

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18615 of 5333 Connecticut Neighborhood Coalition, et al., under 11 DCMR §§ 3100 and 3101, from April 3, 2013 and May 28, 2013, decisions by the Department of Consumer and Regulatory Affairs to issue building permits (FD1200052, SH1200128 and B1208792,) authorizing the construction of an apartment building in the R-5-D District at premises 5333 Connecticut Avenue, N.W. (Square 1873, Lot 128).

HEARING DATE: September 24, 2013

DECISION DATE: October 29, 2013

DECISION AND ORDER

The instant appeal was filed with the Board of Zoning Adjustment (the "Board" or "BZA") on May 31, 2013, by 5333 Connecticut Neighborhood Coalition with 32 individuals who are members of that organization (collectively, "5333 CNC" or "Appellant") and Advisory Neighborhood Commission ("ANC") 3/4 G. The ANC subsequently withdrew from the Appeal on September 13, 2013. The Appellant challenged the administrative decision of the Department of Consumer and Regulatory Affairs ("DCRA") to approve the issuance of Building Permit Nos. B1208792, FD1200052, and SH120012, which authorized construction at premises 5333 Connecticut Avenue, N.W.

The "FD" and "SH" permits were issued on April 3, 2013, and authorized the foundation to grade and sheeting and shoring work, respectively. The "B" permit, which was issued on May 28, 2013, authorized construction of a new 263-unit apartment building. The Appellant claimed that the DCRA approvals involved the following errors: (i) misidentification of the applicable zone district; (ii) failure to measure building height at the correct street and street location; (iii) allowing non-permitted roof structures above the maximum height allowed by the Height Act;¹ and (iv) the exclusion of lower portions of the building from the calculation of FAR.

Based on the evidence of record, including extensive prehearing submissions and testimony received at the public hearing, the Board affirms the DCRA decisions and denies the appeal.

PRELIMINARY MATTERS

Notice of Public Hearing

The Office of Zoning scheduled a hearing on September 24, 2013. Under 11 DCMR §§ 3112.13

¹ Formally entitled An Act to Regulate the Height of Buildings in the District of Columbia.

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and 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3/4G (the ANC in which the property is located), the property owner, and to DCRA.

Parties

The Appellant is 5333 CNC, an unincorporated association of individuals and households formed to advocate against the development proposed for the site. DCRA is the Appellee, as the "person" whose administrative decision is the subject of the instant appeal, under 11 DCMR § 3199.1(a)(2). CMK DEV, LLC, the owner of 5333 Connecticut Avenue, NW ("Property Owner" or "Owner") is automatically a party to the proceeding under 11 DCMR § 3199.1(a)(3). ANC 3/4G, also an automatic party, originally filed as a party to the Appeal and withdrew its appeal by letter to the Board dated September 13, 2013, under a Memorandum of Understanding entered into with the Property Owner. (Exhibit 31.)

The Board received prehearing materials from the Appellant on September 13, 2013, under 11 DCMR § 3112.10. (Exhibits 16-29.) The Property Owner submitted prehearing materials for the Board's consideration on September 19, 2013 (Exhibits 32-50), and DCRA submitted its prehearing statement on September 20, 2013 (Exhibit 51).

Hearing and Closing of the Record

The Board convened a public hearing on September 24, 2013, during which the Appellant, DCRA and the Property Owner presented their respective cases through legal counsel. The Board received testimony on behalf of the Appellant from representatives of Appellant, Elizabeth Lenyk and Richard Graham, and from Don Hawkins, whom the Board qualified as an expert in architecture and in reading maps. Testimony was received on behalf of the Property Owner from Steven E. Sher, Director of Zoning and Land Use Services, Holland & Knight LLP, whom the Board qualified and recognized as an expert in zoning and planning issues.

The Board deferred its decision on the merits and closed the record, except to receive proposed findings of fact and conclusions of law from all parties by October 22, 2013. The Board scheduled the case for decision on October 29, 2013, at which time it considered the merits and voted to affirm DCRA.

FINDINGS OF FACT

The Property

1. The subject property is at Square 1873, Lot 128, premises address 5333 Connecticut Avenue, N.W. ("Property"). Square 1873 is bounded to the west by Connecticut Avenue, N.W., to the north by Military Road, N.W., to the east by Chevy Chase Parkway, N.W., and to the south by Kanawha Street, N.W.

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2. The Property fronts on three streets: Kanawha Street, Connecticut Avenue, and Military Road. Connecticut Avenue is the widest of these streets, with a right of way measuring 130 feet. Kanawha Street has the highest elevation of the three streets.
3. The Property has a land area of approximately 47,370 square feet and increases in grade from north to south with an elevation measuring along Kanawha Street approximately 18 feet higher than along Military Road. (Exhibit 49.)
4. The Property is unimproved.

Zoning of the Property

5. On March 16, 1965, the Zoning Commission rezoned lots 44, 35, 37, 19, 20 and 21 in Square 1873 to R-5-C, extending the R-5-C zone to the eastern lot line of Lot 37 on Military Road and the eastern lot line of Lot 19 on Kanawha Street, NW. (Exhibit 33.)
6. When added to the depth of the zoning line existing at the time, the depth of the R-5-C zoning was approximately 221 feet along Kanawha Street and approximately 290 feet along Military Road.
7. These dimensions are reflected on the Zoning Map issued in 1966. There have been no actions taken by the Zoning Commission since 1965 to change the zoning boundary line in Square 1873. (Exhibit 26.)
8. The 1973 Zoning Map continued to show the 290-foot dimension along Military Road.
9. The 1975 Zoning Map shows the location of the zoning boundary line identical to the 1973 Zoning Map although the 291 foot dimension for the R-5-C zone on Military Road is partly obscured by a dashed line indicating the building restriction line such that the "9" could be read as a "5".
10. The top of the number "9" is similarly obscured in subsequent maps (1983, 1984, 1987, and 1996). The dimension of the zoning boundary line along Kanawha Street is not shown except in the 1966 Zoning Map; however, the location of the line appears to be identical in all subsequent maps.
11. The R-5-C zoning category was reclassified to R-5-D by action of the Zoning Commission through its adoption of Zoning Commission Order No. 721, effective November 13, 1992.
12. The 2003 Zoning Map, produced in a different format from the earlier maps, shows the same boundary line configuration as earlier maps, but with a dimension of 251 feet indicated along Military Road.

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13. The Office of Zoning has concluded, and the Board finds, that the 251 foot dimension on this map was in error and resulted from reading the “291” figure in prior maps as “251”. (Exhibit 26.)
14. Effective April 13, 2012, the paper official zoning map was replaced with an electronic zoning map drawn and maintained on the Geographic Information System in the Office of Zoning. (11 DCMR § 106.1.)
15. Since April 13, 2012, the electronic zoning map has shown the entire Property zoned R-5-D. (Exhibit 37.)
16. The 2013 summary Zoning Map shows the entire Property zoned R-5-D. (Exhibit 36.)
17. The Office of Zoning may provide zoning certifications under 11 DCMR § 3045.1(a).
18. According to the certification of the Office of Zoning from the official records issued January 15, 2013, on the plat issued by the District of Columbia Surveyor, the Property is zoned R-5-D, with the following street frontages: 203.20 feet along Connecticut Avenue; 221.22 feet along Kanawha Street; and 291.31 feet along Military Road. (Exhibit 38.) The plat also reflects building restriction lines applicable to the Property: 15 feet along the entire Military Road frontage; and 10 feet along the Kanawha Street frontage.

Building Height

Measurement

19. The Height Act and the Zoning Regulations each establish maximum height limits for property. If there is a conflict between the two, the more stringent height limitation applies. (D.C. Official Code § 6-641.11 (2012 Repl.).)
20. The Zoning Regulations establish maximum height by zone district. Subsection 400.1 provides that the maximum height for a building in the R-5-D zone is 90 feet.
21. The Height Act establishes maximum building height based upon the width of the street abutting the property. Subject to certain exceptions not applicable here, the Height Act provides that:

On a residence street ... building shall be erected, altered, or raised in any manner so as to be over 90 feet in height at the highest part of the roof or parapet, nor shall the highest part of the roof or parapet exceed in height the width of the street, avenue, or highway upon which it abuts, diminished by 10 feet

(D.C. Official Code § 6-601.05 (c).)

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22. The Property Owner had the building's maximum height determined from Connecticut Avenue, which has a width of 130 feet. Since deducting 10 feet would still result in a height greater than the 90 foot maximum permitted, the maximum height of the Building for Height Act purposes was 90 feet.
23. As of the date upon which the building permits were issued, the Zoning Regulations provide that for all zone districts height was to be "measured from the level of the curb, opposite the middle of the front of the building."
24. Section 7 of the Height Act provides that if "the building has more than one front, the height shall be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height" (D.C. Official Code § 6-601.07.)
25. The Zoning Administrator determined that the elevation of Kanawha Street permitted the greatest height and therefore used that street frontage to measure height
26. In determining the exact point of measurement along Kanawha Street, the Zoning Administrator followed the long-standing interpretation of the term "the middle of the front of the building" to mean the middle point of the full length of the exterior walls of a building. This location was determined by drawing lines out perpendicular to Kanawha from both ends of the building.
27. Based upon this calculation, the middle of the front of the building on Kanawha Street was determined to be at elevation 316.83.
28. Under the Zoning Regulations, the height of a 90 foot building in the R-5-D zone district is measured to the top of the roof from the point of measurement at street level. However, under §§ 5 and 7 of the Height Act, the height is measured to the top of the roof or parapet, the latter of which is normally slightly above the height of the roof.
29. From the measuring point selected, the Zoning Administrator determined that building's height to the top of the parapet measured 87.83 feet.

Roof Structures

30. The roof of the building will have a roof deck, a pool, protective guard rail, and a penthouse.
31. The roof deck measures 86.5 feet above the measuring point and less than four feet above the parapet wall.
32. The upper most portion guardrail is 90 feet above the height measurement point.
33. The penthouse of the Building contains elevators, mechanical equipment, stairs, and accessory storage space to the rooftop pool and recreation space.

Building Density

34. The R-5-D zone district allows a maximum building density of 3.5 floor area ratio ("FAR"), under (11 DCMR § 402.4.) Residential developments on properties subject to the Inclusionary Zoning provisions of 11 DCMR Chapter 26, including the Property, are provided bonus density of 20% additional gross floor area as a matter of right. In the R-5-D zone district, the resulting maximum density is 4.2 FAR.
35. FAR is calculated by dividing the gross floor area of the building by the area of the lot. (See 11 DCMR § 199.1 (Definition of "Floor area ratio").) Cellars are excluded from gross floor area, but basements are included. (See 11 DCMR § 199.1 (Definition of "Gross floor area").)
36. The difference between the two is that cellars are less than four feet above the adjacent finished grade, while basements are four feet or more above the adjacent finished grade.
37. Given the site's lot area of 47,370 square feet, the permitted gross floor area is 198,954 square feet (4.2 FAR). As approved in the Permits, the Building's gross floor area measures 198,338 square feet.
38. The lowest habitable level of the Building is located partly above-grade.
39. The Zoning Administrator utilized the long-accepted "perimeter wall method" to determine the floor area on this level appropriately charged to gross floor area ("GFA").
40. The perimeter wall method has been utilized to differentiate cellar space from basement space in buildings throughout the District for decades.
41. As stated in the Memorandum of James J. Fahey dated September 11, 1990 (included within Exhibit 20 as "Exhibit R"), the perimeter wall method involves the following steps:
 - A. First measure the total perimeter of the floor,
 - B. Then measure that portion of the perimeter of the floor, the ceiling of which is four feet or more above the adjacent finished grade, and what percentage this is of the total perimeter of that floor.
 - C. The answer to the above will be the percentage of the floor area chargeable to gross floor area.
42. Applying this methodology to the proposed building, the Zoning Administrator determined that the perimeter of the lowest habitable floor was 982 linear feet with 121.6 feet being above four feet or more above the adjacent finished grade, or 12.38% of the perimeter. This calculates to 2,689 square feet to be counted in gross floor area at this level (12.38% times 21,718 square feet). (Exhibit 48.)

43. Because of this calculation, portions of 17 apartment units were included in the cellar level of the proposed building and not counted towards FAR.
44. A portion of the finished grade on the Military Road side is approximately two feet higher than the existing condition over a distance of approximately 30 feet. Measurements along that point reflected that the ceiling of the lowest floor to be less than four feet above this adjacent finished grade and therefore a cellar not countable against GFA.
45. Along Military Road and in the interior courtyard of the proposed building, plans show an areaway. Similar to a window well, this areaway is a narrow space between the grade and the building to provide additional light to the lowest units.
46. The areaway along Military Road measures approximately four feet wide, with no access from the units, and the areaways within a portion of the courtyard measure five feet wide and are accessible only to each individual unit (Exhibit 48.)
47. Based upon prior administrative practice, the Zoning Administrator identified the top of the grade behind the areaways as being the adjacent finished grade. Measurements reflected that the ceiling of the lowest floor adjacent to this finished grade was less than four feet, and therefore a cellar not countable against GFA.
48. The Zoning Administrator has never considered the bottom of an areaway as the adjacent finished grade.

