

Appeal of
Lawrence and Kathleen Ausubel

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Appeal No. 18577

Appellants Lawrence and Kathleen Ausubel, by and through counsel, submit this brief with exhibits in anticipation of the hearing in this matter, currently scheduled for July 30, 2013.

Factual Background

Appellants' property, at 2744 32nd St., NW (Square 2119, Lot 12) and the adjacent property at 2750 32nd St., NW (Square 2119, Lot 25) are both located in the Woodland Normanstone Neighborhood, northeast of the Naval Observatory. Both lots are curved at their frontage on 32nd Street, and both are wider at the rear than

at the front. Both lots slope downward from 32nd Street NW to Normanstone Park. See Exhibit 1 hereto (excerpt of Zoning Map).

The area is zoned R-1-A. In response to neighborhood concerns about preserving the park-like character of the neighborhood, the Zoning Commission ordered the amendment of the Zoning Regulations to impose a Tree and Slope Protection (TSP) Overlay district in this area, restricting further the total percentage of a lot which can be occupied. Zoning Commission Order No. 713, case 89-36 (2/10/92).

The Property at 2750 32nd St., NW

The house on the property at 2750 32nd St. is located approximately 8 feet from the side lot line shared with Lot 24, and aligned with that lot line, creating a larger setback from the side lot line shared with Appellants, as shown on Exhibit 2 attached (survey submitted in support of building permit no. B1103930). The house faces the street (See Exhibit 3) but the side lot line shared with Appellants runs at a diagonal to it. A parking pad is located in front of the house. The land slopes downward from 2750 to Appellant's property, so that the parking pad is supported along the side lot line by a retaining wall which varies in height.

The current owners, 2750 32nd Trust (hereinafter "the Trust"), purchased the property in late 2010. Soon thereafter, the owners began submitting applications for building permits for major construction and remodeling. The Trust sought to add a three-story addition with an elevator on the side of the house, which would take up the entire remainder of the lot up to the side lot setback shared with Appellants, but which would be set back from the street more than the main house.

See Exhibit 4 (drawings for three levels of proposed addition). The construction of the addition continued for a year and a half from July 2011 through the end of 2012. During the initial months of this period, Appellants and the Trust litigated a dispute over the protection of several large trees near the property line. The Trust and its contractors submitted multiple building permit applications.

As part of the building project, the Trust also sought to “heavy-up” the electrical system, from 400 amps to 800, and to relocate the meter. Because the proposed increased capacity exceeds 400 amps, PEPCO requires transformer-rated metering. The Trust was therefore required to purchase and install a cabinet for the transformer. PEPCO insisted that the Trust choose the site for installation of the cabinet, and that the Trust be responsible for obtaining approvals from any government agency for the siting. See Exhibit 5 (PEPCO Response to Application for Electric Service). PEPCO sets forth certain standards for the cabinet, as set forth in the attached Exhibit 6 (PEPCO drawing nos. 3-5-0694 and 3-5-0695)

The Trust installed a cabinet, seven feet in height, on the outside of a retaining wall some three feet from the side lot line shared with Appellants. The Trust did not seek a variance from the side-yard setback requirements of the Zoning Code before the installation. The Ausubels first learned of the installation when it occurred in the second half of 2012. DCRA inspected in October 2012 and found that the cabinet violated the side yard setback requirements and issued a notice of violation. The Trust appealed. After the Trust’s attorney met with the Zoning Administrator, however, the Zoning Administrator withdrew the notice. The appeal

was then dismissed, without ANC 3C having the opportunity to weigh in on the matter.

The cabinet, depicted in Exhibit 7, is constructed of metal, and stands seven feet tall, with a red warning light on top. Because the land slopes downward from lot 25 to Appellant's property, the cabinet appears even taller, and the top of it is level with the eaves of Appellant's house. See Exhibits 6 and 7 submitted 4/10/13 with appeal. The interior contains the transformer wiring, and a good deal of free space, as shown in Exhibit 8 (photograph of cabinet open during installation).

Because of its placement on the downhill side of a retaining wall, the cabinet is invisible from 2750 32nd St., NW. See Exhibit 9 (photograph of 2750 32nd St., NW). It looms over Appellant's property, however, and creates the appearance of being situated in Appellant's front yard. This electrical transformer is located just steps away from Appellant's house, immediately adjacent to the gas meter for 2750 32nd, which causes Appellants concern about safety. It is also esthetically unappealing, taking up most of the view from a nearby window. See Exhibit 10 (photograph from inside 2744 32nd St., NW).

