

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18577 of Lawrence M. and Kathleen B. Ausubel, pursuant to 11 DCMR §§ 3100 and 3101, from a February 13, 2013 decision by the Department of Consumer and Regulatory Affairs to allow an electrical cabinet in the yard of a one-family dwelling in the TSP/R-1-A District at premises 2750 32nd Street, N.W. (Square 2119, Lot 25).

HEARING DATE: July 30, 2013

DECISION DATE: July 30, 2013

ORDER DENYING APPEAL

This appeal was submitted on April 10, 2013 by Lawrence and Kathleen Ausubel (collectively, “Appellant”) to challenge a decision of the Zoning Administrator, at the Department of Consumer and Regulatory Affairs (“DCRA”), made February 13, 2013 to cancel a notice of violation pertaining to the installation of an electrical cabinet in the TSP/R-1-A District at 2750 32nd Street, N.W. (Square 2119, Lot 25). Following a public hearing, the Board of Zoning Adjustment (“Board”) voted on July 30, 2013 to sustain the decision of the Zoning Administrator.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated April 11, 2013, the Office of Zoning provided notice of the appeal to the Zoning Administrator at DCRA, with a copy to 2750 32nd Street Trust, the owner of the property that is the subject of the appeal; the Office of Planning; the Councilmember for Ward 3; Advisory Neighborhood Commission (“ANC”) 3C, the ANC in which the subject property is located; and Single Member District/ANC 3C08. Pursuant to 11 DCMR § 3112.14, on April 15, 2013 the Office of Zoning mailed letters providing notice of the hearing to the Appellant, the Zoning Administrator, the owner of the subject property, and ANC 3C. Notice was also published in the *D.C. Register* on April 19, 2013 (60 DCR 5861) and on May 24, 2013 (60 DCR 7315).¹

¹ The hearing was originally scheduled for June 25, 2013 but was postponed to July 30, 2013 pursuant to a consent motion submitted by DCRA.

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Party Status. Parties in this proceeding are the Appellant, DCRA, ANC 3C, and 2750 32nd Street Trust, the owner of the property that is the subject of the appeal (“Property Owner”). There were no other requests for party status.

Appellant’s Case. The Appellant challenged the decision of the Zoning Administrator to cancel a notice of violation on the grounds that the notice was correctly issued and the violation should be abated. As described by the Appellant, the notice concerned a cabinet structure for a generator transformer switch, seven feet in height, installed by the neighboring property owners within three feet of the common property line, beyond a six-foot retaining wall installed on the neighboring property. The Appellant alleged that the structure was in violation of § 2503.2² and § 405.9³ of the Zoning Regulations because of its height – in excess of four feet – and its location within the eight-foot side yard required in the R-1-A zone.

The Appellant asserted that the notice of violation had correctly directed the neighboring property owners to lower the height of the structure to less than four feet or to relocate it to maintain an eight-foot setback from the property line. Instead, the notice was rescinded by the Zoning Administrator, which the Appellant argued 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 only from a house – and not a retaining wall.

(Exhibit 3.)

DCRA. The Department of Consumer and Regulatory Affairs argued that “the appeal must be denied because the Zoning Administrator correctly concluded that the electrical cabinet is located in the front yard of the Property and is not located in a required side yard.” (Exhibit 28.)

Property Owner. The owner of the subject property requested that the Board deny the appeal because the cabinet enclosure was not located in a required side yard. According to the Property Owner, the Appellant relied on “a narrow and selective reading of the Zoning Regulations” to claim “erroneously ... that the emergency generator transfer switch and cabinet enclosure is located within ‘the required side yard setback for the adjacent retaining wall’...[when] there is no side yard setback requirement for this retaining wall.” (Exhibit 36.)

ANC Report. By resolution adopted at a public meeting on June 17, 2013, with a quorum present, ANC 3C requested that the Board grant the appeal. According to the ANC, “in order to justify withdrawing the Notice of Violation and Notice to Abate ... the Zoning Administrator

² The relevant portion of § 2503.2 states that “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 the provisions of this title.”