Events leading to the filing of this Appeal

49. On May 28, 2013, DCRA issued Permit No. B1208792 that authorized the construction of a 263-unit, nine-story apartment building with cellar and below-grade parking on the Property.
50. This appeal was filed three days later.

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment is authorized by § 8 of the Zoning Act of 1938 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) (2012 Repl.)) (See also 11 DCMR § 3100.2.) The decision or determination is DCRA's issuance of the Permits. The Board also has the authority to hear appeals alleging errors in interpreting the Height Act. *See Appeal No. 17109 of Kalorama Citizens Association* (2005).

Under 11 DCMR § 3119.2, in all appeals and applications, the burden of proof shall rest with the appellant or applicant. In the instant appeal, the Appellant argues that the Zoning Administrator

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erred by: (1) calculating zoning compliance based entirely upon the requirements of the R-5-D zone, rather than recognizing that a portion of the building was zoned R-1-B, (2) using the wrong street and street measurement point for determining the building height, (3) allowing non-permitted roof structures, and (4) erroneously excluding portions of the building from being counted as gross floor area.² This Order will refer to DCRA as the entity that issued the Permits and the Zoning Administrator as the person whose decision is the subject of the Appellant's complaint.

The Board addresses each of these issues in turn, based upon the record and testimony in this case.

1. The Entire Property is Zoned R-5-D.

The Appellant argued that that only a portion of the Property is legally zoned R-5-D, which permits development of apartment buildings, and that the remainder of the site is zoned R-1-B. As such, the Appellant claimed that the Building as approved by DCRA does not comply with the zoning regulations.

The Board disagrees and concludes that on the dates Permits were issued the entire Property was zoned R-5-D.

The Zoning Commission extended the R-5-C zone district in 1965 to include Lots 44, 35, 37, 19, 20, and 21 in Square 1873 and that effective November 13, 1992, all R-5-C properties were rezoned to R-5-D. However, the Appellant claimed that "sometime between the publishing of the 1973 Official Zoning Map and the 1975 Official Zoning Map, the zone boundary was amended by the Zoning Commission to be limited to 251 feet [from 291 feet] from the line of Connecticut Avenue along Military Road." (Exhibit 16, pg. 27.)

The Appellant proffered no evidence that the Zoning Commission issued any notice of public hearing or any order adopting such a change, which would be a necessary legal prerequisite for such an action. The Zoning Act of 1938, as amended by § 492 of the District's Home Rule Act, required notice of a public hearing before the Zoning Commission could adopt a map amendment. (D.C. Official Code § 6-641.05.) Further, the Zoning Commission was also required to publish a notice of proposed rulemaking for any map amendment under § 6(a) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206) codified at D.C. Code Official § 2-505(a). The Board credits the statement made by Office of Zoning Deputy Director Richard Nero in his March 29, 2013 memorandum to Richard Graham on behalf of 5333 CNC that there have been no actions since 1965 by the Zoning Commission to change the location of the zone boundary line in Square 1873. (Exhibit 26.)

Although irrelevant absent a zoning order, the Appellant incorrectly states that the 1975 Zoning Map showed a change in the R-5-C zone's length on Military Road from 291 to 251 feet. The

² Appellant further asserts that the approved construction involves illegal projections, in violation of the Construction Code (12 DCMR), which claim is not properly before the Board nor addressed herein because those provisions are not contained within the Zoning Regulations.

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number shown is 291, but the top of the “9” is partly obscured by a dashed line indicating the building restriction line, such that the “9” could be read as a “5”. The top of the number “9” is similarly obscured in the zoning maps published in 1983, 1984, 1987, and 1996.

The 2003 zoning map was produced in a different format than the prior maps. Unfortunately, the mappers made the same error as the Appellant by reading the figure “291” as “251.” This error was corrected when the Zoning Map was transitioned from an analog to a digital format. The 2013 summary Zoning Map shows the entire Property zoned R-5-D. (Exhibit 36.) The Office of Zoning confirmed the accuracy of the electronic zoning map through a certificate made on January 15, 2013. (Exhibit 38).

Therefore, the Zoning Administrator did not err in ascertaining the zoning compliance of the project based on the provisions of the Zoning Regulations that pertained to the R-5-D District.

2. Building Height.

A. The measurement of the building’s height was correctly taken from Kanawha Street.

The Appellant claims the Building violates the Height Act in that DCRA should have measured its building height from Connecticut Avenue rather than Kanawha Street, which would yield a lower height than was approved in the Permits. The Appellant argues that to determine the maximum height on one street and determine actual height from another is a form of “mixing and matching” not permitted by the Height Act. Both the Zoning Regulations and the Height Act establish maximum height limits for building and structures in the District. The Zoning Regulations establish maximum height by zone district whereas the Height Act limits are based upon the width of a street upon which the building fronts. In this instance, the building fronted three streets and as authorized by the Zoning Regulations, the height of the building was determined by the Connecticut Avenue frontage giving a maximum height of 90 feet.

The Zoning Administrator then had to determine whether the building’s height fell within the 90-foot limit. . However, because the Property fronts three streets, Section 7 of the Height Act provides that “height *shall* be measured from the elevation of the sidewalk opposite the middle of the front that will permit of the greater height.” (D.C. Official Code § 6-601.07 (emphasis added).) In the present case, given the respective elevations of the three frontages of the Property, Kanawha Street "provides the greater height.

The Appellant's claim that the Zoning Administrator improperly determined the height by "mixing and matching" has no merit. The Zoning Administrator's determination to measure building height from Kanawha Street is consistent with longstanding applications of the Height Act in the District of Columbia, including approvals by the Zoning Commission, the Board, as well as DCRA. (Exhibit 32, pgs 5-7.) Further, these determinations follow direction provided by the District of Columbia Office of the Corporation Counsel (now the Office of the Attorney General) over 60 years ago.

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For all these reasons, the Board concludes that DCRA's use of Kanawha Street to determine whether the Building's height would be within the 90 foot limit follows both the clear language of the Height Act and its subsequent interpretation.

B. The Zoning Administrator correctly identified the middle of the front of the building when measuring its height.

With Kanawha Street established as the location from which to measure building height, the Board next turns to the Appellant's argument that the wrong location was chosen along Kanawha Street to serve as the base measurement point.

Section 7 of the Height Act (D.C. Official Code § 6-601.07) provides that "the height of buildings shall be measured from the level of the sidewalk opposite the middle of the front of the building." As of the date upon which the building permits were issued, the Zoning Regulations provided that for all zone districts height was to be "measured from the level of the curb, opposite the middle of the front of the building." The Appellant claims that the location chosen by the Zoning Administrator to measure height was not opposite the middle of the front of the building on Kanawha Street.

In locating the middle of the front of the building the Zoning Administrator followed the longstanding approach of using the full length of the exterior walls that run along a street - drawing lines out perpendicular to the street on which the building fronts from both ends but not beyond the end of the street on either end. The mid-point from those projected lines establishes the location on the top of the curb to begin the measurement vertically.

Despite the Appellant's objections, the Board is persuaded that this longstanding practice "is neither clearly erroneous [n]or inconsistent with the zoning regulations as a whole." *Wallick v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 1183, 1184 (D.C. 1985)." *Kalorama Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 934 A.2d 393, 402 (D.C. 2007). The interpretation ensures that every building no matter the shape, (for example a building that squarely fronts on the street, or has a portion a few feet back or many feet back, or is designed with an angle back) would always have the same consistent point of height measurement.

The Board concludes DCRA's determination of the building height measurement at elevation 316.83 along Kanawha Street, as shown at Exhibit 39, is an appropriate interpretation of the Height Act and the Zoning Regulations. From this measuring point, the building height to the top of the parapet has been determined by DCRA to measure 87.83 feet and therefore was within the 90 foot maximum allowed by the Height Act and the Zoning Regulations.

C. The Roof Structures are Lawful.

i. The Swimming Pool Deck and Guard Rail.

The Appellant claims that the swimming pool deck and the guard rails exceed the maximum

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height limits established by the Zoning Regulations and the Height Act. First, neither element exceeds matter of right height. The dimension from the measuring point to the top of the guard rail, which is greater than the top measuring point under either the Zoning Regulations or Height Act, is 90 feet. Second, the deck is less than four feet above the parapet and is therefore permitted by 11 DCMR § 411.17 and guardrails, such as the one involved here (Exhibit 40), were recognized as an allowed structure by this Board in *Appeal No. 17335 of Kalorama Citizen's Association* (2005).

ii. The Penthouse

The penthouse of the Building contains elevators, mechanical equipment, stairs, and accessory storage space to the rooftop pool and recreation space, all of which are permitted by the Zoning Regulations to exceed the maximum building height. (11 DCMR § 411.1.) At the time the building permits were issued, § 5 of the Height Act, D.C. Official Code § 6-601.05 (2012 Repl.) provided that ... penthouses over elevator shafts ... may be erected to a greater height than permitted” if approved by the Mayor. The Section also prohibited “human occupancy above the top story of the building upon which such structures are placed.”³

The Appellant argues that the space accessory to the rooftop pool and recreation space is not among the penthouse types eligible to exceed the limitations of the Height Act, either in the express language of the Act or as interpreted by the Corporation Counsel. The Appellant's arguments are based upon two erroneous premises: (1) that the Corporation Counsel Opinion contained the exclusive list of permitted penthouses and (2) that the penthouse space was intended for human occupancy.

Contrary to the Appellant's contention, Section 5(h) of the Height Act does not limit the height of the proposed rooftop penthouse. That section states that "spires, towers, domes, minarets, pinnacles, penthouses over elevator shafts, chimneys, smokestacks and fire sprinkler tanks" may be constructed in excess of the limits of the Height Act provided they are 1) fire proof, 2) not used for human occupancy, and 3) setback from exterior walls (1:1 setback). *See* DC Code §6-601.05(h).

The 1953 Corporation Counsel Opinion (the "1953 Opinion") makes clear that the list set forth in Section 5(h) has never been viewed as an exhaustive list of elements that may exceed the limits of the Height Act. *See* Pre-Hearing Statement of Owner at Exhibit J. Specifically, the 1953 Opinion references stairway penthouses, penthouses for air-conditioning equipment, condensers, water towers, heating equipment and boilers. *Id.* at p. 2. As Owner notes, there are numerous other roof structures that are commonly approved above the Height Act, including pools and their

³ As of May 16, 2014, the Height Act was amended to make any type of penthouse eligible for a Height waiver and to permit human occupancy within “a penthouse which is erected to a height of one story of 20 feet or less above the level of the roof. *See* Public Law 113-103, An Act To amend the Act entitled “An Act to regulate the height of buildings in the District of Columbia” to clarify the rules of the District of Columbia regarding human occupancy of penthouses above the top story of the building upon which the penthouse is placed.

accessory penthouses. *See* Pre-Hearing Statement of Owner at p.11.

The 1953 Opinion explained the intent of Congress in enacting the Height Act:

[Congress] was not concerned so much with the use to which such penthouses would be put as with the fireproofing of such penthouses, and it would seem there was no objection on the part of Congress to the construction of fireproof penthouses above the height limit, just so such penthouses were (1) set back from the exterior walls, apparently for reasons of light and ventilation, and (2) were not constructed or used for human occupancy.

[T]he term 'human occupancy' as it is used in such paragraph should be construed to preclude the construction or use of penthouses for residential, office or business purposes[.]

The penthouse is not approved for use for human occupancy. There is no residential, office or business use occurring there. Instead, it is used for elevators, stairs, and as space that is accessory to the rooftop pool and recreation space (such as the pool pump room, restrooms, and storage). These uses are not residential as they are not part of a dwelling unit, but are accessible to all tenants for the purposes of utilizing the rooftop pool and recreation space. As stated above, all of those uses have been allowed by the Zoning Commission in rooftop penthouses per §411.1. Accordingly, the rooftop penthouse meets the intent and requirements of the Height Act and Zoning Regulations.

3. Building Density.

The Appellant's final claim of zoning error regards DCRA's determination to exclude certain portions of the lowest habitable level of the Building from the calculation of building density. The parties agree that the building density maximum for the site is 4.2 FAR. However, the Appellant claims that DCRA erroneously excluded the majority of the lowest habitable level even though certain units fronting Military Road sit above the sidewalk and street level.

