

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of Lawrence M. and
Kathleen B. Ausubel

Appeal No. 18577
ANC 3C

OWNERS' PREHEARING STATEMENT IN OPPOSITION TO APPEAL

**I.
INTRODUCTION**

The owners of the property which is the subject of this appeal, 2750 32nd Street Trust (hereinafter, the "Owners" or the "Vorobeks"), parties to this appeal pursuant to 11 DCMR Section 3199, respectfully request that the Board deny this appeal. The appeal should be denied because the emergency generator transfer switch and cabinet enclosure at issue is not located in a required side yard.

**II.
THE FACTS**

A. Background

This appeal is the latest in a series of administrative and judicial challenges by Lawrence and Kathleen Ausubel to stop or otherwise control the renovation activities of the Owners, the Ausubels' neighbors at 2750 32nd Street, NW. The neighbors, Christopher and Matthew Vorobek, own their property in trust as 2750 32nd Street Trust. The Ausubels' previous challenges include the following:

1. Office of the Zoning Administrator. In the spring of 2011, over a period of about four months, the Ausubels and their counsel met with and corresponded with the Zoning Administrator in an effort to get him to deny the issuance of a building permit to allow the construction of an addition to the Vorobeks' home. The Zoning Administrator ruled on June 14, 2011 in favor of the Vorobeks, and the building permit was subsequently issued.

2. D.C. Superior Court - Lawrence M. Ausubel, et al. v. 2750 32nd Street Trust, et al., Case No. 2011 CA 005856B. After the Zoning Administrator denied their request, the Ausubels filed on July 22, 2011 a complaint for injunction and a motion for a temporary restraining order and preliminary injunction to stop the issuance of the necessary permits to the Vorobeks. Over the next five months, after several hearings and a trial, the Court denied two TRO requests by the Ausubels from the bench and ruled for the Vorobeks on all counts at the end of the trial, by Judgment issued on December 13, 2011.

3. Board of Zoning Adjustment - Appeal No. 18300 of Lawrence and Kathleen Ausubel. After filing their complaint in Superior Court, the Ausubels filed an appeal with the Board on September 9, 2011, challenging the Zoning Administrator's decision to issue the building permit for the Vorobeks' addition. The Ausubels also filed a request for stay of the Vorobeks' building permit, and a request for an expedited hearing. The Vorobeks filed a Motion to Dismiss the Ausubels' appeal as untimely filed. On November 8, 2011, this Board dismissed the Ausubels' appeal as untimely filed. The Board's order in this case is dated April 11, 2012.

4. D.C. Court of Appeals - Lawrence and Kathleen Ausubel v. D.C. Board of Zoning Adjustment, Case Nos. 11-AA-1430 and 11-OA-39. On November 10, 2011, the Ausubels filed a Motion for Summary Reversal of the BZA Dismissal of their untimely appeal. They also filed on that same date a Petition for Review of the Board's decision. Both the District of Columbia and the Vorobeks filed Motions to Dismiss the Ausubel appeal as untimely filed. The Court issued an Order denying the Ausubels' Petition for Writ of Mandamus on November 21, 2011. By Order dated January 31, 2012, the Court denied the Ausubels' Petition for Review as untimely filed.

Copies of the above Orders are attached hereto as Exhibits A, B and C.

B. BZA Appeal No. 18577.

The subject of this new Appeal No. 18577 is an emergency generator transfer switch and cabinet enclosure that is part of the emergency generator system on the Vorobek property. According to the Appellants, the emergency generator transfer switch and cabinet enclosure "creates the appearance of being situated in Appellants' front yard" and "is also aesthetically unappealing". See Appellants' Prehearing Brief, BZA Exhibit. 26, at p. 4. The Ausubels first raised this issue in an email to the Vorobeks dated July 1, 2012. See Exhibit D, July 1, 2012 email from Appellant Kathy Ausubel to Owners. In that email, Kathy Ausubel states that they "have started looking into putting up a fence on the property line to help hide it from our view and from the street. We assume that you do not have any objections to us adding a fence near the property line to screen your equipment."¹ She then goes on to say that "If we don't hear from you within a week, we'll let D.C. know that there might be a problem...".