Law and Argument

1. The Cabinet is Sited within the Required Side Yard Setback for the Adjacent Retaining Wall

The Zoning Administrator decided that the regulations do not provide for a side yard setback for a retaining wall, and that therefore the Cabinet did not violate the Zoning regulations. The plain language of the regulations provides otherwise. 11 DCMR 199.1 defines side yard as:

a yard between any portion of a building or other structure and the adjacent side lot line, extending for the full depth of the building or structure.

Nowhere in the regulations is there any exception to this provision for accessory uses in general or retaining walls in particular. The term "structure" is defined in the same provision specifically to include retaining walls.

The logic of these definitions is apparent in this case. The retaining wall is nearly as high as the cabinet, and supports the parking pad, which in itself is a structure within the meaning of 11 DCMR 199.1. *See Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427 (DC 2008) (upholding BZA decision that retaining wall and geogrid system constituted "structure", not merely retaining wall).

Because the law is clear on its face, it must be enforced according to its terms.

We have stated on numerous occasions that "when the language of a statute is clear and admits of no more than one meaning, we are not empowered to look beyond the literal words of the statute." *Nova Univ. v. Educ. Inst. Licensure Comm'n*, 483 A.2d 1172, 1179 (D.C. 1984), *cert. denied*, 470 U.S. 1054, 105 S.Ct. 1759, 84 L.Ed.2d 822 (1985); *see also Auger v. District of Columbia Bd. of Appeals & Review*, 477 A.2d 196, 211 (D.C. 1984). Thus, if the meaning of the plain language of a statute is clear, we must enforce it according to its terms, *see United States v. Edelen*, 529 A.2d 774, 778 (D.C. 1987).

Citizens Ass'n V. D.C. Bd. Of Zoning Adj., 642 A.2d 125 (DC, 1994).

The Zoning Administrator read into the regulations an exception to the side-yard setback requirements for retaining walls, or perhaps for all "accessory uses". Based on this interpretation, it can also be said that he amended the zoning regulations to require side yard setbacks only for buildings, not for structures. The Zoning Administrator has initial authority to interpret the regulations, but his

interpretation must be reasonable, and he cannot simply decline to enforce the regulations as written.

To find otherwise would be to ignore the paramount right of the public to have its zoning regulations enforced. *See Goto v. District of Columbia*, 423 A.2d 19 (D.C. 1980); *Jackson v. Kenai Peninsula Borough*, 733 P.2d 1038 (Al. 1987); *Weik v. Dist. of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 13 (D.C. 1978); 73 ALR 4th 857. A public employee charged with enforcing the Zoning Regulations, including the Zoning Administrator, lacks authority to waive those regulations. *See Weik* at 13. *Zoning Comm. Order No. 952*, Case No. 01-26/16716 (12/10/01) at p. 4.

This case provides a good illustration of the wisdom of literal interpretation of the regulations. The Trust erected the Cabinet in such a way that it was hidden from the house behind the retaining wall.¹ However, from Appellant's property, the retaining wall is of the same height as a one-story structure, such that the placement of the cabinet is functionally no different than it would be had it been installed on the outside of a one-story building wall. The retaining wall connects to the parking pad it supports, which is a separate structure, and through that pad to the entryway, house and addition, creating a continuous series of structures that occupy the lot. Under the unambiguous language of the regulations, all of these structures require side lot setbacks.²

¹ The Cabinet is a structure within the meaning of 11 DCMR 199.1. While it houses "mechanical equipment", it is not itself mechanical equipment. Rather, it is a support for that equipment which PEPCO requires in order to perform the service upgrade.

² The fact that a retaining wall may itself be located within a side yard does not change this analysis. 11 DCMR 2503.3 expressly allows retaining walls in side yards. 11 DCMR 2503.1 states that "[e]xcept for the structures and exceptions specified in this section, every part of a yard required under this title shall be open and unobstructed to the sky from the ground up." [emphasis added]

B. The Cabinet is Located in the Side Yard of the Main House

Even were the Zoning Administrator correct in deciding that no side yard need be measured from a retaining wall, he erred in concluding that the cabinet is not sited in the side yard of the principal house. In order to arrive at this conclusion, the Zoning Administrator read into the regulations a method of calculation which is not written into the regulations, and which, in this case, conflicts with the language of the regulations.

11 DCMR 199.1 provides that a side yard extends “for the full depth of the building or structure.” As the term “depth” is not defined, 11 DCMR 199.2(g) provides that it bears the meaning set forth in Webster’s Unabridged Dictionary. Webster’s defines depth as “the direct linear measurement from front to back”. Based on this definition, the side yard begins at the forward-most point of the structure, and extends to the most rearward point.