Cellars are excluded from gross floor area, but basements are included. (See 11 DCMR § 199.1 (Definition of "Gross floor area").) The Zoning Regulations define the term "cellar" as that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade and "basement" as "that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade." (11 DCMR 199.1.) When, as here, a portion of the building is partly below grade, the Zoning Administrator uses the perimeter wall method to determine which area are located four or more feet above the finished grade and therefore included within the computation of gross floor area.

The Appellant argues that the Zoning Administrator considered areas of the building's lowest floor to be less than four feet by counting as finished grade: (1) an area along Military Road approximately two feet higher than the existing condition over a distance of approximately 30 feet; and (2) the top of the grade adjacent to areaways along Military Road and in the interior courtyard. On the latter, the Appellant claims that the Zoning Administrator should have measured from the bottom most portion of the areaways.

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The Board concludes that the Zoning Administrator properly identified the finished grade at both locations.

In neither location was the grade substantially raised from the natural grade. The Board notes that it is even being lowered in certain areas according to the final building permit plans. (Exhibits 49 and 50.) The Appellant's assertion to the contrary likely results from its failure to use the final building plans showing the building walls adjacent to the finished grade on the Military Road side or at the center court level of the building. (Compare Appellant's Exhibit 4, which is part of record Exhibit No. 17 with Exhibit 49.)

Further, the Board agrees with DCRA that the term "adjacent finished grade" connotes the ability to adjust the grade as compared to keeping "natural" or "previously existing grade." And contrary to the position of the Appellant, the determination of density for new construction involving courtyard construction above a garage requires the use of finished grade irrespective of the material that forms the adjacent finished grade, be it dirt or other landscaping, or paving or hardscaping.

The slightly elevated grade along the 30-foot portion of Military Road and adjacent to the areaways is no greater than has been allowed in countless number of projects approved by DCRA. It was in reaction to the potential abuse of this practice that the Zoning Commission, subsequent to the issuance of these permits, adopted a rule providing that in residence zones "berms or other forms of artificial landscaping shall not be included in measuring building height." Although the Board doubts that the minor increase in grade involved here would run afoul of this rule, the Appellant's construction rights were vested against any change to the Zoning Regulations as of the date the building permit was issued. (11 DCMR § 3202.4.)

Areaways, are a common and efficient method of maximizing light and ventilation to dwelling units located partially below grade in an urban environment routinely approved by DCRA. The proposed areaways measure within the generally accepted five-foot width standard. The Zoning Administrator properly determined that the finished grade adjacent to the areaways was the top of the grade behind each areaway. The Appellant erroneously contends that the finished grade should be considered to be the bottom of each areaway. This has never been the method followed by the Zoning Administrator.

For all these reasons, the Board concludes that the Zoning Administrator did not err in its calculation of the Building's density to exclude certain portions of the Building's lowest level as determined by the perimeter wall method.

DECISION

The Board finds the appeal without merit. The entire property is zoned R-5-D and the interpretations used by the Zoning Administrator to measure height and density and approve the roof structures were based upon long standing administrative practices and precedent. While the Board is not required to honor past administrative precedent clearly erroneous or inconsistent

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with the zoning regulations, *Kalorama Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment supra*, the Zoning Administrator's actions were both reasonable and consistent with the letter and spirit of the regulations.

It is therefore **ORDERED** that the DCRA administrative decisions are **AFFIRMED**.

Vote taken on October 29, 2013.

VOTE: **4-0-1** (Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle (by absentee vote), and Marcie I. Cohen to Affirm; one Board seat vacant)

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

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

ATTESTED BY:  _____ *for*
SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: June 18, 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17109 of Kalorama Citizens Association, pursuant to 11 DCMR § 3100 from the administrative decision of David Clarke, Director, Department of Consumer and Regulatory Affairs, from the issuance of Building Permit Nos. B455571 and B455876, dated October 6 and 16, 2003, respectively, to Montrose, LLC to adjust the building height to 70 feet and to revise penthouse roof structure plans to construct an apartment building in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. and from the issuance of the original Building Permit No. B449218, dated March 11, 2003.

HEARING DATES: February 17, March 9 and 16, April 6 and 20, 2004
DECISION DATES: June 22, 2004, December 7, 2004 and February 1, 2005

ORDER

INTRODUCTION

The **Kalorama** Citizens Association ("KCA") filed this appeal with the Board of Zoning Adjustment ("Board") initially challenging the decision of the Director of the Department of Consumer and Regulatory Affairs ("DCRA") to issue Building Permit Nos. B455571 and B455876 ("Revised Permits"), dated October 6 and 16, 2003, respectively, to Montrose, LLC ("Montrose"). The permits authorized Montrose to adjust the building height to 70 feet and to revise penthouse roof structure plans for a five-story apartment building ("Project") in the R-5-D District at 1819 Belmont Road, N.W., Washington, D.C. Montrose sought the Revised Permits after DCRA issued a stop work order on the Building Permit No. 449218 ("Original Permit").

KCA alleged DCRA erred in issuing the Revised Permits because the Project exceeded the maximum height and set back requirements of the Act to Regulate Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, D.C. Official Code §§ 6-601.01 to 6-601.09 (2001)) ("the Height Act"), and the applicable FAR and roof structure set back requirements of the Zoning Regulations. Prior to the hearing on the appeal, the Board granted KCA's motion to amend the appeal to include appeal of the Zoning Administrator's decision to issue the original building permit.

For the reasons stated below, the Board concludes that the Zoning Administrator erred in approving the building permits in the following respect:

The height of the building, with the roof deck, exceeds the height limitations set forth in the Height Act.

The Board also concludes that the Zoning Administrator properly determined that the building's floor area ratio was within the matter of right limit and that the penthouse structure was properly set back according to the Height Act and 11 DCMR §§ 411 & 400.7(b).

PRELIMINARY AND PROCEDURAL MATTERS

Parties. The parties to the proceeding are the KCA, Advisory Neighborhood Commission 1C ("ANC"), and Montrose LLC. The ANC was an automatic party pursuant to 11 DCMR § 3199.1. Montrose LLC owns the property, also making it an automatic party pursuant to 11 DCMR § 3199.1.

Notice of Hearing. The Office of Zoning provided notice of the hearing on the appeal to the parties, including Montrose, and to the ANC. The Office of Zoning advertised the hearing notice in the D.C. Register at 50 D.C. Reg. 11060 (Dec. 26, 2003).

Motion to Dismiss. Montrose moved to dismiss the appeal on jurisdictional and equitable grounds. The Board denied the Motion for the reasons discussed below.

Motion to Amend. KCA moved to amend its appeal to include the decision to issue the Original Permit. The Board granted the motion for the reasons discussed below.

Further Proceedings: At its regularly scheduled meeting of June 8, 2004, the Board voted to grant the appeal with respect to Appellant's allegations regarding set back and height and denied the appeal with respect to the measurement of FAR. On December 7, 2004 the Board on its own motion reopened the record to reconsider and receive more evidence on the set back issue. After reviewing the materials submitted, the Board, at its regularly scheduled public meeting held February 1, 2005, denied the portion of the appeal that challenged the legality of the penthouse setback under the Height Act. The remainder of its earlier decision was left intact.

FINDINGS OF FACT

A. Description of the Property

1. The property that is the subject of this appeal ("Subject Property") is located at 1819 Belmont Road, N.W., Washington, D.C., in the R-5-D District.
2. The Subject Property is improved with a multiple story townhouse.
3. The width of the 1800 block of Belmont Road, N.W., measured from building line to building line, is 80 feet.
4. Montrose LLC owns the Subject Property.

B. Issuance of the Original and Revised Building Permits and KCA's Investigation

5. On December 12, 2002, Montrose applied for a building permit to alter and repair the existing building on the Subject Property, construct an addition at the rear of the building, and add two floors and an attic (the "Project").
 6. The plans submitted with the building permit application showed the following:
 - the height of the building as measured from the curb opposite the middle of the building would increase the existing building height to 71 feet, 3 inches;
 - a penthouse would be constructed on top of the attic story at a height of 10 feet, 4 inches;
 - the penthouse would be set back from the front and rear building walls a distance greater than 10 feet, 4 inches;
 - the penthouse would be set back six feet on the west wall and flush with the wall along the east property line;
 - the roof deck and railing were shown to be several feet above the roof line;
 - without including the railing, the roof deck was less than four feet in height;
 - the overall density of the Project was listed as 3.49 FAR;
 - the building was to be connected to the adjacent buildings by a party wall that ended short of the building's height, leaving a portion of the building's side walls exposed.
 7. On March 11, 2003, DCRA issued Building Permit No. B449218 authorizing construction of the Project (the "Original Permit").
 8. The Original Permit stated it was for, "Alteration and repair of exist. Bldg. Addition in rear, add 2 floors plus attic; retaining wall & stair at rear." The Original Permit also had a notation indicating 5 stories plus basement.
 9. In the late spring and summer of 2003, the existing row house was demolished except for the façade, and a new building constructed from the ground up.
 10. On September 10, 2003, and again on September 15, 2003, KCA wrote to Denzil Noble, Administrator of the Building and Land Regulation Administration of DCRA, alleging that the Project exceeded the allowable height under the 1910 Height Act and might exceed the maximum allowable Floor Area Ratio.
 11. DCRA issued a stop work order for the Project on September 12, 2003. DCRA determined that the third party inspector for zoning only analyzed the Project's compliance with building height under the R-5-D provisions, which permit a height of 90 feet, while the Height Act limits the Project's height to 70 feet.
 12. Montrose began displaying the Original Permit in a location visible from the street after the stop work order was issued on September 12, 2003.
 13. On September 22, 2003, KCA submitted a Freedom of Information Act request to DCRA seeking the plans associated with the Original Permit.
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14. On September 29, 2003, DCRA wrote to KCA requesting assurance that KCA would pay the cost of providing the documents sought in its FOIA request, and stating that the statutory 10 day deadline for responding to the request was "suspended until all processing issues are resolved."
15. On October 1, 2003, a Montrose representative appeared at an ANC meeting. After the meeting, KCA representative Ann Hargrove requested copies of the plans associated with the Original Permit. Montrose did not provide the plans to KCA.
16. On October 6, 2003, DCRA issued Building Permit No. B455571 (the "First Revision Permit") to Montrose to revise the Original Permit "to adjust the height of the building to 70'-0" [and] clarify FAR. calculations, as per attached drawings." The drawings depicted:
 - a section drawing through the east elevation showing the original height at the roof of the building;
 - a section drawing through the east elevation showing the revised height at the roof of the building;
 - a drawing showing the area of each level included in the FAR calculations; and
 - the FAR calculations (the overall density remained 3.49 FAR).
17. The drawings did not depict the roof deck and railing, or the set back of the roof structure. Those details were provided only in the plans approved by the Original Permit.
18. The plans attached to the First Revision Permit show the Project's parapet 69 feet, 9 and 3/8ths inches from the top of the curb at the midpoint of the lot.
19. On October 16, 2003, DCRA issued Building Permit No. 445873 (the "Second Revision Permit") to "revise penthouse roof structure per DC request and per attached drawings." The drawing submitted with the Second Revision Permit showed the rear half of the roof structure gable removed. No other changes were made to the penthouse, the penthouse set backs along the interior lot lines remained as shown in the Original Permit, and no other changes were made to the Project.
20. On October 16, 2003, KCA representative Ann Hargrove met with ANC Commissioners Alan Roth and Bryan Weaver, and Councilmember Jim Graham in Mr. Graham's office. In the course of the meeting, in speakerphone conversation with DCRA officials, including Denzil Noble, Mr. Graham requested that DCRA provide the plans associated with the Original Permit to KCA.
21. On October 17, 2003, KCA received from DCRA copies of the plans, minus a certification of the actual height of the re-positioned roof, and initial FAR worksheets for the original and revised plans.
22. On November 10, 2003, KCA filed its appeal with the Board challenging the issuance of the First and Second Revision Permits.

23. On February 8, 2004, KCA filed a motion with the Board requesting that DCRA supply KCA with the documents listed in its FOIA request but not provided by DCRA.
24. On February 12, and 16, 2004, DCRA supplied the missing plan documents, minus the FAR worksheets.
25. On March 2, 2004, KCP. moved to amend its appeal to include the Original Permit.

C. Height and Set Back of Roof Structures

26. The plans available to the Zoning Administrator depicted a penthouse on top of the attic story at a height of 10 feet, 4 inches from the roof.
27. If the height of the penthouse is added, the building's height, if measured in accordance with the Height Act, exceeds 70 feet.
28. The penthouse is set back from the front and rear building walls a distance greater than 10 feet, 4 inches.
29. The penthouse is set back six feet from the building's west wall, and flush with the wall along the building's east property line.
30. The roof deck and railing are several feet above the-roofline, and are over 70 feet in height.