³ Pursuant to § 405.9, the minimum depth of a side yard required in the R-1-A zone is eight feet.

created [in] the Zoning Regulations the concept of a ‘front yard,’ which does not exist in the regulations...” and “further decided that, unlike the rear yard and side yard provided for in the Zoning Regulations, the ‘front yard’ contains no restrictions on the height or placement of structures within it.” Citing the definition of “side yard” and structure set forth in 11 DCMR § 199, the ANC contended that the cabinet was in the side yard of the main building and the retaining wall at 2750 32nd Street, N.W. The ANC also complained that, in deciding to withdraw the Notice of Violation, the Zoning Administrator “ignored the plain language of the Zoning Regulations and found that only the main building on the property – and not an auxiliary structure such as a retaining wall – defines a side yard.” (Exhibit 25.)

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at 2750 32nd Street, N.W. (Square 2119, Lot 25). The property is zoned TSP/R-1-A and is improved with a one-family detached dwelling.
2. The subject property is an irregularly shaped lot. The parcel has five sides; the shortest is the front property line, which provides approximately 55 feet of frontage along a curving portion of 32nd Street. The front portion of the northern property line meets the front property line at an angle of approximately 90 degrees, but the southern property line occurs at an angle so that the lot width increases significantly as it extends approximately 172 feet toward the rear property line.
3. The current owners of the subject property have enlarged the dwelling through new construction near the property line shared with the Appellant. The residence now comprises the main dwelling and an enlargement known as the guest house, which has a separate entrance but was built as an addition attached to the residence. The new construction, including an addition to house an elevator and machine room, was undertaken pursuant to permits issued by DCRA.
4. Vehicular access to the property is reached by a driveway from 32nd Street to a paved parking area known as the drive court. The front door of the dwelling faces the drive court.
5. A retaining wall, six feet in height, is located along the southern edge of the subject property. The retaining wall coincides with the property line for some distance closest to the street, and then curves away from the property line toward the dwelling, approximately parallel with the edge of the paved drive court.
6. The owner of the subject property installed a cabinet structure for electrical equipment that is approximately three feet wide and seven feet in height. The cabinet is located in the area south of the drive court and east of the dwelling, such that the western edge of the cabinet almost coincides with the easternmost line of the front of the dwelling. The location of the cabinet is to the east and slightly to the north of the entrance to the guest portion of the dwelling, in addition to being in the area between the southern property line and the retaining

wall. The cabinet is located on a concrete pad three feet from the property line and is bolted to the retaining wall.

7. The electrical equipment was installed pursuant to an electrical permit issued by DCRA. Construction was completed by July 2012 and was inspected and approved by a third-party inspector. Because the electrical cabinet had not been shown on a site plan, it was not reviewed by the Office of the Zoning Administrator for compliance with the Zoning Regulations.
8. Following an inspection on October 24, 2012, the Department of Consumer and Regulatory Affairs issued a Notice of Violation and Notice to Abate to the subject property. The Notice indicated violations of § 405.9 and § 2503.2 of the Zoning Regulations associated with “[e]lectrical equipment ... more than 4’ in height and [c]loser than 8’ to property line.” The required corrective action was indicated as “[l]ower the height to less than 4’ or relocate to maintain 8’ set back from property line.” (Exhibit 5.)
9. The Appellant owns and lives in a one-family detached dwelling on property that abuts the subject property to the south (2744 32nd Street, N.W.; Lot 12 in Square 2119). That property is generally rectangular and is also zoned TSP/R-1-A.
10. By email to the Appellant sent February 13, 2013, the Zoning Administrator indicated that “after further review by my office I have determined that the electrical equipment cabinet which was constructed on the subject property is not in violation of the zoning regulations.” The email stated that the Zoning Administrator had initially 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, and on that basis, DCRA had issued the notice of violation. Subsequently, the Zoning Administrator determined that “the cabinet is not sited within the required side yard setback, but is located in the front yard” and “since under the zoning regulations there is no limitation for structures in a front yard, there is no zoning violation” and DCRA canceled the notice of violation. (Exhibit 4.)
11. The Zoning Administrator determined the location of the side yard at the subject property by drawing perpendicular lines on a plat of the property from the side property line to the side corners of the principal building on the lot (*i.e.* the dwelling). The drawing illustrated that the electrical cabinet was not located within the area delineated as the required side yard by the Zoning Administrator, but in the front yard of the property. The electrical cabinet was installed closer to the front property line than to any part of the house, and no portion of the house is parallel to any portion of the electrical cabinet.
12. The Zoning Administrator based the measurement of the side yard on the corner of the elevator addition recently made to the dwelling, rather than on the corner of the house as it existed before the elevator addition was constructed. The elevator addition is part of the principal building on the lot as the addition is not a detached structure but was attached to the

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house and has a roof. The corner of the elevator addition is the portion of the building closest to the side lot line.

