

Statement in Support of Appeal

Introduction

Lawrence and Kathleen Ausubel (hereinafter “the Ausubels”) appeal the decision of the Zoning Administrator to cancel his Notice of Violation and Notice to Abate – Control No. CEL1300001 (hereinafter “Notice of Violation”), on the grounds that the Notice was correctly issued and that the violation which is the subject of the notice should be abated.

The subject of the Notice of Violation is a cabinet structure for a generator transformer switch (hereinafter “Structure”) seven feet in height, which the owners of 2750 32nd Street NW (the 2750 32nd St. Trust, hereinafter “the Trust”) placed a mere three feet from the property line shared with the Ausubels, beyond a six-foot high retaining wall located on the Trust’s property. The structure is greater than four feet in height and located within the eight-foot side yard required in the R-1-A zone, and is therefore in violation of 11 DCMR 2503.2 and 405.9. The Notice of Violation required the Trust to “lower the height [of the Structure] to less than 4’ or relocate to maintain 8’ setback from the property line”. This action was correct.

The Zoning Administrator then rescinded the Notice of Violation. This decision was in error because (1) DCRA incorrectly measured the side yard, both generally in its method of measuring a side yard relative to a house and specifically in counting an outdoor staircase/elevator as part of the house, and therefore erroneously concluded that the Structure rested in a “front yard”; and (2) DCRA incorrectly applied the definition of side yard and concluded that a side yard could be measured from only a house—and not a retaining wall. As a result of these

errors in interpretation of the regulations, the Zoning Administrator erroneously withdrew the Notice of Violation. The Structure indeed violates 11 DCMR 2503.2 and 405.9, because it exceeds 4 feet in height and it is located in a required side yard. The Notice of Violation should therefore be reinstated.

Factual and Procedural Background

The Ausubels own the property located at 2744 32nd St., NW. The Trust owns the adjacent property, located at 2750 32nd St., NW. Both properties are located in a TSP/R-1-A zone. The Trust's lot is irregularly shaped, narrower where it fronts the street than it is at the rear. The property line between the Trust's property and the Ausubels' property is essentially a straight line, extending for more than 100 feet from the street.

At the street, the Trust's property is improved with a paved "drive court." Adjacent to the drive court is a retaining wall which begins on the property line shared with the Ausubels, and then curves to run parallel to the drive court. The house located on the Trust property is situated rearward of the "drive court", and was recently improved by the addition of an elevator, staircase, entrance courtyard and large "guest house", adjacent to the Ausubels' property. The drive court, house and entrance courtyard are depicted on the diagrams marked as exhibit 4 and 5 hereto.¹

¹ The underlying diagram in Exhibits 4 and 5 is identical. Only the additional markings differ. The markings in Exhibit 4 were made by Zoning Administrator LeGrant. Those in Exhibit 5 were made by the Trust, in its appeal of the Notice of Violation.

The Trust has obtained a number of building permits over the past two years, and has conducted a good deal of construction. In Summer 2012, the Trust erected the Structure, on the outside of the retaining wall, facing the Ausubels' property. The Structure is clearly visible from the Ausubels' property and, because of its location outside the retaining wall and very near the property line, actually gives the appearance of being in the Ausubels' yard, as shown in the photograph marked as Exhibit 6 hereto. The structure is also visible from the street, as shown in the photograph marked as Exhibit 7 hereto.

DCRA inspected on October 24, 2012, and issued a Notice of Violation, a copy of which is attached hereto as Exhibit 2. The Trust appealed on January 20, 2013. In support of its appeal, the Trust argued that because rear yards are measured from the rear line of the building to the rear lot line, a "front yard" should be measured in a similar way. Drawing a line across the front of the main house, the Trust argued, defines the rearward edge of the front yard. See markings on the diagram attached hereto as Exhibit 5. Because a rear yard cannot also be a side yard, the Trust argued, neither can a front yard also be a side yard. Because the Structure is located just forward of this artificial line, the Trust argues that the Structure was in a front yard and not a side yard, and was therefore permitted.

