with the stairs leading to grade.

The Appellant cited several orders that contained references to “landings.” The Board does not agree with the Appellant’s contention that “it appears from the context that the Board viewed the ‘landing’ as a separate element and not part of the stairs.” (Exhibit 16). A reference to a landing, without more, does not indicate that a landing is not an integral part of a staircase; rather, the references are merely descriptive of a feature proposed in a given application. As noted by DCRA, the Board has previously held that a “landing area, which connects the access door and the exterior stairs leading to grade level, is a component of a stairway, pursuant to § 2503.4.” Application No. 17476, order issued May 24, 2006.

With regard to the Appellant’s contention that the owner of the subject property constructed a “deck” on the main floor of the dwelling, the Board was not persuaded by the Appellant’s argument that the landing, by virtue of its reduced size, constituted a deck that could be used for purposes other than merely servicing the rear doors, such as serving as a balcony where people could eat meals or have parties. The landing at issue is four feet wide – after it was shortened by the revision of plans to obtain the second building permit – and currently does not extend across the rear of the house, but is only wide enough to provide convenient access to the rear doors of the dwelling. The Board was not persuaded that the area provided by the landing was

sufficiently large to serve as recreational space or anything other than a pathway of travel forming a utilitarian connection between the stairs and the doors.

The Appellant also argued that a landing area should not be included in the exception created by § 2503.4 because “a landing or deck can vary greatly in size and can be interpreted to extend from the top of the stair to the door and thus be of any desired size and occupy any amount of the rear yard desired by the home owner.” (Exhibit 16). The Board does not agree, and credits the testimony of the ZA that a “landing” can be distinguished from a “deck” – the terms are not interchangeable. A landing must relate to a doorway and a path of travel between that door and a stair. A deck may be larger than a landing, containing space outside a path of travel that can be devoted to other functions, and a deck may or may not have stairs down to the grade level. The Board concludes that the Appellant’s concern that a landing could extend to an unfettered size is unfounded. In this case, the ZA appropriately exercised his judgment in finding that the structure as originally proposed was too large to constitute a landing, and required a revision that decreased the dimensions of the project to a reasonable size for a functional landing. The Board credits the ZA’s testimony that removal of the portion of the structure that would not have been in the path of travel took the project at the subject property “out of the deck category and made it into a landing.” (Hearing Transcript of November 3, 2009, p. 200).

The Board was not persuaded by the Appellant’s contention that “only the stair and railing but not the landing may be constructed in the rear yard as a matter of right” or the claims that “any landing that is required must either be located outside the rear yard” or would require zoning relief if “located in the rear yard.” (emphasis in original) (Exhibit 16). For reasons discussed above, the Board finds that the landing is a component of a stair that may be located in the rear yard consistent with § 2503.4. Moreover, the Appellant’s scenario would create the anomalous result of requiring relief for a landing as a component of a stair on a nonconforming structure, even though the stair and railing could be placed in a required yard as a matter of right under § 2503.4. The Board does not find that result reasonable.

With regard to the roof deck, the Board was not persuaded by the Appellant’s contention that the deck was an “addition” by virtue of the transformation of an “unusable” roof into a usable deck, thereby increasing the value of the dwelling. Rather, the Board credits the ZA’s testimony that the deck did not constitute an addition because the deck was not an enclosed space and thus did not create interior useable space in the dwelling, did not create any additional space that was not already available to the homeowner, did not increase the floor area ratio of the dwelling, and did not increase the lot occupancy because the extension of the dwelling under the roof was already part of the calculation.⁶ Further, the roof was not previously “unusable” but served as the roof over a portion of the dwelling. While the occupants of the dwelling are more likely to venture out on the roof after the installation of flooring, a railing, and a convenient means of access, the

⁶ The Board also concludes that the roof deck did not constitute a “balcony,” which is typically a projecting cantilevered structure that goes beyond a building wall. Rather, the deck is located on top of an existing enclosed portion of a building and did not protrude from the exterior face of the building with no aspect of the building underneath it.

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outdoor space occupied by the deck already existed and thus the new deck did not comprise an addition to the dwelling that required relief as an enlargement of a nonconforming structure.⁷

The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. D.C. Official Code § 1-309.10(d)(3)(A) (2001). In this case, ANC 2E submitted a letter indicating its support for the appeal “in view of the fact that the proposed addition of a second story deck and a separate third story deck raises issues of lot occupancy, rear yard loss, number of stories on the property and the negative impact on adjacent properties.” (Exhibit 15). The Board does not find that the issues and concerns raised by the ANC provide grounds to grant the appeal. For the reasons discussed above, the Board finds that what the ANC called a “second story deck” is actually a landing, part of a rear stair permitted as a matter of right under § 2503.4, on the main (*i.e.* first) floor of the dwelling, while the “separate third story deck” is actually a roof deck built as a matter of right on the roof of an existing extension of the dwelling. Neither project affects lot occupancy, rear yard, or the number of stories for zoning purposes, or will create any negative impact on adjacent properties that is addressed in the Zoning Regulations.

Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the administrative decision by the ZA, DCRA, to allow a landing as part of a rear stair and a roof deck at a one-family dwelling by Building Permit Nos. B0902028 and B0905289, in the R-3 District at 3046 N Street, N.W. (Square 1209, Lot 854). Accordingly, it is therefore **ORDERED** that the appeal is **DENIED**.

VOTE: **4-0-1** (Marc D. Loud, Shane L. Dettman, Meridith H. Moldenhauer and Konrad W. Schlater voting to Deny the appeal with respect to the landing; No other Board member (vacant) participating)

VOTE: **3-1-1** (Marc D. Loud, Shane L. Dettman, and Konrad W. Schlater voting to Deny the appeal with respect to the roof deck; Meridith H. Moldenhauer opposed; No other Board member (vacant) participating)

⁷ The Board was not persuaded to reach a different result by the cases cited by the Appellant. While recognizing a history of somewhat inconsistent treatment with projects designated as “roof decks” in past orders, the Board notes that a review of recent cases shows that roof decks may be constructed without zoning relief. *See, e.g.*, Application No. 17341 (July 6, 2005) (Board dismissed self-certified application for variances on grounds that project, including roof deck over second-floor rear portion of row dwelling, was a matter-of-right modernization under § 2001.2); Application No. 17835 (February 4, 2009) (Board granted special exception under § 223 and variance from alley setback requirement to allow construction of an accessory garage serving a one-family row dwelling, not meeting lot occupancy requirement, but no additional relief was needed with respect to applicant’s plans to construct a roof on top of the new garage).

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

A majority of the Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 17 2010

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.