" FAR Calculations

31. The plans depict an attic space less than 6 feet 6 inches in height from the floor level of the attic space to the underside of collar ties that form the ceiling of the attic.
32. The collar ties shown in the plans work to brace the building against racking in a north-south direction.
33. When calculating the Floor Area Ratio ("FAR") attributable to partial basements, the Zoning Administrator uses either the "perimeter wall method" or the "grade plane method".
34. For this building, the Zoning Administrator used the perimeter wall method to calculate FAR.
35. Under the perimeter wall method, FAR is determined by establishing a ratio between the linear square footage of the portion perimeter wall with more than 4 feet out of grade and the total square footage of the lower level.
36. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane

intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

37. Using the perimeter wall method, the amount of basement gross floor area assignable to FAR is 147.3 square feet, which results in a total FAR that is within the matter of right 3.5 limitation.

CONCLUSIONS OF LAW

1. Amendment to Include Original Permit

KCA initially appealed only the First and Second Revised Permits, and did not appeal the Original Permit. Prior to the Board's initial hearing in this matter, KCA moved to amend its appeal to include DCRA's decision to issue the Original Permit.

The Board has broad discretion to allow amendments to appeals, derived from its power to control its docket. The Board concludes that because the same errors alleged in the appeal (height of the roof deck and railing, set back of the penthouse, and bulk of the Project) are encompassed in the Original Permit and appeal of the original permit is timely pursuant to the Board's discussion below, it is inappropriate to include the decision to issue the Original Permit in the appeal.

2. Timeliness of the Appeal

Montrose moved to dismiss the appeal as untimely. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) there are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR § 3112.2(d).

The "decision" at issue in this case with respect to timeliness is the Original Permit. The height, FAR, and penthouse set back were depicted on the original plans. Neither of the subsequent revisions changed these aspects of the building's designs. The Board must therefore first determine when the Appellant knew or should have known that the permit was issued.

Whether or not the permit was visible prior to September 2003 is irrelevant since construction was visible to the public by at least the summer of 2003, and KCA knew enough about the project on September 10th to write to DCRA concerning potential height and FAR violations. (Findings of Fact 10 and 11). It is unnecessary in these circumstances to pinpoint a precise date

when the appellant knew or should have known that a permit had been issued. It is clear that whatever that date might have been, this appeal was filed more than 60 days from that time.

Nevertheless, the Board concludes that exceptional circumstances outside the KCA's control substantially impaired its ability to file a good faith appeal, and that in light of these circumstances, an extension should be granted. KCA could not file a good faith appeal until it had some reason to believe the Zoning Regulations were violated. Given these facts, KCA did not have reason to believe the Project was problematic until the framing of the structure was completed in mid September 2003. Even then, it could not tell the precise height and bulk of the Project without access to the plans supporting the permit application. Although its September 10, 2003 letter indicates some level of concern, DCRA's resistance to providing the necessary information made the filing of a timely appeal impossible.

Beginning in mid-September, KCA demonstrated considerable diligence in its efforts to acquire information about Montrose's permit and construction plans from DCRA, but these efforts were thwarted. DCRA did not provide the plans attached to the Original Permit until October 17, 2003. Meanwhile, Montrose had changed the design of the Project, seeking the Revised Permits in October 2003. This meant that KCA needed to determine whether their concerns had been ameliorated.

The Board concludes the extension will not prejudice the parties to the appeal. Montrose was on notice that the appellant had serious concerns with the project and was seeking information concerning project details. As late as October 3, 2003, a Montrose representative refused KCA's request for such information. (Finding of Fact 16). Since Montrose contributed to KCA's inability to discern the true nature of the project, it cannot be heard to claim prejudice from a delay of its own making.

3. Laches and Estoppel

Montrose also moved to dismiss the appeal as barred by laches and estoppel. The defenses of laches and estoppel are disfavored in the zoning context because of the public interest in the enforcement of the zoning laws. *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964, 972 (D.C. 2002) (quoting *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990)). Application of estoppel is limited to situations where the equities are strongly in favor of the party invoking the doctrine. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). To make a case of estoppel, Montrose must show that it: (1) acted in good faith; (2) on the affirmative acts of a municipal corporation; (3) made expensive and permanent improvements in reliance thereon; and (4) the equities strongly favor the party invoking the doctrine. *Sisson*, 805 A.2d at 971.

The Board notes that Montrose seeks to invoke the doctrine of estoppel against the Appellant, a private party, and not the government. The affirmative acts upon which Montrose is claiming reliance, namely the issuance of the building permits, were all taken by DCRA, not the appellant. The Board has previously taken the position that estoppel should not bar a neighboring property owner (as distinct from the District) from asserting rights under the Zoning Regulations. See *Appeal of Advisory Neighborhood Commission 5B*, BZA No. 16998 (August 26, 2004); see also *Beins v. D.C. Board of Zoning Adjustment*, 572 A.2d 122, 125 (D.C. 1990). As noted by the

Board in the Appeal of *Advisory Neighborhood Commission 5B*, "estoppel should not be used to preclude an innocent non-government appellant from seeking to eliminate a zoning violation."

Finally, laches is an equitable defense and may only be sought by a person with clean hands. The refusal of Montrose to provide KCA with project documentation contributed to the very delay it now complains of. Equity is not available under these circumstances.

Laches is rarely applied in the zoning context except in the clearest and most convincing circumstances. *Sisson*, 805 A.2d at 971-972. To determine the validity of a laches defense, the Board must look at the entire course of events. Laches will not provide a valid defense, unless two tests are met: the defendant has been prejudiced by the delay and that delay was unreasonable. In the absence of an analogous statute of limitations, the party asserting the defense has the burden of establishing both elements. *Id.*

Montrose did not carry its burden of establishing that KCA unreasonably delayed in bringing its appeal. Montrose claims that KCA was on constructive notice of the original permit in March, 2003 when it was available to the ANC, was published in the D.C. Register, and when Montrose met with the ANC's transportation committee. However, one cannot conclude that an Advisory Neighborhood Commission's knowledge of a permit is timely communicated to every person or association that may be affected. Similarly, persons and associations cannot be expected to subscribe to the D.C. Register to learn of construction activities that may impact them. As part of its discussion of the timeliness issue, the Board concluded that KCA was chargeable with notice of DCRA's decision when the new construction became visible in the late spring and early summer of 2003. However, the Board, in that same discussion, also found that exceptional circumstances prevented KCA from filing this appeal within the 60-day period set forth in the Board's rules of procedure. The same factors that justified extension of the 60 day time period also warrant a finding that there was not unreasonable delay in bringing the appeal.

4. Authority of the Board to hear appeals alleging errors in interpreting the Height Act

The Board now turns to a jurisdictional question raised as to its authority to hear an appeal based on alleged errors made in decisions interpreting the Height Act. KCA asserts the Project's penthouse, roof deck and railing exceed the maximum height permitted by the Height Act. In addition, KCA alleges that the set back of the penthouse violates both the Zoning Regulations and the Height Act. Montrose argues to the contrary that the Board lacks jurisdiction to hear appeals of administrative decisions interpreting the Height Act. DCRA concurs with Appellant that the Board does have authority and jurisdiction to interpret the requirements of the Height Act as they are incorporated in the zoning regulations.

For the following reasons, the Board concludes that the Zoning Act and the Zoning Regulations authorize the Board to interpret the Height Act in consideration of an appeal regarding an alleged violation of the Height Act.

Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799) ("Zoning Act"), delineates the scope of the Board's appellate jurisdiction. It authorizes the Board to hear and

decide appeals based on errors made by District officials in enforcing the Zoning Regulations. Section 8 of the Zoning Act provides in relevant part that:

Appeals to the Board of Adjustment may be taken by any person aggrieved ... by any decision ... based in whole or in part upon any zoning regulation or map adopted under this Act.

Section 8 of the Zoning Act further authorizes the BZA:

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 the Inspector of Buildings or the Commissioners of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this Act.

The Board concludes it has jurisdiction over all height and set back aspects of the appeal because the Height Act is incorporated throughout the Zoning Regulations that the Board is entrusted to interpret in hearing and deciding appeals. Of particular note is 11 DCMR § 2510.1 which expressly provides that all buildings or other structures shall comply with the height limitations of the Height Act. It reads:

In addition to any controls established in this title, all buildings or other structures shall comply with the Act to Regulate the Height of Buildings in the District of Columbia, approved June 1, 1910 (36 Stat. 452, as amended; D.C. Official Code §§ 6-601.01 to 6-601.09 (2001) (formerly codified at D.C. Code §§ 5-401 to 5-409 (1994 Repl. and 1999 Supp.))).

11 DCMR § 2510.1.

In addition, 11 DCMR § 411.1 Roof Structures, requires that roof structures not be in conflict with the Height Act. See also § 400.1, which establishes height limits in Residence zone districts. That section provides that the heights set out in a table that follows apply, "except as specified ... in chapter[s] 20 thorough 25." Chapter 25 incorporates the Height Act's restrictions. Thus, the Zoning Regulation that establishes the maximum height permitted in Residence zone districts provides that the height limits in the zone district are circumscribed by the limitations of the Height Act.

Accordingly, the Board finds that it must interpret the Height Act in order to determine whether the Zoning Administrator erred with respect to his determinations regarding the height and set back issues.¹

¹ This conclusion is consistent with the BZA's decision in *Howard University*, BZA Appeal No. 15568 (October 21, 1991). In the *Howard University* case, the Zoning Administrator denied a building permit on grounds that the height of a proposed dormitory building violated the height limitations of the Zoning Regulations and the Height Act. The BZA affirmed the Zoning Administrator's determination, concluding that, "[t]he height of buildings in the District of

Montrose argues that the Height Act vests exclusive enforcement authority in the D.C. Attorney General's Office, and that the Board is therefore precluded from enforcing the Height Act's limits, citing the case *Techworld Development Corporation v. D.C. Preservation League*, 648 F. Supp. 106 (D.D.C. 1986). Montrose is correct that the Board has no enforcement responsibilities with respect to the Height Act. But the same is true with respect to the Zoning Regulations. Section 11 of the Zoning Act gives that responsibility to the Mayor of the District of Columbia. D.C. Official Code § 6-641.01 (a) (2001). The Board is not an enforcement body. It is, in this context, an appellate body that hears and decides allegations of errors made in the carrying out or enforcement of any regulation adopted under the Zoning Act. The incorporation of the Height Act into the Zoning Regulations makes decisions made under that Act reviewable by this Board. The Board is therefore not persuaded by Montrose's argument.

5. Merits of the Appeal

A. Height of the Building with Roof Structures

The maximum height permitted in an R-5-D district is 90 feet. 11 DCMR § 400.1. However, as discussed in section 3 above, the Zoning Regulations incorporate the height limitations of the Height Act into the height restrictions in every zone district. The Height Act limits the height of a building on a residential street to the width of the street diminished by ten feet. Height Act § 5, D.C. Official Code § 6-601.05 (c). The width of the 1800 block of Belmont Road, N.W., is 80 feet, yielding a maximum permitted building height of 70 feet.

Building height for both Height Act and zoning purposes is measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. Height Act § 7, D.C. Official Code § 6-601.07; 11 DCMR § 199.1 (Feb. 2003) ("Building, height of"). The height of the building to the highest point of the roof is 69 feet 9 and 3/8 inches. The revised plans depict a roof deck and railing at the front of the building extending several feet above the roof. Although the plans do not indicate a precise height of these structures, the Zoning Administrator should have known that the additional height depicted, if measured from the opposite curb, would cause the building to exceed the two and five eighth inches remaining in lawful height. The Board therefore concludes that the roof deck exceeds the maximum height permitted by the Height Act.

Montrose argues that the roof deck's height should not be counted because it is less than four feet in height. This argument relies upon § 411.17, which provides that:

Roof structures less than four feet (4 ft.) in height above a roof or parapet wall shall not be subject to the requirements of this section. (Emphasis added).

Columbia is governed by both the 11 DCMR Zoning Regulations and the Act to Regulate the Height of Buildings in D.C. June 10, 1910. When determining the allowable height of a structure, the more restrictive of the two laws must apply." Howard at 3.

The flaw in Montrose's argument is that the 'section' being referred to in the italicized language is § 411, which governs the height and location of roof structures under DCMR 11I, however no provision in this section, or any of the Zoning Regulations, can authorize a structure to exceed the height limitations imposed by the Height Act under any circumstances not authorized in the Act itself.

Section 5 of the Height Act permitted the Commissioners, now the Mayor, to waive its height restriction for certain types of structures. D.C. Official Code § 6-601.05 (h).² As documented in this appeal, the Board finds that this specific deck is a structure and that this roof deck is not among the enumerated structures exempted under § 5 of the Height Act, neither is it one that can be construed to be included in that provision. See n.4, *infra*.