Drawing a line across the front of the building to create a front yard, as proposed by the Trust, would conflict with this definition, and shorten the side yard dramatically. There is no basis for importing the concept of such a line from the definition of rear yard. The definition of rear yard specifically instructs the measurement from such a building line. A rear yard cannot also be a side yard, because the rear yard extends for the entire width of the lot. Because the structures prohibited in a side yard are also prohibited in a rear yard, however, the inclusion of this artificial line does not lessen the protection to be given adjoining property owners. 11 DCMR 2503.1 and 2503.2 make no distinction between rear and side yards in their prohibition of structures. Because both rear and side yards are

required, no structures may be erected in either one, except as specifically permitted.

Creating a front yard by drawing a line across the front of the main building, by contrast, would lessen the protection afforded adjoining property owners by shortening the side yard. Because the house fronts on a curve, and because it sits at an angle to Appellants' side lot line, drawing a line across the front of the house makes the side yard setback on Appellants' side shorter than the side yard setback for lot 24, on the other side of 2750. This method of measurement would create a larger free area on Appellants' side of the property, where the regulations would not prohibit any type of structure.

The Zoning Administrator did not specifically adopt the Trust's argument that a line should be drawn across the building, but his chosen method of measurement resulted in the termination of the side yard at virtually the same point along the side lot line. The Zoning Administrator chose a corner of the entryway in front of the new addition, and measured the side yard from that point, stating that forward of that point there was no required side yard. In so doing, the Zoning Administrator declined to extend the side yard for the full depth of the principal building.

The Zoning Administrator's interpretation was error, because it ignored the instruction of 11 DCMR 199.2 to seek definitions for undefined terms in the dictionary, and because it imported into the definition of side yard a concept—the choice of a near point on a building as the measuring point—which has no place in the regulations as drafted.

Appellants ask the Board to use its authority to correct this mis-interpretation, and to follow the letter and spirit of the regulations.

As we have often held, “It is the Board, not the Zoning Administrator, which “ has final administrative responsibility to interpret the zoning regulations.’ *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C.1990); see D.C.Code § 6-641.07(g)(4) (2001) (empowering the BZA to “reverse or affirm, wholly or partly, or ... modify” any order or decision appealed from, or to “make such order as may be necessary to carry out its decision”).”

Bannum, Inc., v. District of Columbia Board Of Zoning Adjustment, 894 A.2d 423 (DC 2006).

The Zoning Code contains an express preference for an expansive reading of side yard requirements. DC Code §6-641.11. As the Board noted in Appeal No. 16811, David and Janet Pritchard (6/4/02):

The minimum yard requirements require the provision of open spaces around buildings and structures. As described in 3 Rathkopf's The Law of Zoning and Planning 34B.02[1] at 34B-2 to 34B-5 (2001):

Restrictions on land development controlling building setback lines and requiring minimum front, side, or rear yard areas that must be kept free from structural development have long been recognized by courts as being reasonably related to light, air, and privacy. They afford room for lawns and trees, keep residences away from street traffic, noise, dust, and neighbors, provide space for recreation and relaxation, and add to the attractiveness and comfort of a residential district.

In the language of 11 DCMR 101.1,

In their interpretation and application, the provisions of this title shall be held to be the minimum requirements adopted for the promotion of the public health, safety, morals, convenience, order, prosperity, and general welfare to:

- (a) Provide adequate light and air;
- (b) Prevent undue concentration of population and the overcrowding of land

In this case, the definition of “depth” mandates that the side yard setback requirement for the principal building (the house) begin at the point of the house closest to the street, and follow a perpendicular line to the side lot line. On Exhibit 2, the point closest to the street appears to be the corner of the house closest to lot 24. On the drawing the Zoning Administrator used (Exhibits 4 and 5 to Appellant’s statement in support of appeal), the forward-most point appears to be the main entryway. Drawing a perpendicular line from either location to the side lot line would place the cabinet well within the depth of the building, and in violation of the side yard setback requirements.