The Zoning Administrator informed the Ausubels by email on February 13, 2013 (attached hereto as Exhibit 1, and hereinafter "LeGrant Email") that "DCRA has canceled the Notice of Violation." The appeal, set for hearing April 2, was withdrawn. The LeGrant Email stated: "Initially, when the matter was brought to my attention, I believed that the electrical equipment cabinet was located in the

required side yard, and was subject to the four foot height limitation set forth in 11 DCMR 2503.2. On that basis, DCRA had issued a Notice of Violation dated 10-24-12 seeking a correction. However, upon further review, it is now my determination that the cabinet is not sited within the required side yard setback, but is located in the front yard.”

The Ausubels requested a meeting with the Zoning Administrator, and met with Mr. LeGrant and with Ms. Melinda Bolling, General Counsel, Office of the Attorney General for the District of Columbia, on March 4, 2013. During this meeting, the Ausubels learned that the Zoning Administrator reversed his position on the Notice of Violation primarily based on two arguments provided by Mr. Chris Collins, counsel for the Trust. First, the Zoning Administrator accepted that the “side yard” should be measured with respect to the front corner of the house, in particular, with respect to an outdoor staircase/outdoor elevator that was recently added—and not with respect to the traditional front corner of the house. If a front-corner rule was applied and if the recently-added outdoor staircase/elevator was included as part of the “house”, the Structure was located in the front yard of the house. Second, the Zoning Administrator accepted that the only relevant side yard was the side yard of the “house”—and not the side yard of the retaining wall—arguing that the retaining wall is an “accessory structure” and is therefore not subject to the side yard provisions of the DC Zoning Regulations. Each of these conclusions constitutes error.

The Appeal is Timely

The Ausubels are “persons aggrieved” by the Zoning Administrator’s withdrawal of the Notice of Violation, within the meaning of 11 DCMR 3112.1, and are therefore proper parties to this appeal. The Ausubels are the persons most affected by the improper erection of the Structure in a required side yard. Indeed, the Structure, while nearly invisible from the Trust property, is conspicuously visible from the entryway to the Ausubels’ property and creates the visual appearance of being located in the Ausubels’ yard

The appeal is timely. The LeGrant email, dated February 13, was the first notice the Ausubels had that the Zoning Administrator had withdrawn the Notice of Violation. A later search of the IZIS case records shows a filing date of 2/12/13 for the withdrawal of the notice. The time should run from the Ausubels’ notice of the Zoning Administrator’s Action, but based on either date, this Appeal is timely filed within 60 days of notice of the action taken. 11 DCMR 3112.2(a).

The Structure is Located in the Side Yard of the House

11 DCMR 199 defines a “side yard” as “Yard, side – 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.” The Zoning Administrator improperly read into this definition an additional limitation based on the drawing of an imaginary line across the front of the property.

The Zoning Administrator incorrectly interpreted the regulations. The Board has final administrative authority to interpret the Zoning Regulations, and is obliged to overrule the Zoning Administrator’s interpretation of a regulation where it is

erroneous. *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1057 (D.C. 1990). In this case, the Zoning Administrator erred in reading into the definition of “side yard” a concept which is not supported in the law, either by the regulations or by decisions interpreting those regulations, and erred in calculating the side yard for the Trust property.

Under DC law, rear yards and side yards are required in areas zoned R-1, and are defined by statute. The regulations contain no definition of front yard, and no required setback from the street. 11 DCMR 199.1 defines a rear yard as:

a yard between the rear line of a building or other structure and the rear lot line, except as provided elsewhere in this title. The rear yard shall be for the full width of the lot and shall be unoccupied, except as specifically authorized in this title.

The depth of a rear yard is measured from the rear line of the building to the rear lot line, as provided in 11 DCMR 199.1, in the definition of “rear yard, depth”. In its statement in support of appeal, the Trust argued that a similar line should be drawn across the front of the main structure, which would then define a “front yard”. This front yard would then extend the entire width of the lot, because the rear yard so extends.