Accordingly, the Board concludes that the Zoning Administrator erred in issuing the Original Permit, and the Revised Permits, based upon plans depicting a roof deck that would have exceeded the 70 foot height limit imposed by the Height Act. And thus, the Board concludes that this roof deck must comply with the height limitations of the Height Act.

Because the roof deck exceeds the limitations of the Height Act and the railings are attendant to the deck, the Board need not reach the issue of whether safety rails alone may be exempt under the Act if they are attendant to a compliant deck.

B. Penthouse Set back

Elevator penthouses are listed among the enumerated structures specifically exempt from the Height Act pursuant to D.C. Official Code § 6-601.05(h). While the Height Act permits such penthouses, to receive height waivers it also requires that they "be set back from exterior walls distances equal to their respective heights above the adjacent roof." D.C. Code § 6-601.05(h).³

The Zoning Regulations subject roof structures to conditions not in conflict with the Height Act, including the requirement that an elevator penthouse "be set back from all exterior walls a distance at least equal to its height above the roof upon which it is located." 11 DCMR § 400.7(b). § 400. 1 and § 400.2. This requirement applies to all elevator penthouses, including those that are within matter of right zoning height, regardless of whether the penthouse is "located below, at the same roof level with, or above the top story of any building or structure." 11 DCMR § 411.2.

² The record is silent with respect to whether a waiver was ever sought or granted in accordance with this provision for any roof structure in excess of the height limitations under the Act. Appellants did not allege any error related thereto. While such waiver is required under the Act, the Board need not resolve this factual issue in light of its finding that the Zoning Administrator erred in issuing the building permit on other grounds.

³ The Board concurs with the 1953 Office of the Corporation Counsel Opinion that the phrase "penthouses over elevator shafts" set forth in D.C. Official Code § 6-601.05(h) may be construed to include penthouses over stairways. See opinion of Vernon E. West, Corporation Counsel, D.C., July 27, 1953, at 4, attached as Exhibit 1 to Appellant's Supplemental Memo on Historical Treatment by Corporation Counsel and Zoning Authorities of Roof Structure and Basement FAR issues.

Accordingly, with respect to the set back requirement, the provisions of 11 DCMR § 400.7 (b) are similar, but not identical to § 5 of the Height Act, D.C. Official Code § 6-601.05 (h) (2001).

Appellants argue that the penthouse is not set back from all exterior walls in compliance with the Act or the Zoning Regulations 'because it is not set back the required distance from the two side walls. There is no dispute that the penthouse is properly set back from the front and back. The side walls are partially exposed to the outside where they extend above the rooflines of the adjacent buildings. Matter of right development on adjacent properties would allow the walls to be covered in the future.

A threshold issue is whether the Zoning Administrator, in applying the set back requirement for the stairway penthouse, looks to the current height of the roofs on adjacent lots to determine whether an exterior wall will result from the plans being reviewed, or to the potential height to which those rooflines may be brought as a matter of right. The Zoning Administrator's current practice when examining roof structure plans is to assume that adjacent structures are built to the maximum dimensions permitted by the zoning regulations.

The Board finds that the Zoning Administrator must look at the potential height as a matter of right. To find otherwise, would be almost impossible for the Zoning Administrator to administer, would result in inconsistent application, and would regulate zoning based upon the whim of third parties. With respect to the subject property, since the connected buildings on the adjacent lots could reach the same maximum height of 70 feet and thereby cover the exposed portions of the walls, the Zoning Administrator did not err in considering the side walls to be interior.

This conclusion is in accord with the historical treatment of the term "exterior walls under the Zoning Regulations and the Height Act. While there have been differing opinions regarding the correct interpretation of exterior walls under the Height Act, the Zoning Commission has adopted the view that the Height Act requires set back only from a property line which abuts a street. See Zoning Commission Order No. 749-A, Case No.93-9C (1994) at 12, wherein the Zoning Commission concurred with the conclusion of the Zoning Administrator that the project did not violate the Height of Buildings Act. In that case the Zoning Administrator submitted a memorandum to the Zoning Commission stating that the setbacks of a roof structure under the provisions of the Height Act "have always been interpreted by the Zoning Division as being required to set back from the property line which adjoins a street." Memorandum to Madeleine H. Robinson, Acting Director, Office of Zoning from Joseph F. Bottner, Jr., Zoning Administrator, Subject: Commission Case No. 93-9C, (PUD and Map Amendment at 21st and H Streets, N.W. -GWU/WETA (hereinafter "Bottner Memorandum"). In accord, Note to George Oberlander, National Capital Planning Commission, from Sandra Shapiro, dated February 17, 1994; Report of the Zoning Advisory Council on Proposed Amendments to the Zoning Regulations, July 15, 1958. In that same memorandum, the Zoning Administrator advised that the Zoning Commission, under a Planned Unit Development Review, does have authority to "waive the setback of a roof structure from a property line that does not adjoin a street." Bottner Memorandum, supra, at 2.

The different interpretation under the Height Act and the Zoning Regulations of the term "exterior walls" may be explained by the fact that the term "exterior walls" is not defined in either the Act or the regulations, and the Act and the regulations governing the set back of penthouses serve different, if complementary, purposes. Under the regulations deviation from the set back provisions is allowed by special exception. Accordingly, the focus of analysis under the regulations is broader - whether the deviation will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and will not tend to affect adversely the use of neighboring property. In contrast, the Height Act is prohibitive, allowing no flexibility or exception, and the focus is on the protection of views from the street or alley.

While the term "exterior walls" has been interpreted more broadly under the Zoning Regulations to include a wall set back from the property line that abuts a yard or court, as opposed to a street or alley, it has not been interpreted to apply to a side wall constructed to the lot line of an abutting property. This type of wall has been considered a "party wall" or "common division wall", not subject to the set back requirements. See testimony of Faye Ogunneye, Chief Zoning Review Branch, DCRA (March 16, 2005 Transcript at 169 -71, 191-93; and 222). Accordingly, what distinguishes an exterior wall for zoning purposes is not whether it is exposed to the elements, but whether it is set back from a property line.

The Court of Appeals has stated that while the Board is not bound by past decisions, it must consider in its deliberations long-standing interpretations of the Zoning Regulations which have had precedential effect. *Smith v. District of Columbia Board of Zoning Adjustment*, 342 A.2d 356 (1975). In light of the fact that "exterior walls" is neither defined in the Height Act nor the regulations, but has a history of interpretation by the Zoning Commission, the Zoning Administrator, NCPC, and this Board, and that the historical interpretations referenced above support the stated purpose of the Act and the regulations, respectively, this Board concludes that these interpretations should apply.

Accordingly, in this case, the two walls from which the penthouse is not set back at a distance equal to its height are not exterior walls because they are built to the property line and abut the adjacent properties. For these reasons, the Board finds that pursuant to the Height Act and the Zoning Regulations the subject property has two exterior walls, at its front and back, and that the stairway penthouse was properly set back from both.

C. FAR Calculations

The Appellant asserts the Zoning Administrator committed two errors in calculating the FAR in the building permit. First, the area counted as attic space should have been included in the gross floor area of the Project. Second, the basement floor area was incorrectly calculated using the "perimeter wall method" instead of the "grade plane method."

All structures within the R-5-D Districts are limited to a maximum Floor Area Ratio ("FAR") of 3.5. 11 DCMR § 402.4. FAR is defined as "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." 11 DCMR § 199.1 ("Floor Area Ratio"). The term "Gross Floor Area" includes basements and attic space, whether or not a floor has actually been

laid, providing structural headroom of six feet, six inches or more. 11 DCMR § 199.1 ("Gross Floor Area").

Turning first to the attic issue, the Appellant contended that the plans showed that the attic's ceiling was not "structural" and therefore should not have been used to limit the height of the attic space. If the ceiling is not counted as "structural headroom" then the height would exceed six feet six inches and the space would be included in the Gross Floor Area, and the building would exceed 3.5 FAR.

The term "structural" is not defined in the Zoning Regulations, accordingly the definition for zoning purposes is provided by Webster's Unabridged Dictionary pursuant to 11 DCMR § 199. The dictionary defines "structural" as "of or relating to the load bearing members or scheme of a building, as opposed to the screening or ornamental elements."

The Board credits the testimony of the architect of record for the Project that because the building is framed from front to back, rather than relying on the adjacent walls of the abutting townhouses for support, the collar ties forming the attic ceiling were not ornamental, but served as structural members necessary to help brace the building against racking in a north-south direction. The Board therefore concludes that the collar ties created structural headroom of less than six feet, six inches, and thus the space was properly excluded from FAR calculations.

With respect to the basement issue, KCA argued that the Zoning Administrator failed to include more of its square footage to the building's FAR. Under the Zoning Regulations, a story that has a ceiling four feet or less out of grade is considered a cellar and does not count toward FAR. See 11 DCMR § 199.1 ("cellar"). Conversely, if a lower story has a ceiling height of more than four feet out of grade, it is considered a basement and the area must be included in the density calculations of the building. See 11 DCMR § 199.1 ("basement"). The difficulty arises when the lower level is partially above and partially below that four-foot plane, and when the adjacent grade cannot be determined. Such is the case here where the Project is bounded on either side by row dwellings and the finished grade is not apparent.

The Zoning Regulations provide no guidance on how to calculate the FAR of partial basements and partial cellars. The Zoning Administrator's office has employed at least two methods for calculating lower level FAR: the grade plane method and the perimeter wall method. In this instance, the Zoning Administrator utilized the latter. KCA asserted the "grade plane" method was the appropriate means to calculate partial basements/cellars.

Under the "perimeter wall" method, the FAR is determined by establishing a ratio between the linear footage of the portion perimeter wall with more than four feet out of grade and the total square footage of the lower level. Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

Both methods appear reasonable and the choice of which is most appropriate is within the Zoning Administrator's discretion.

The Board concludes the **floor space** in the basement was correctly calculated using the perimeter wall method in the plans submitted by Montrose. At most, only 147.3 square feet of space on the lower level is a basement, which counts toward FAR. The Project thus complies with the density limitation of 3.5 FAR for the R-5-D District.

6. Great weight given to ANC issues and concerns

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code Ann § 1-309.10(d) (3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's written recommendation. In this case, the ANC joined with KCA in the above arguments that the Board has fully considered and **addressed** above.

Accordingly, it is therefore **ORDERED** that the appeal is **DENIED** in part and **GRANTED** in part. The Appeal is **DENIED** with respect to the penthouse set back requirements under the Height Act and the Zoning Regulations, and as to the FAR calculations. The Appeal is **GRANTED** on the grounds that the height of the building with the roof deck exceeded the height limitations of the Height Act.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II and John G. Parsons to grant in part and deny in part).

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

Each concurring Board member **approved** the issuance of this order.

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: NOV 08 2005

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



BZA APPEAL NO. 17109

As Director of the Office of Zoning, I hereby certify and attest that on NOV 08 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning 

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 16764 of Darrel J. Grinstead, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Denzil L. Noble, Deputy Administrator, Department of Consumer and Regulatory Affairs, in the issuance of a building permit (#B430178) issued on October 13, 2000, to William Wahabi, permitting the construction of a new house allegedly not complying with height, lot occupancy, lot area, and rear and side yard requirements in an R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30).

HEARING DATES: September 25, 2001; October 16, 2001; October 23, 2001

DECISION DATE: December 4, 2001

DECISION AND ORDER

Darrel J. Grinstead filed an appeal with the Board of Zoning Adjustment on June 28, 2001, challenging on various grounds the decision of the Department of Consumer and Regulatory Affairs (DCRA) to issue a building permit for the construction of a one-family detached dwelling at 2944 Chesapeake Street, N.W., property owned by William Wahabi and Mouzella Ademilluyi. The appellant, a neighboring property owner, is represented in these proceedings by James T. Draude from Driscoll & Draude. Assistant Corporation Counsel Marie Claire Brown appeared on behalf of DCRA. John Patrick Brown, Jr., of Greenstein DeLorme & Luchs, P.C., represents Messrs. Wahabi and Ademilluyi. After a public hearing, the Board granted the appeal in part with respect to the building height and minimum rear yard requirements and denied the appeal in all other respects.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Appeal and Notice of Public Hearing. By memoranda dated July 5, 2001, the Office of Zoning advised the Zoning Administrator; the Office of the Corporation Counsel; William Wahabi, the owner of the property that is the subject of the appeal; Advisory Neighborhood Commission (ANC) 3F, the ANC for the area within which the property is located; the ANC Commissioner for the affected Single-Member District; the affected Ward Councilmember; and the D.C. Office of Planning of the filing of the appeal.

The Board scheduled a public hearing on the appeal for September 25, 2001. Pursuant to 11 DCMR § 3113.14, the Office of Zoning, on August 16, 2001, mailed the appellant, the Zoning Administrator, and ANC 3F notice of hearing. The property owner, Mr. Wahabi, was copied with the notice sent to the appellant. Ex. 17. Notice of the public hearing was also published in the *D.C. Register* on August 24, 2001, at 48 DCR 7998.