Indeed, even measuring the side yard from the corner of the main house closest to the side lot line shared with Appellants would produce the same result. The Zoning Administrator declined to measure in this manner. Rather, he chose for the measuring point a corner of an entrance courtyard closest to the side yard lot line. This choice shortens the side yard by just enough to place the cabinet outside the line. The line would end in virtually the same place as from employing the measurement method advocated by the Trust’s attorney. The choice of this entryway as a measuring point creates an inconsistency in the Zoning Administrator’s interpretation of the regulations, because it measures from a structure other than the principal building. It creates a shorter side yard on one side of the property than on the other. It also shortens the side yard by several feet in comparison to where the Zoning Administrator would have placed the side yard before the construction project began. The entrance courtyard was installed as part of the construction project. A new elevator and a new partially-covered outdoor

staircase each provide access to the entrance courtyard from the parking pad. Before the project began, then, the side yard could not have been measured from the corner of the partially-covered outdoor staircase. The nearest point to the side lot line was then the corner of the principal house.

By electing to place its guest-house addition³ and partially-covered outdoor staircase⁴ on the side of the existing house, set back from the street by a greater distance than the main house, the Trust apparently managed (in the Zoning Administrator's view) to eliminate several yards of side yard setback requirement, an anomalous result considering the proximity of the addition to the side lot line. Had the Trust elected instead to place the addition behind the existing house, the side yard would have remained several yards longer, and placement of the cabinet would then have violated the setback requirement.

This discussion simply makes clear the absurdities that can result when the regulations are interpreted in this manner. The Zoning Administrator should have calculated the depth of the building (and other structures) and measured accordingly. Appellants ask that the Board correct this error and reinstate the violation notice.

³ The addition is referred to in the drawing used by the Zoning Administrator as a "guest house". See Exhibits 4 and 5 to Appellants' Statement in Support of Appeal.

⁴ It should also be noted that the roof which partially covers the outdoor staircase does not connect either to the primary residence or to the guest house. In addition, neither the elevator nor the partially-covered outdoor staircase provides direct access to the primary residence or the guest house; rather, they provide access from the parking pad to the entrance courtyard.

C. The Board Must Give Great Weight to the Resolution of ANC 3C

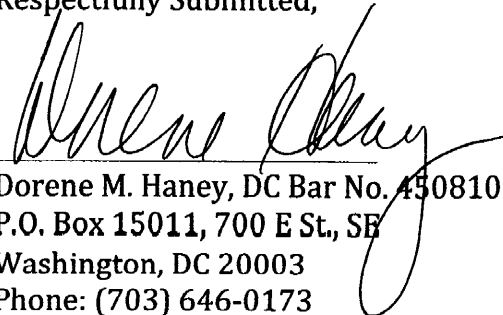
ANC 3C has filed a resolution, duly voted on at a regular meeting, in which it asks that the violation notice be reinstated. ANC 3C members expressed serious reservations about the safety and esthetic issues created by the placement of the Cabinet. The Board is required by statute and regulation to give great weight to the ANC opinion on this subject. DC Code 1-309.10(d)(3)(A); 11 DCMR 3115.2.

CONCLUSION

Because of the Zoning Administrator's interpretation of the zoning regulations, the Trust was able to place a transformer within a required side-yard setback, virtually under the eaves of Appellants' house. Properly interpreted, the letter of the zoning regulations forbid this placement. The current placement of the cabinet offends as well the spirit and intent of the zoning regulations. The Advisory Neighborhood Commission agrees that the cabinet should be relocated. Appellants respectfully request that the Board enforce the zoning regulations as written, reinstate the violation notice, and require the Trust to move the cabinet to comply with the law.

July 16, 2013

Respectfully Submitted,



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Appeal No. 18577
Prehearing Brief
List of Exhibits

1. Zoning Map excerpt, Square 2119
2. Survey submitted for Building Permit No. B1103930
3. Photo of Front of House at 2750 32nd St., NW (pre-addition)
4. Plans for addition to 2750 32nd St., NW
5. Pepco order document
6. Pepco drawings 3-5-0694 and 0695
7. Photo of electrical Cabinet open
8. Photo of electrical Cabinet showing surveyor stake
9. Photo of Front of House at 2750 32nd St. NW
10. Photo showing view of cabinet from window

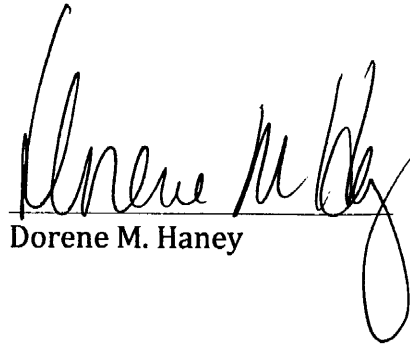
CERTIFICATE OF SERVICE

I hereby certify that the attached Appellants' Prehearing Brief, with Exhibits 1-10,
were served via electronic mail on the following, this 16 day of July, 2013:

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