13. The Appellant first learned of the cancellation of the notice of violation by means of the February 13 email, and submitted this appeal on April 10, 2013 to challenge DCRA's decision.
14. The Zoning Regulations define a "yard" as "an exterior space, other than a court, on the same lot with a building or structure." A yard required by the provisions of the Zoning Regulations must be open to the sky from the ground up, and cannot be occupied by any building or structure (except as specifically provided in the Zoning Regulations). No building or structure may occupy more than 50% of a required yard. (11 DCMR § 199.)
15. A "side yard" is defined 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." (11 DCMR § 199.)
16. A retaining wall is a "structure" as defined in the Zoning Regulations: "anything constructed ... the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including ... retaining walls." (11 DCMR § 199.)

CONCLUSIONS OF LAW AND OPINION

The Board is authorized by § 8 of the Zoning Act to "hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal" made by any administrative officer in the administration or enforcement of the Zoning Regulations. (D.C. Official Code § 6-641.07(g)(1) (2008 Repl.). *See also* 11 DCMR § 3100.2.) Appeals to the Board of Zoning Adjustment "may be taken by any person aggrieved, or organization authorized to represent that person, ... affected by any decision of an administrative officer...granting or withholding a certificate of occupancy ... based in whole or part upon any zoning regulations or map" adopted pursuant to the Zoning Act. (D.C. Official Code § 6-641.07(f) (2008 Repl.). *See also* 11 DCMR § 3200.2.) In an appeal, the Board may "reverse or affirm, wholly or partly; or may modify the order, requirement, decision, determination, or refusal appealed from; or may make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken." (11 DCMR § 3100.4.)

In this case, the Appellant argued that the Zoning Administrator incorrectly measured the side yard of the property abutting the Appellant's lot relative to the house and retaining wall on the neighboring property, and therefore concluded erroneously that an electrical cabinet, seven feet in height and installed on the abutting property within three feet of the common property line, did not violate provisions in the Zoning Regulations despite its height in excess of four feet and

its location within the eight-foot side yard required in the R-1-A zone. The Department of Consumer and Regulatory Affairs and the owner of the abutting property do not agree; DCRA contends that the Appellant is “wrong on both points” and instead asserts that the electrical cabinet was located in the front yard of the neighboring house, not in the required side yard, and that the retaining wall does not require its own side yard.

As noted by DCRA, the Zoning Regulations distinguish between a “yard” and a “yard required” by zoning (also known as a “required yard”). A required yard must be unoccupied by any building or structure, with certain exceptions delineated in § 2503. The permitted exceptions include structures less than four feet in height, fences and retaining walls, and stairs leading to the principal entrance of a building, provided that (as specified in the definition of “yard”) no building or structure shall occupy more than 50% of a required yard. The Board concurs with the conclusion of DCRA that a structure less than four feet in height is permitted in a required yard so long as the structure does not occupy more than 50% of that yard. The Zoning Regulations do not preclude the location of structures in yards that are not required under the regulations.

A side yard of at least eight feet is required in the R-1-A Zone District. (11 DCMR § 405.9.) As defined in the Zoning Regulations, a required side yard is located “between any portion of a building or other structure and the adjacent lot line” and extends “for the full depth of the building or structure.” (11 DCMR § 199.) In this definition, “building or structure” refers to the principal building on a lot, and does not encompass an accessory structure or other structure, such as a retaining wall, that might also be constructed on the property. The Board finds that the Zoning Administrator reasonably determined the location of the required side yard, and affirms his finding that the electrical cabinet was installed in the front yard of the subject property and not in the required side yard. The Zoning Administrator’s method was consistent with the definition of side yard in that a side yard exists for the full depth of the dwelling on the subject property, and was correctly drawn only along the principal structure on the lot. Although this case was unusual, given the irregularly shaped building and a side property line that skewed at an angle compared to the property line along the street, the Zoning Administrator reasonably found the corner of the building and then drew a line perpendicular from the side property line inward toward the building to determine where the side yard begins. Because the side yard and rear yard are mutually exclusive and do not overlap, and because the Zoning Regulations specify that the rear yard is measured as the full width of a lot along the rear wall of the building, the side yard exists only for the full depth of the structure until the corresponding back corner of the house.