Mr. Wahabi appeared at the September 25 hearing. He advised the Board that up to that point, he did not fully appreciate the nature of the proceedings and therefore was not prepared to address the issues on appeal. As neither the appellant nor the Zoning Administrator objected to a continuance, the Board rescheduled the hearing for October 16. At the conclusion of the October 16 hearing, the case was continued to October 23.

Dispositive Motions. The property owner, William Wahabi, filed a motion to dismiss the appeal on the grounds that it was untimely and barred by the doctrines of laches and estoppel. After consideration of the factual circumstances of the case and the parties' legal arguments, the Board denied the motion.

Appellant's Case. The appellant, Darrel J. Grinstead, owns the property at 2964 Chesapeake Street, immediately to the west of the subject property. He testified and also presented testimony by Steve Gresham, an architect. The appellant contends that the proper measuring point for building height is the middle of the 35-wide façade that contains the dwelling's main entrance, such that the building violates the maximum number of stories and height limitations. He also argued that dwelling fails to comply with maximum percentage of lot occupancy limitations, minimum rear and side yard requirements, and minimum lot dimension requirements. The appellant also complained about minimum street frontage, but abandoned this issue during the course of the proceedings.

DCRA's Case. DCRA presented testimony by then-Zoning Administrator, Michael D. Johnson, as well as by Toye Bello, of the Office of the Zoning Administrator. They testified that the lot and dwelling meet all applicable zoning regulations. They stated that the "front" of the building for purposes of measuring building height is the full 46-foot wide span of the building, which includes a north facing façade located at the rear of the building.

Property Owners' Case. William Wahabi, the property owner, and his architect, Richard Lessard, who qualified as an expert in residential architecture, presented testimony and arguments in support of DCRA's position. Mr. Wahabi also described the construction schedule.

ANC Report. Robert V. Maudlin, the affected Single-Member District Commissioner, presented the ANC report at the hearing. In its report dated September

18, 2001, ANC 3F states that at a duly-noticed public meeting with a quorum present, the ANC voted to support the appeal. The ANC characterizes the issues on appeal as whether DCRA erred in reviewing the building permit application for 2944 Chesapeake Street and in issuing the permit; whether the building has been constructed in accordance with the DCRA-approved plans; and whether the building complies with the Zoning Regulations with respect to height, height of ceiling of the lower level above the adjacent grade, and side and rear yard setback requirements. The ANC recommends that to address these issues, the Board direct DCRA to retain an independent surveyor to measure the building for purposes of determining whether the building complies with the Zoning Regulations. Since the property owner submitted a location survey dated September 25, 2001, a DCRA survey was unnecessary.

At the October 16, 2001, hearing, the Board waived the seven-day advance filing deadline in 11 DCMR § 3115.1 to accept the ANC's October 16 written report concerning building height. In this report, the ANC recommends that the Board find that height should be measured at the middle of the 35-foot wide "front" of the dwelling, such that the dwelling does not comply with the number of stories and height limitation. As discussed below in the conclusions of law and opinion, the Board concurs with ANC 3F that the building height should be measured at the middle of the 35-foot wide front of the building, and that measured at that location, the building exceeds the maximum number of stories and height limitations.

Closing of the Record. The record closed at the conclusion of the hearing on October 23, 2001, with the exception of specific materials requested by the Board and the parties' proposed findings of fact and conclusions of law.

Decision Meeting. On October 23, 2001, the Board voted to deny the property owner's motion to dismiss the appeal based on untimeliness. At its decision meeting on December 4, 2001, the Board voted to deny the property owner's motion to dismiss based on the doctrine of laches. The Board granted the appeal in part with respect to the issues on appeal involving the number of stories and building height limitations and the rear yard setback. The Board denied the appeal with respect to the maximum percentage of lot occupancy limitation and the minimum side yard requirement. But for the number of stories and height limitations and the minimum rear yard requirement, the Board determined that the property would meet the minimum lot dimension requirements so as to constitute a "buildable lot."

FINDINGS OF FACT

The Subject Property

1. The property that is the subject of this appeal is located at 2944 Chesapeake Street, N.W. (Square 2256, Lot 30), in an R-1-A District.
2. The property is a pie-shaped lot, with a lot area of 6,723 square feet. The front lot line is an arc, 39.27 feet long, along the cul-de-sac at the end of Chesapeake Street. The average width of the lot, calculated using ten-foot intervals, is 67.80 feet. The rear property line is 91.42 feet long. The western side lot line is 109.99 feet long, while the eastern side lot line is 108.13 feet long.
3. The subject dwelling is L-shaped, 35 feet wide along its front-most portion, with an 11-foot wide rear wing.

The Building Permit and Timeliness of Appeal

4. On June 27, 2000, Mr. Wahabi filed an application with DCRA for a building permit to construct a new one-family dwelling on the property, then a vacant lot. The application described the number of stories as three, plus a cellar.
5. In late September 2000, Mr. Grinstead learned of the permit application from his ANC Commissioner. Mr. Grinstead testified that he visited DCRA once or twice before he was finally able to view the building plans that were on file, sometime in late September or early October.
6. On October 5, 2000, Mr. Wahabi filed an application for a permit for grading, excavation, and footing and foundation walls. The application described the number of stories as three plus cellar. The following day, DCRA issued Building Permit No. B430003 for "Grading, Excavation, Footing and Foundation Walls." Mr. Grinstead did not learn of this permit until after the fact.
7. On October 7, 2000, Mr. Grinstead wrote to Armando Lourenco, then-Administrator of DCRA's Building and Land Regulation Administration (BLRA), with a copy sent to then-Zoning Administrator Michael Johnson as well as to Mr. Wahabi, alleging numerous problems with the permit application, including minimum lot size, height, lot occupancy, rear yard, side yard, and minimum street frontage. Mr. Grinstead followed up with a number of telephone calls to DCRA, but his calls were not returned and his letter went unanswered.

8. On October 13, 2000, DCRA issued Mr. Wahabi Building Permit No. B430178 to construct a "New Custom Home." The permit described the building as three stories. Mr. Grinstead did not learn of this permit until after the fact.

9. Mr. Wahabi started construction shortly after the issuance of the two building permits.

10. Once excavation began, Mr. Grinstead contacted Mr. Wahabi directly. They met the sometime the first or second week of October 2000 to review the plans. At that time, Mr. Grinstead advised Mr. Wahabi that he believed that the lot was unbuildable and that the dwelling was too large for the lot, too high, and violated zoning regulations. He also advised Mr. Wahabi that he planned to oppose the construction. Mr. Wahabi declined to make any concessions regarding the height and size of the house.

11. Shortly afterward, following an incident in which certain neighbors refused to move one or more cars blocking access to the Wahabi property, Mr. Grinstead and several other neighbors confronted Mr. Wahabi with their objections. They advised Mr. Wahabi that they intended to do everything they could to stop the dwelling from being built as planned. Mr. Grinstead again resumed his efforts to contact DCRA regarding the status of the building permit, but was unable to get a response.

12. On February 19, 2001, Mr. Grinstead wrote to the Zoning Administrator, with a copy to the Mayor's Office and Mr. Wahabi, requesting DCRA to conduct a site inspection and to issue a stop work order. He wrote that in addition to his earlier objections,

the most apparent violation as construction has proceeded is the height of the building, which has grown to four stories in violation of the zoning requirements for houses in this R-1-A district. The ground floor is clearly a story, the ceiling of which protrudes more than four feet above the adjacent finished grade. Above that are three more stories, which soar far above the roofs of adjacent houses.

Ex. 3.

13. On February 28, 2001, both the Mayor's Office and DCRA acknowledged receipt of Mr. Grinstead's February 19 letter, and indicated that the letter had been forwarded to appropriate DCRA officials for response.

14. Shortly afterward, the Zoning Administrator telephoned Mr. Grinstead, and advised him that he had not heard anything about his concerns before that point and that he would have someone look into the situation right away.

15. On March 7, 2001, DCRA issued a stop work order pending a wall check survey. The survey was completed on March 30, 2001. Mr. Grinstead testified that during this

period of time, it was clear to him that the matter was under active review by DCRA because there were surveyors out taking measurements.

16. It is a common practice that if DCRA discovers an error in a building permit, DCRA may issue a stop work order and/or a subsequent remedial or corrective permit to correct the error.

17. However, when he did not hear any further response from DCRA, Mr. Grinstead again began making calls to DCRA, which were not returned.

18. Finally, around May 20, 2001, Mr. Grinstead received a letter dated May 14, 2001, from BLRA Deputy Administrator Denzil Noble, responding to Mr. Grinstead's earlier letters. The letter stated that upon review of the approved plans and the wall check survey, BLRA found the dwelling in compliance with the Zoning Regulations. The letter also stated that Mr. Grinstead had a right to appeal BLRA's decision to the Board of Zoning Adjustment.

19. Mr. Grinstead felt that DCRA's response did not address his concerns regarding building height. He then consulted an attorney and determined to appeal the issuance of the permit.

20. On June 28, 2001, Mr. Grinstead filed the instant appeal with the Board of Zoning Adjustment.

21. Based on the above, the Board finds that Mr. Grinstead was not aware until receipt of DCRA's May 14, 2001, letter, that DCRA had made a final determination with respect to the issues he had raised involving the permit and that any further administrative recourse would be to the Board of Zoning Adjustment. Mr. Grinstead had proceeded in good faith to address his concerns with DCRA. Once DCRA clarified the status of its review, Mr. Grinstead acted in a timely manner to file an appeal.

Laches

22. Based on the above findings, the Board also finds that there was no unreasonable delay in the filing of the appeal.

23. The Board does not credit Mr. Wahabi's testimony that he did not become aware of the building height issue until September 10, 2001. Mr. Grinstead had copied Mr. Wahabi on his October 7, 2000, and February 19, 2001, correspondence with DCRA, which had included complaints regarding building height. In addition, Mr. Grinstead had verbally complained to Mr. Wahabi that the building was too high when they met in early October 2000.

24. Mr. Wahabi began and continued construction despite notice that Mr. Grinstead and other neighbors were opposed to the project and that Mr. Grinstead intended to pursue his legal remedies to challenge the issuance of the permit.

25. During the eight months between the issuance of the permit and the filing of the appeal, Mr. Wahabi spent over \$500,000 in construction costs. When the appeal was filed, the dwelling was substantially completed.

26. Based on the above, the Board finds that any prejudice to Mr. Wahabi did not result from the timing of the filing of the appeal, but rather from Mr. Wahabi's decision to proceed with construction before resolution of the disputed zoning issues.

Estoppel

27. Apart from the evidence supporting the above findings, Mr. Wahabi did not introduce any evidence to support his argument that the doctrine of estoppel might bar an appeal by a neighboring landowner.

Maximum Height Limitation

28. The dwelling is in an L-shaped configuration. The façade that includes the main entrance is 35-feet wide. There is a wing at the rear of the dwelling that extends to the west. The 11-foot wide northern façade of the rear wing sets back approximately 33.93 feet from the front of the front porch, more than half of the full depth of the building.

29. The north façade of the rear wing faces the western property line. It does not abut or front on a property line that abuts the street.

30. The Zoning Administrator's decision that the building complies with the height and number of stories limitation depends on including the north façade of the rear wing is part of the front of the building, producing a "front" that is 46 feet wide.

31. Following the Zoning Administrator's approach, the height of the building is 37 feet, 2.5 inches, as measured from the finished grade at the 'center of the front' to the ceiling of the top story. As measured to the peak of the roof, the building is less than 38 feet high.

32. Also following the Zoning Administrator's approach, the ceiling of the lower level is three feet, two inches, above finished grade. The lower level would be considered a "cellar" and would not count as a story. The building would therefore be three stories in height.

33. The appellant, on the other hand, argues that the front of the building is limited to the 35-foot façade that includes the main entrance, with the middle of the front located in front of the garage door.

34. The appellant's architect, Mr. Gresham, testified that the height from the finished grade in front of the garage door to the peak of the roof is 46 feet, 8 inches. Since the property owner's architect, Mr. Lessard, testified that the ceiling of the top story is three feet below the peak of the roof, the building height would be 43 feet, 8 inches.

35. The appellant also asserts that only that portion of the lower story that is west of the main entrance of the house appears to qualify as a cellar, with a ceiling less than four feet above grade. The portion east of the main entrance includes a garage at the front, as well as living space to the rear. Since the ceiling of the garage at the front of the house is more than four feet above the adjacent finished grade, the garage would be considered a "basement."