Beginning on or about July 11, 2012 and continuing through the spring of 2013, the Ausubels engaged in extensive dialogue with the Office of the Zoning Administrator regarding the height and location of the emergency generator transfer switch and cabinet enclosure. Appellant Kathy Ausubel initially met with the Office of the Zoning Administrator on or about July 11, 2012 to discuss this issue. Based upon the facts presented at that meeting, the Deputy Zoning Administrator was led to believe that the emergency generator transfer switch and cabinet enclosure was located in a required side yard. See Exhibit E. Two inspectors visited the Vorobek property on July 24, 2012, to inspect the placement of the emergency generator transfer switch and cabinet enclosure. Three months later an inspector returned to the Vorobek property,

¹ The Vorobeks are willing to give the Appellants written consent to build a fence on the Appellants' property adjacent to the side lot line, up to a height of 10 feet. Per Section 2503.3, a fence that is built in accordance with the DC Construction Codes may occupy any required yard. Section 3110.3.3 of the DC Construction Codes 2008 Supplement allows a fence located within 10 feet and parallel to a "party line" (a side or rear lot line) to be constructed to a height of seven feet in a residence district, and up to 10 feet in height in a residence district with the written consent of the adjoining owner.

and subsequently issued the Notice of Violation to the Vorobeks in November. Counsel for the Vorobeks contacted the inspector, and then the Zoning Administrator, to discuss the matter and provide all of the relevant facts. The Vorobeks' counsel also filed a timely appeal (BZA Appeal No. 18525) to preserve the Vorobeks' rights during the pendency of those discussions.

On February 11, 2013, DCRA cancelled the Notice of Violation and on February 12, 2013, the Vorobeks withdrew their BZA appeal. In his February 13, 2013 email to the Ausubels, the Zoning Administrator explained that "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...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. Accordingly, since under the Zoning Regulations, there is no limitation for structures in a front yard,² there is no zoning violation." See BZA Ex. 4. Approximately 60 days later, the Appellants filed their appeal in this case.

III.

THE EMERGENCY GENERATOR TRANSFER SWITCH AND CABINET ENCLOSURE IS NOT LOCATED IN A REQUIRED SIDE YARD.

A. Retaining Wall.

Using a narrow and selective reading of the Zoning Regulations, the Appellant erroneously claims that the emergency generator transfer switch and cabinet enclosure is located within "the required side yard setback for the adjacent retaining wall". However, there is no side yard setback requirement for this retaining wall.

The following facts are indisputable:

1. A retaining wall is a structure, as defined in 11 DCMR, Section 199, "Structure".

² Both this Board and the Court of Appeals have held that "the Zoning Regulations do not require front yards in any zone district." BZA Appeal No. 17414 of Rebach and Schonberger, at P. 6 (November 16, 2006), affirmed, Schonberger and Rebach v. D.C. Board of Zoning Adjustment, No. 06-AA-1454, at p. 4 (January 10, 2008).

2. The retaining wall on the Vorobek property begins at the front corner of the Vorobek property, adjacent to the Appellants' property, and extends along the side lot line to a point just past the Building Restriction Line, and then curves away from the side lot line until it reaches a point adjacent to the front corner of the Vorobek house, roughly eight feet from the side lot line. See Exhibit F.
3. The Office of the Zoning Administrator measures a required side yard setback from the side lot line inward, and in a direction perpendicular to the side lot line.
4. According to 11 DCMR, Section 2503.3, a "retaining wall constructed in accordance with the DC Construction Code may occupy any yard required under the provisions of this title".

If a retaining wall is permitted to occupy a required side yard, then it is simply not logical to read the Zoning Regulations to say that a retaining wall must also have its own side yard setback requirement. These two concepts are inconsistent. The former is clearly permitted in Section 2503.3 of the Zoning Regulations. Through their narrow and selective reading, the Appellants have interpreted the Zoning Regulations in a way that "invents" a new zoning requirement that heretofore has not existed. Such illogical results are to be avoided. Courts have consistently held that agencies should "not wallow in literalism where the plain language of a statute would lead to absurd consequences which the legislature could not have intended." *Parreco v. District of Columbia Rental Housing Commission*, 567 A.2d 43, 46 (D.C. 1989), citing *United States v. Brown*, 333 U.S. 18, 27, 92 L.Ed. 442, 68 S. Ct. 376 (1948); *Holt v. United States*, 565 A.2d 970, slip op. at 4 (D.C. 1989) (*en banc*).

Because the open area between the retaining wall and the side lot line where the emergency generator transfer switch and cabinet enclosure is located is not a required side yard, then the emergency generator transfer switch and cabinet enclosure may be located in that area.³

B. **The Vorobeks' House.**

The plain language of the Zoning Regulations and a view of the relative locations of the emergency generator transfer switch and cabinet enclosure and the Vorobeks' house can lead to only one logical and inescapable conclusion-- that the emergency generator transfer switch and cabinet enclosure is not located in the required side yard of the Vorobeks' house.