This leap of logic finds no support in the regulations. A rear yard extends the entire width of a lot because the regulations so provide. Nothing in the zoning regulations defines a front yard, or even requires that a front yard exist, so there is no reason to create a method for defining it. Nothing in the zoning regulations supports the proposition that an area cannot be both a “front yard” and a “side yard” when it represents the setback for the corner area of a building.

The focus should be on the definition of side yard. The side yard runs from the property line “the full depth of the building or structure”. In this case, the Trust’s main building is set at an angle to the side yard line. The depth of that structure, which defines the side yard, must be measured perpendicular to the property line in order to determine the depth of the building. If the side yard is measured from the property line to the main structure, on a perpendicular line, the depth of the building (and hence the side yard) extends well beyond the location of the Structure.

The Trust argued in its appeal that the measurement should begin from a straight line drawn across the front of the building, not the property line, citing Appeal No 17414, Geraldine Rebach and Jeffrey Schonberger, and *Schonberger v. District of Columbia Board of Zoning Adjustment*, 940 A.2d 159 (DC 2008). In that case, the Board indeed measured from the rear of the main building, rather than from the property line or an accessory building. However, the case does not address the question of how to measure depth of a building, particularly where the building is situated at an angle to the property line. The cases therefore provide no guidance in the method of calculating a side yard.

The Zoning Administrator explained during the March 4, 2013 meeting with the Ausubels that he measures perpendicularly to the property line, but chooses the corner of the house nearest the property line to measure depth. He stated that he draws a line from the closest corner of the house and extends it on the perpendicular to the property line. That line denotes the front of the side yard. While this may make sense for a rectangular house on a rectangular lot oriented in

the ordinary way, it yields irrational and contradictory conclusions when applied to an irregularly shaped house on an irregularly shaped lot.

The error was compounded in this case by the choice of a point of measurement. Originally the Zoning Administrator used a measurement from the corner of the house, but after meeting with Mr. Collins, he redrew the line, beginning instead from the corner of the structure containing the top landing of an outdoor staircase that connects the front yard of the Trust property to a courtyard.

On the attached diagram, which the Trust submitted in support of its appeal, the structure located next to the Entrance to Courtyard is not shaded. That structure contains the landing to the staircase, plus an elevator. Both the staircase and the elevator allow visitors to travel from the front yard to the courtyard without entering the house; there is no passage from either the elevator or the staircase to the house. There is no shading of this structure, unlike the original house or its recent addition, the "guest house". As shown in the photograph attached hereto as Exhibit 8, the covered, open landing of the staircase is not part of the house. The purpose of the staircase is to provide a means of access from the front yard to the outdoor courtyard below. The separate elevator structure is also not part of the house. The elevator's purpose is to provide a means of access from the street to the outdoor courtyard below. The elevator structure should be viewed as a separate accessory structure, just as a garage or a shed is an accessory structure.

The net effect of the Zoning Administrator's method of measurement would allow the size of the side yard to shrink even as the size of the building itself expands. This is, in fact, what happened when the Zoning Administrator redrew the

perpendicular line to start from the corner of the landing of the new staircase of 2750 32nd St NW, instead of using the corner of the house. The side yard dimensions shrank.

Based on DC Zoning Regulations, the side yard should be as long as the building is deep. The correct technique to implement this definition is to measure the side yard from that point of the house that is the furthest forward (toward the front of the house) and draw a perpendicular line from that point to the property line where the side yard is located. Then, take the point of the house that is the furthest back (toward the rear of the house) and draw a perpendicular line from it to the property line where the side yard is located. (In the previous sentences, “furthest forward” and “furthest back” are meant in relation to the relevant side property line.) Basic Euclidean geometry yields a side yard whose length equals the depth of the building or structure. This method correctly projects the building’s depth onto the side property line, satisfies the definition of a side yard per the DC Zoning Regulations, and works perfectly no matter whether the house is a rectangular house in a rectangular lot, or is an irregularly shaped house in an irregularly shaped lot. Using this method, the Structure is clearly located in the side yard. Only structures not exceeding four feet in height are permitted in this area under 11 DCMR 2503.1 and 2503.2. As the structure exceeds that height, it is improperly located in a side yard and must be reduced or moved.