36. *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1986) includes the following definitions of the word "front":

1. the foremost part or surface of anything.
2. the part or side of anything, as a house, which seems to look or to be directed forward
... .
5. a property line along a street or the like: the entire block front; a fifty-foot front.

37. *Webster's Third New International Dictionary of the English Language Unabridged* (1986) includes the following definition:

- 2: something that confronts or faces forward: as a (1): a face of a building;
esp: the face that contains the principal entrance.

38. The Zoning Administrator relied on the definition of "front" as "the part or side of anything, as a house, which seems to look or to be directed forward" and the portion of the building facing the property lot line that abuts the street.

39. The Board finds that the rear wing is not the foremost part of the building, where it would have the greatest impact on the public, but rather is oriented to the rear of the building. It does not face forward, but rather faces the western side lot line.

40. The Board finds that the front of the building is the façade that is shown on the drawings as 35 feet wide. The middle of that façade is east of the main entrance, in front of the garage. The finished grade at that location is the driveway. The height of the building from that point to the ceiling of the top story is 43 feet, 8 inches. Since the garage is a basement, with a ceiling higher than four feet above grade, the building is four stories in height. The building therefore exceeds the 40-foot height and 3-story limitation in § 400.1.

Maximum Percentage of Lot Occupancy Limitation

41. The lot occupancy is 32.1 percent, well under the maximum 40 percent lot occupancy permitted in the R-1-A District under § 403.2.

42. The property is not located within a Tree and Slope (TSP) Overlay District as alleged by the appellant, and therefore not subject to the more stringent TSP lot occupancy limitation.

Minimum Rear Yard Requirement

43. The rear yard varies from 25.39 feet to 25.73 feet in depth, which exceeds the 25-foot minimum depth of rear yard requirement in § 404.1 for an R-1-A District.

44. As originally permitted, the building included a bay that projected three feet, one inch, into the required 25-foot rear yard. This deviation exceeds Zoning Administrator's authority under § 407.1, which permits the Zoning Administrator to allow a ten percent deviation of the linear rear yard requirement (a 2.5-foot inch deviation in this case) through a minor flexibility ruling.

45. On November 28, 2001, while this appeal was pending, DCRA issued the applicant Building Permit No. B440549 to reduce the depth of the bay.

46. With the reduced rear bay, the depth of the rear yard is 22.70 feet, a 2.3-foot deviation. The Zoning Administrator has the authority under § 407.1 to permit this deviation, provided the Zoning Administrator determines that it does not impair the purpose of otherwise applicable regulations.

47. Mr. Wahabi originally intended to construct a rear deck of approximately 10 feet by 28 feet at the second story level; however, during the appeal proceedings, he advised the Board that he will not construct the deck.

48. Mr. Wahabi and the neighboring property owner to rear jointly own an outdoor tennis court, a small portion of which is located in the rear yard of the subject property. The tennis court is at grade.

49. There is a fence in the rear yard. The appellant did not introduce any evidence that the fence was not constructed in compliance with the D.C. Building Code.

Minimum Side Yard Requirement

50. Both side yards are a minimum of eight feet in width. The wall test report indicates a 7.97 foot setback on the west side was revised by the same surveyor, following a second survey, to 8.03 feet.

51. There are chimneys on both the east and west side of the building. The chimney on the west side does not project into the required side yard; however, the chimney on the east side projects into the required side yard by 1.43 feet.

52. The appellant alleged that window wells are located on the west side of the house, within four feet, eight inches, of the property line. The window wells generally do not rise above the finished grade. None of the window wells exceed four feet in height.

53. There is a retaining wall located approximately three feet, six inches, from the east property line. The appellant did not provide any evidence that this retaining wall was not constructed in accordance with Building Code requirements.

Minimum Lot Dimension Requirements

54. The lot was in single ownership on November 1, 1957.

55. The lot is 6,723 square feet in area, which exceeds 80 percent (6,000 square feet) of the 7,500 square foot minimum lot area prescribed in § 401.3.

56. The average lot width, using any of three different methods for computing average lot width, exceeds 60 feet or 80 percent of the 75 foot minimum width prescribed in § 401.3.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799; D.C. Code § 6-641.07(g)(1) (2001)), to hear and decide appeals where an appellant alleges that an administrative officer erred in carrying out or enforcing the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of § 3112 for the public hearing on the appeal have been met.

Timeliness of Appeal

Under 11 DCMR § 3112.2, an appeal to the Board must be timely filed. Mr. Wahabi urged the Board to dismiss the appeal as untimely. The question of timeliness is jurisdictional. If the appeal is not timely filed, the Board lacks authority to consider it. Because the Board's Rules of Practice and Procedure do not specify a time limit, a standard of reasonableness is applied in determining whether an appeal is timely filed. *Waste Management of Maryland, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (D.C. 2001). As stated in *Waste Management*,

Reasonableness is a standard that requires due consideration of attendant facts and circumstances that legitimately may bear on the particular appellant's ability to seek review.

Id. at 1122. For example, in applying the reasonableness standard, the time for filing an appeal begins when the appellant knew or should have known of the decision complained of. *Id.* In *Waste Management*, the court concluded that in the absence of exceptional circumstances outside of a party's control and substantially impairing the ability of that party to appeal, two months between notice of a decision and the appeal therefrom is the outer limit of timeliness. *Id.*

Unlike *Waste Management*, in which an appellant "chose to concentrate on avenues that reasonably may have appeared more promising than an appeal," *id.* at 1123, Mr. Grinstead pursued administrative review of the building permit through DCRA, the administrative agency charged with making a final decision on the issuance of the permit. It was not until May 14, 2001, that DCRA advised Mr. Grinstead that it, in fact, had made a final decision and that its decision could be appealed to the Board of Zoning Adjustment. If DCRA had found the Mr. Grinstead's allegations correct, then DCRA, as customary, would have taken steps to cure the identified deficiencies, saving all involved the time and expense of an appeal to the Board. To rule otherwise would mean that DCRA would not be given the opportunity to correct its errors internally before the appeal process begins – an opportunity that promotes administrative efficiency, the prompt correction of errors, and the resolution of disputes.

For example, in *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093-94 (D.C. 1994), the Court held that the time for filing an appeal ran from the date that DCRA had issued a revised building permit in response to litigation and complaints concerning the initial permit, not from the date of the initial permit. Similarly in *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C. 1980), the Court ruled that time for filing an appeal ran from the date of the Zoning Administrator's written letter advising the appellant of DCRA's decision that a property owner could build a kiln at the rear of her pottery shop without a building permit, even though the appellant had notice of BLRA's oral ruling six months earlier. The Court

stated that "During that seven-month period, [the appellants] were working within the administrative process to attempt to prevent the construction of the kiln; that delay is reasonable and cannot be held against them." *See also Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 636-37 (D.C. 1985) (time for filing an appeal ran from the date a certificate of occupancy incorporating new parking calculations was issued, not from the date of the building permit); *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 127 n.5 (time for filing an appeal commenced on the date the Zoning Administrator orally rescinded a stop work order and notified the appellants of his decision by telephone, not from the date of the issuance of the permit two months earlier).

Mr. Grinstead filed his appeal six weeks after receiving notice of DCRA's final determination that the building plans were in accordance with the Zoning Regulations and that Mr. Grinstead could appeal that determination to the Board. The Board concludes therefore that the appeal was timely filed.

Laches

Mr. Wahabi also asked the Board to dismiss the appeal on the grounds of laches. The equitable doctrine of laches prevents the enforcement of stale claims. In the context Board of Zoning Adjustment appeals, the doctrine asks whether the appellant has inexcusably slept on his rights so as to make a determination against the property owner unfair. *Beins*, 572 A.2d at 126; *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). Laches may bar a claim that for jurisdictional questions would be timely. The question of timeliness looks only to the period between notice of the zoning official's determination and the filing of the appeal, while laches is concerned with the entire course of events. *Beins*, 572 A.2d at 127; *Goto*, 423 A.2d at 925.

Fairness will bar application of the doctrine of laches if the result would be unjust. Moreover, laches is judicially disfavored in the zoning context because of the public interest in the enforcement of the zoning laws. It is only applied in the clearest and most compelling circumstances. *Beins*, 572 A.2d at 126; *Wieck*, 383 A.2d at 10.

Mr. Grinstead undertook to resolve his concerns about the dwelling before the issuance of the building permit. He continued throughout the construction process, having learned of the issuance of the permit after the fact, and was given reason to believe that his efforts were bearing fruit when he received a letter from DCRA that indicated that the matter was under review. With the DCRA stop work order in March 2001, Mr. Grinstead had reason to believe that his concerns were being addressed and that DCRA had not yet made a final decision. The reasonableness of this belief was confirmed by DCRA's letter dated May 14, 2001, indicating that it was not until that date that a final decision had been made and that Mr. Grinstead could appeal to the Board. In

light of these facts, the Board concludes that Mr. Wahabi failed to prove that there was inexcusable delay.

Further, since Mr. Wahabi was on notice of Mr. Grinstead's objections, and in light of § 8 of the Zoning Act of 1938, D.C. Code § 6-641.07(f), (g)(1) and (4) (2001), which permit an aggrieved person to appeal a building permit alleged to violate the Zoning Regulations, Mr. Wahabi proceeded with construction at his own risk. For example, in *Beins*, 572 A.2d at 128, where a property owner invested substantially and to some extent irrevocably in a construction project before the aggrieved neighbors could protest to the Zoning Administrator and the Board of Zoning Adjustment, the Court recognized that it was not possible to quantify the prejudice traceable to any portion of the delay in the filing of an appeal. Similarly, in *Murray v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 1055, 1058 (D.C. 1990), the Court stated that a property owner who made commitments for architectural plans upon receiving the Zoning Administrator's ruling, despite knowledge of neighborhood opposition, invites application of the self-created hardship doctrine and precludes application of estoppel given the likelihood that the Zoning Administrator's ruling will be appealed. Mr. Grinstead's objections intensified as construction progressed, with Mr. Grinstead and the neighbors advising the Mr. Wahabi that they intended to do everything they could to stop the construction. Any prejudice to the property owner therefore does not result from the timing of the filing of the appeal, but rather from the property owner's decision to undertake and complete construction before the disputed issues were resolved.

Estoppel

Mr. Wahabi also raises the doctrine of estoppel as a possible barrier to this appeal. As with laches, estoppel is judicially disfavored in the zoning context in light of "the important general public interest in the integrity and enforcement of the zoning regulations" *Wieck*, 383 A.2d at 10.

As acknowledged by the property owner, the law is not clear on whether estoppel can bar an appeal by a neighboring landowner. *Goto*, 423 A.2d at 925. Since the property owner failed to identify what the elements of estoppel against a neighboring landowner might be or to brief the issue of such estoppel in any detail other than to allude to the elements of estoppel against the government in a footnote, the Board concludes that the property owner has not met his burden of proof in showing that the appeal should be barred.

Moreover, under § 8 of the Zoning Act, any person aggrieved by any decision granting a building permit based in whole or in part on the Zoning Regulations may appeal to the Board. D.C. Code § 6-641.07(f), (g)(1) and (4). Thus, Mr. Wahabi is chargeable with notice that following issuance of the permit, an aggrieved person could challenge the permit in an appeal. Mr. Wahabi's decision to proceed despite his

knowledge of neighborhood opposition and the likely appeal of the permit precludes equitable estoppel. *See Murray*, 572 A.2d at 1058.

Maximum Height Limitation

This appeal involves interpretation and application of the phrase “middle of the front of the building,” the measuring point under 11 DCMR § 199.1 for the “height of building” in those zone districts such as the R-1-A District where building height is limited to 40 feet. The definition of “height of building” in § 199.1 states that:

In those districts in which the height of building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story.

The term “story” is defined in § 199.1 as:

the space between the surface of two (2) successive floors in a building or between the top floor and the ceiling or underside of the roof framing. The number of stories shall be counted at the point from which the height of the building is measured.

For the purposes of determining the maximum number of permitted stories, the term “story” shall not include cellars, stair or elevator penthouses, or other roof structures; Provided, that the total area of all roof structures located above the top story shall not exceed one-third (1/3) of the total roof area.

The term “cellar,” in turn, is defined in § 199.1 as “that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade. A “basement” is defined in § 199.1 as “that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.”

The Zoning Administrator’s decision that the Wahabi dwelling complies with the R-1-A height and story limitations depends on including the north façade of the rear wing as part of the “front of the building” to establish the measuring point.

The Zoning Regulations use the word “front” in contexts that indicate that the word refers to that part of a building that abuts the street. *See* 11 DCMR § 199.1 (“building, height of” and “street frontage”). In § 199.2, the Zoning Regulations incorporate the meanings given “Webster’s Unabridged Dictionary” for the definition of terms not defined in the regulations. The regulations do not specify the edition to be used; therefore, the Board reviewed the definition of the word “front” in the two editions supplied by the parties. The Zoning Administrator testified, based on the dictionary

definitions, that the part of the house that seems to look or to be directed forward and that portion of the building that faces the property line that abuts the street.