The side yard is required to extend for the full "depth" of the house. In cases such as this, where the side lot line is at an angle to the house, the Zoning Administrator measures the required side yard setback from the side lot line inward toward the house, in a direction perpendicular to the side lot line. Where the perpendicular lines (or, as in this case, the perpendicular lines extended) intersect with the front corner and back corner of the house closest to that side lot line, the area between those two lines, for a distance of eight feet from the side lot line, constitutes the required side yard for the house. See Exhibit F.

In an effort to find a required side yard measurement method that fits with their purposes, Appellants urge the Board to adopt an "expansive reading of side yard requirements".

Appellants argue on page 10 of their Prehearing Brief (BZA Ex. 26) that:

1. The front corner of the Vorobek house that should be used for the required side yard measurement should be either a) the front corner of the original house, before the Vorobek addition was

³ The Board can also take the position that the emergency generator transfer switch and cabinet enclosure is not a "structure", and may therefore be located anywhere on the lot. The definition of "structure" in Section 199 specifically excludes "mechanical equipment". Appellant agrees on page 6, footnote 1 of their Prehearing Brief, BZA Ex. 26, that the emergency generator transfer switch is "mechanical equipment" but argues that the cabinet enclosure should be excluded from that definition. The cabinet enclosure is an integral part of the emergency generator transfer switch, and serves the same safety and enclosure functions as the cabinet enclosure for the emergency generator itself, or the cabinet enclosure for an air conditioning unit, or a furnace, and should be considered as part of the mechanical equipment.

constructed; or b) the main entryway in the front of the Vorobek house; or c) the front corner on the *other side of the Vorobek house*, opposite from the Appellants' property; and

2. The required side yard setback measurement should begin at any of these three points, "and follow a perpendicular line to the side lot line."

The required side yard dimension in this zone is eight feet. A required side yard dimension of eight feet, measured from any of these three points, would fall far short of the location of emergency generator transfer switch and cabinet enclosure. See Exhibit G. Therefore, contrary to the Appellants' claim, none of these new suggested methods of measurement would result in the emergency generator transfer switch and cabinet enclosure being located in a required side yard. See Exhibit G. The Appellants' theories make no sense.⁴

IV.

LIST OF EXHIBITS

- A. Lawrence M. Ausubel, et al. v. 2750 32nd Street Trust, et al., Case No. 2011 CA 005856B (December 13, 2011).
- B. BZA Order No. 18300 of Lawrence and Kathleen Ausubel (April 11, 2012).
- C. Lawrence and Kathleen Ausubel v. DC Board of Zoning Adjustment, Nos. 11-AA-1430 and 11-0A-39 (November 21, 2012 and January 31, 2012).
- D. Email dated July 1, 2012 from Kathy Ausubel regarding the electrical cabinet.
- E. Email dated July 11, 2012 from Deputy Zoning Administrator Kathleen Beeton to Zoning Administrator Matt Le Grant and Zoning Enforcement Officer Rohan Reid.

⁴ Even if the Appellants were to abandon their theory, and instead adopt a new position that the eight foot required side yard dimension should be measured from the side lot line, in a perpendicular direction, toward any of the above three points, all of those alternative methods would defy logic and common sense and a plain reading of the Zoning Regulations, all of them would result in a "required side yard" in the front yard of the Vorobek house, and none of those alternative methods has ever been used by the Office of the Zoning Administrator to measure a required side yard.

F. Plat showing Zoning Administrator's method of determining the required eight foot side yard.

G. Plat showing Appellants' method of determining the required eight foot side yard.

V.
EXPERT WITNESS

Steven E. Sher, Director Zoning/Land Use Services, Holland & Knight LLP.

VI.
CONCLUSION

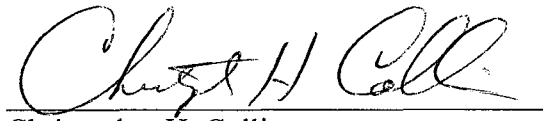
The Zoning Administrator's application of the side yard requirements to the facts of this case is reasonable and consistent with prior interpretations. The Appellants' interpretations of the side yard requirement are unreasonable and would produce an unreasonable result.

The emergency generator transfer switch and cabinet enclosure is not located in a required side yard. The Zoning Administrator committed no error in withdrawing the Notice of Violation. Accordingly, the Board should deny this appeal.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By:



Christopher H. Collins

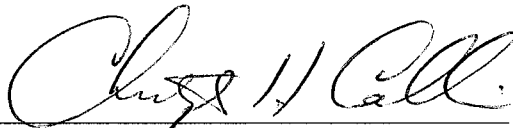
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of July, 2013, a copy of the foregoing, with Exhibits, was sent by email to the following:

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