The Board was not persuaded by the Appellant that the Zoning Administrator should have used a different method in light of the irregular shape of the subject property and the dwelling, or because the house fronts on a curving street and the house is located at an angle to the Appellant’s side lot line. The Zoning Administrator reasonably determined the front edge of the required side yard based on the front of the house. The area in front of that line – between the front of the house and the street frontage – is reasonably considered a front yard that is not required under the Zoning Regulations. As noted by DCRA, the Zoning Regulations do not

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specify a method for measuring a side yard, and the Zoning Administrator's interpretation in this case was reasonable and is entitled to deference.

The Board does not agree with the Appellant that a separate side yard is required for the retaining wall built on the neighboring property. Rather, the required side yard is determined by the location of the dwelling, which is the principal building on the lot, and the retaining wall constructed on the neighboring lot is permitted within the side yard. The Board concurs with DCRA that the Zoning Regulations historically have been interpreted and applied so that a principal building or structure on a lot must have required rear and side yards, but accessory buildings or structures do not have their own required yards. As noted by DCRA, the Zoning Regulations contain provisions governing the location of accessory buildings and accessory structures that would be unnecessary if each accessory building had its own yard requirements. (See 11 DCMR §§ 2300.2, 2500.6, 2502, and 2503.) See also Appeal No. 17414 (order issued November 16, 2006) (accessory garage did not require its own rear yard). The Board concurs with the Property Owner's contention that, because under § 2503.3 "a retaining wall ... may occupy any yard required under the provisions of [the Zoning Regulations]," "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." (Exhibit 36.)

The Board does not agree that the Zoning Administrator created the concept of a front yard, or that a front yard does not exist in the Zoning Regulations. Similarly, the Board does not agree with ANC 3C that the Zoning Administrator erred in concluding that "the 'front yard' contains no restrictions on the height or placement of structures within it." The Zoning Regulations are intended, among other things, to establish minimum requirements to provide adequate light and air and to prevent the overcrowding of land. (See 11 DCMR § 101.1.) The regulations therefore include numerous provisions governing minimum setbacks for required yards as well as the placement of structures on property as necessary to achieve the purpose of the Zoning Regulations. The definition of "yards" – that is, any exterior space, other than a court, on the same lot with a building or other structure – encompasses areas commonly known as "front yards" even though a "front yard" is not separately defined as a "required yard" and thus is generally not subject to specific zoning requirements.⁴ The ANC did not cite any zoning restrictions on the height or placement of structures within a front yard, and the Board finds no error in the Zoning Administrator's determination in this respect.

The Board is sympathetic to the Appellant's concerns with respect to the cabinet installation and urges the Property Owner to implement any possible measures to mitigate those concerns. However, the R-1-A District as mapped at the subject property only requires two types of yards; rear and side. The Appellant does not contend that the electrical cabinet is installed in the required rear yard and the Board has concluded that the cabinet is not in the required side yard. Therefore, whatever yard the cabinet is located in, it is not a yard required by the Zoning Regulations.

⁴ A "front yard" is specifically recognized in the Zoning Regulations in the Wesley Heights overlay district, which does require a front yard setback. (See 11 DCMR § 1543.4.)

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The Board is required to give “great weight” to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 3C adopted a resolution in support of the appeal challenging various aspects of the Zoning Administrator’s determination to cancel the notice of violation. For the reasons discussed above, the Board does not agree with the ANC’s contentions but concurs with the Zoning Administrator.

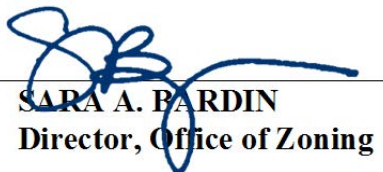
Based on the findings of fact and conclusion of law, the Board concludes that the Appellant has not satisfied the burden of proof with respect to the claim of error in the decision of the Zoning Administrator to cancel the notice of violation pertaining to the installation of an electrical cabinet in the TSP/R-1-A district at 2750 32nd Street, N.W. (Square 2119, Lot 25). Accordingly, it is therefore **ORDERED** that the Zoning Administrator’s determination is **SUSTAINED**.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle, and Anthony J. Hood voting to Sustain the decision of the Zoning Administrator; one Board seat vacant.)

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

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

ATTESTED BY: _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: April 11, 2014

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6. PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.