The Zoning Administrator Erroneously Concluded that a Retaining Wall Does Not Define a Side Yard

Even if the Zoning Administrator did not err in measuring the side yard of the main house, he erred in concluding that the retaining wall was not a structure from which a side yard could be measured.

11 DCMR 199 defines a “side yard” as “Yard, side – 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. Section 199 of the Zoning Regulations defines a “structure” as: “anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and ***retaining walls***. Reading these two provisions together, leads inescapably to the conclusion that a retaining wall is a structure, and therefore that a side yard should be measured from it.

The Board has measured rear yards from structures other than the main building. For example, in Appeal No. 17054, Henry Sailer, the Board measured a rear yard from a primary pool, concluding that the rear yard depth requirements had been met.² Measuring the side yard from the retaining wall, it is clear that the Structure is within a side yard, in violation of 11 DCMR 2503.1 and 2503.2.

² Ms. Bolling, DCRA General Counsel, researched this question and confirmed that there is no case law addressing the question of whether accessory structures have side yards. (Melinda Bolling Email of March 11, Exhibit 3 hereto).

Conclusion

Because the Zoning Administrator erroneously drew the side yard, and erroneously concluded that the retaining wall could not serve as a measuring point, he concluded that the Structure as placed does not violate DC Zoning Regulations. The decision should be reversed, for the reasons set forth above, and the Notice of Violation and Notice to Abate – Control No. CEL1300001 should be reinstated.

EXHIBITS ATTACHED

1. Email from Matthew LeGrant to Lawrence and Kathleen Ausubel, dated 2/13/13, notifying them of the cancellation of the Notice of Violation.
2. Notice of Violation no. CEL 1300001
3. Email exchange between Melinda Bolling, DCRA, and Lawrence and Kathleen Ausubel, dated March 11, 2013
4. Diagram showing the house, guest house, drive court and entry courtyard at 2750 3rd St., NW, with markings made by Matthew LeGrant
5. Diagram showing the house, guest house, drive court and entry courtyard at 2750 3rd St., NW, with markings made by counsel for the Trust
6. Photograph depicting the Structure as seen from the front yard of the Ausubel property, 2744 32nd St., NW
7. Photograph depicting the Structure as seen from 32nd St., NW
8. Photograph depicting the entry courtyard at 2750 32nd St., NW

CERTIFICATE OF SERVICE

I hereby certify that the attached appeal and statement in support of appeal, with exhibits, were served on the following, this 10 day of April, 2013:

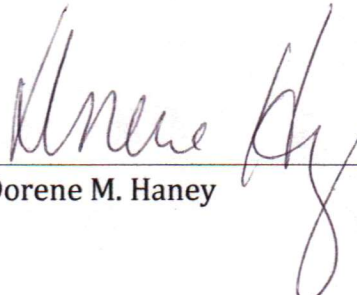
2750 32nd St. Trust (via first-class mail)
2750 32nd St., NW
Washington, DC 20008-2712

Matthew LeGrant, Zoning Administrator (via email and first class mail)
1100 4th St., SW, Room 3100
Washington, DC 20024
Matthew.legrant@dc.gov

Melinda Bolling, Esq. (via electronic mail)
General Counsel, DCRA
Melinda.bolling@dc.gov

ANC 3C (via first-class mail)
4025 Brandywine St., NW
Washington, DC 20016

Christopher H. Collins (via first-class mail)
Holland & Knight
800 17th St, NW
Washington, DC 20006


Dorene M. Haney