The part of the Wahabi dwelling that faces the property line abutting the street is the 35-foot wide façade that contains the main entrance. The rear wing, on the other hand, does not abut or front on a property line abutting the street. Rather, it faces the western side lot line abutting the Grinstead property. Moreover, the rear wing is set back well over half of the full depth of the building, where it appears more as an element the rear of the building than of the front of the building. The Board concludes therefore that the “front” of the building does not include the north façade of the rear wing. This conclusion is consistent with the other pertinent dictionary excerpts introduced by the parties, including the front as the foremost part of anything, the part of a house that seems to look or be directed forward, and the face of a building that contains the principal entrance.

The Zoning Administrator also testified that the rear wing is part of the front of the building because it can be seen from the street at any point of the front of the lot. However, as the photographs introduced in this case show, the view from the street depends on where one stands. The Zoning Administrator also testified that the “front” of the building is that part of the building that one can see from the middle of the front property line. However, as shown from the site plan marked with two sight lines drawn from the middle of the front property line, Ex. 23A, one cannot see the rear wing from the middle of the front property line.

The Board concludes that the front of the building, for purposes of establishing the building height measuring point, is the 35-foot wide façade that contains the main entrance and that is closest to the street. The middle of that façade is in front of the garage, and the finished grade at that point is the driveway. From that point, there is a basement, such that the number of stories is four. The height of the house from that point to the ceiling of the top story is 43 feet, 8 inches. The building therefore exceeds the R-1-A height limitation in § 400.1, both as to number of stories and building height measured in feet.

Therefore, the Board concludes that the Zoning Administrator erred in interpreting and applying the definition of “height of building” in § 199.1. While using the full span of a building to determine the measuring point at the “middle of the front of the building” may yield a valid measurement in most applications, in this case, it does not. As recognized in *Murray*, 572 A.2d at 1056-57, the Board has the authority to reject the Zoning Administrator’s method of determining dimensions when the method yields an unnatural result. Given the configuration of the building, with the wing set back at the rear and facing the western side lot line, use of the full span of the building to establish the “middle of the front” results in a building that is greater than 40 feet and 3 stories in height, a building that is not in keeping with the character and scale of buildings permitted in the R-1-A District.

Maximum Percentage of Lot Occupancy Limitation

Under 11 DCMR § 403.2, a one-family dwelling in an R-1-A District may not exceed 40 percent lot occupancy. The dwelling, at 32.1 percent lot occupancy, meets this limitation. Since the property is not located within a Tree and Slope Overlay District, with a more restrictive lot occupancy limitation, the Zoning Administrator did not err in determining that the dwelling is within the allowed maximum percentage of lot occupancy.

Minimum Rear Yard Requirement

Under 11 DCMR § 404.1, the rear yard of a building in an R-1-A District must have a minimum depth of 25 feet. Subsection 407.1 authorizes the Zoning Administrator to permit a ten percent deviation from rear yard requirements, provided the building may not deviate from more than two of the sections identified in § 407 imposing area and linear restrictions and provided the Zoning Administrator determines that the deviation does not impair the purpose of otherwise applicable zoning regulations.

The permit application drawings for the dwelling showed that the bay projected into the rear yard by three feet, one inch, an extent greater than that that could be permitted by a Zoning Administrator minor flexibility ruling. With the reduced rear bay window as permitted by the remedial building permit issued on November 28, 2001, the rear yard is 22.70 feet deep, within the allowed ten percent deviation.

The appellant also argued that an outdoor tennis court and fence located in the rear yard intrude into the required rear yard. The tennis court is located in part on an adjacent property. To the extent the tennis court is a "structure" as defined in § 199.1, it may occupy the required rear yard since it is at grade. See § 2503.2, which provides 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." Under § 2503.3, a fence constructed in accordance with the D.C. Building Code may occupy any required yard. The appellant did not introduce any evidence that the fence was not constructed in accordance with the Building Code. Therefore, the provisions in § 2503 that limit structures in required open spaces do not apply, and neither the tennis court nor the fence intrude into the required rear yard. Finally, the property owner abandoned his plans, which were apparently not included in his permit application, to construct a second story deck in the rear yard.

Based on the above, the Board concludes that the Zoning Administrator erred in approving the permit with respect to the rear bay, which error was subsequently corrected in a remedial building permit.

Minimum Side Yard Requirement

Under 11 DCMR § 405.9, a building in an R-1-A District must have a minimum eight-foot side yard on each side. As shown by property owner's location survey, the dwelling complies with the minimum side yard requirement.

There are several projections and structures in the required side yards. The chimney on the east side projects into the side yard; however, it is well within the two feet permitted under § 2502.8 as a matter of right. Under § 2503.2, "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." Since none of the window wells exceed four feet in height, they may occupy the required side yards. Under § 2503.3, a retaining wall constructed in compliance with the D.C. Building Code may occupy any required yard. As there is no evidence that the retaining wall was not properly constructed, the retaining wall may occupy the side yard. Therefore, the Board concludes that the Zoning Administrator did not err in determining that the dwelling met the side yard requirements.

Minimum Lot Dimension Requirements

Under 11 DCMR § 401.3, a lot in an R-1-A District must have a minimum lot area of 7,500 square feet and a minimum lot width of 75 feet. Under § 401.2:

[I]n the case of an unimproved lot in single ownership on November 1, 1957, which has an area or width of lot less than that specified in § 401.3 for the district in which it is located and which does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the area and width of lot are at least eighty percent (80%) of the area and width of lot specified under § 401.3; Provided, that the structure shall comply with all other provisions of this title.

But for the height and rear yard requirements, the lot would comply with the 80 percent rule. By the conclusion of the Board's proceedings, the owner had corrected the rear yard problem. If the owner brings the dwelling into compliance with the height and number of story limitations, the lot will meet the requirements of § 401.2. Therefore, the Board concludes that the Zoning Administrator did not err in concluding that the property is a "buildable lot."

For the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED** in part and **DENIED** in part. Pursuant to D.C. Code § 6-641.07(g)(4), the Zoning Administrator's decision to approve Building Permit No. B430178 is **REVERSED**.

Vote taken October 23, 2001, as to property owner's motion to dismiss based on timeliness of the appeal:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to property owner's motion to dismiss based on laches:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to height limitations:

VOTE: 3 – 1 - 1 (Carol J. Mitten, David W. Levy, and Anne M. Renshaw, to grant; Geoffrey H. Griffis, opposed; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum rear yard requirement:

VOTE: 4 – 0 - 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to grant; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to maximum percentage of lot occupancy limitation:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum side yard requirement:

VOTE: 4 – 0 – 1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

Vote taken December 4, 2001, as to that part of the appeal relating to the minimum lot dimension requirements:

VOTE: 4-0-1 (Carol J. Mitten, Geoffrey H. Griffis, Anne M. Renshaw, and David W. Levy, to deny; the third mayoral appointee not sitting, not voting).

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

Each concurring member has approved the issuance of this Decision and Order.

ATTESTED:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: **MAY 22 2002**

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.

MS/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 16764

As Director of the Office of Zoning, I hereby and attest that on MAY 22 2002, a copy of the foregoing Decision and Order in BZA Appeal No. 16764 was mailed first class, postage prepaid or delivered via inter-governmental mail, to each party and public agency who appeared and participated in the public hearing and who is listed below:

Darrel J. Grinstead
2964 Chesapeake Street, N.W.
Washington, D.C. 20008

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Phil Kogan, Vice-Chair
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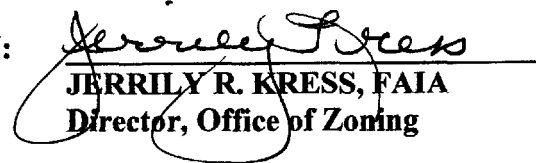
BZA Application No. 16764

Honorable Kathleen Patterson
Councilmember Ward 3
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Room 107
Washington, D.C. 20004

Ellen McCarthy, Deputy Director
Development Review Division
D.C. Office of Planning
801 North Capitol Street, N.E., Suite 4000
Washington, D.C. 20002

Denzil Noble, Acting Zoning Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

ATTESTED BY:


JERRILY R. KRESS, FAIA
Director, Office of Zoning

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



June 13, 2011

Sassan Gharai, Founder
SGA Companies, Inc.
7508 Wisconsin Avenue, 4th Floor
Bethesda, Maryland 20814

Re: 1421 Florida Avenue NW (Square 2660, Lot 237 "Subject Property")

Dear Mr. Gharai:

This letter responds to your request regarding a proposed project at the subject property referenced above, and memorializes the substance of the preliminary design review meeting (PDRM) of May 4, 2010 in respect of same.

Specifically, your request seeks confirmation of compliance in two areas of zoning regulation:

- (1) with respect to the minimum depth of rear yard setback requirement and the use of the method of mean rear yard depth calculation and;
- (2) with respect to compliance with the Floor Area Ratio (FAR) limitation, by either calculating the FAR by using the "Perimeter Wall Method", as measured from finished grade, or by the "Grade Plane Method" calculation.

Property and Project Description

The Subject Property is located within the R-5-B residence zone district, and consists of 4,140.62 ft² on an irregularly-shaped lot. An interior lot by definition, the Subject Property has street frontage only on Florida Avenue, and is located in Square 2660, which is bounded by Florida Avenue on the south, 15th Street to the west, 14th Street to the east, and Belmont Street to the North. The Subject property is otherwise unimproved, vacant, and is characterized by dramatically steep topography with an elevation change of approximately twenty-seven feet (27 ft.) to thirty feet (30 ft.) from the rear downward to front property line where there is an existing retaining wall within the property.

As represented in the accompanying preliminary plans and drawings (revised, and submitted to me after our PDRM meeting), the proposed project is the construction of a new eight (8) unit apartment house, including an entrance lobby and a parking level which provides four (4) parking spaces, sufficient to comply with the minimum number of required parking set forth in § 2101.1, for the proposed use in the underlying R-5-B zone district. Also, because the project contains less than 10 dwelling units, it is not subject to an Inclusionary Zoning requirement.

According to and as depicted in the drawings reviewed and attached herein, the building is proposed to be constructed to the side property lot line on the west, but setback in sufficient distance to comply with the required side yard setback requirement, based on proposed height of building, as further outlined below. The adjoining existing three story apartment house to the east is constructed to the common side property lot line, thereby serving the functional duality of a face-on-line wall and a retaining wall which preserves the natural topography of the site where the side terrace intersects the property lot line.

Further, the building is proposed to be constructed to contain 7,435 square feet of gross floor area (1.79 F.A.R.), based on the definition of the term set forth in § 199.1 and utilizing the "Grade Plane Method", given the site's drastic topography. You assert that the project also complies with the maximum FAR limit by using the "Perimeter Wall Method", as measured at finished grade at the perimeter of the subject property lot lines but since you may choose either method, my analysis is based upon your use of the "Grade Plane Method" as depicted in the schematic FAR drawings attached to this letter.

You have chosen to use the "Grade Plane Method" for calculating FAR. BZA Order No. 17109, Finding of Fact No. D 33 and 36, sets forth the criteria for this method. The relevant excerpt is:

"Under the "grade plane" method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered cellar".

After reviewing your submitted section drawing labeled SK-ZNG, dated 6/6/11, I conclude that the drawing accurately depicts the use of the Grade Plane Method, and the shaded areas may be deemed as a cellar and excluded from the FAR calculation. If the resultant floor area contains 7,435 square feet of gross floor area (1.79 F.A.R.), this is less than the maximum 1.8 FAR and would comply.

Finally, the new building is proposed to be constructed to a height not to exceed fifty feet (50 ft.), measured from curb opposite the middle of the front of the building to the highest point of the main roof of the building or parapet.

Zoning Compliance Analysis

Minimum Depth of Rear Yard Setback Requirement: As set forth in § 404.1, the minimum rear yard setback requirement for the underlying R-5-B zone district is 4 inches per foot of vertical distance from the mean finished grade at the middle of the rear of the structure to the highest point of the main roof or parapet wall, but in no event, less than 15 ft.

As depicted in the provided section labeled SK-ZNG, the height at the middle of the rear of the proposed structure as measured from mean finished grade, based on the drastic change in topographical elevation, to the highest point of the main roof or parapet is thirty-four feet and three inch (34 ft- 3 inches) which results in a minimum rear yard setback requirement of eleven feet and five inches (11 ft- 5 inches) ($\text{height at mean finished grade} \times 4 \text{ inches} = 137 \text{ inches} \div 12 = 11.41\text{ft}$). Therefore the 15 foot rear yard standard applies.

Because the lot shape is irregular, with the rear lot line at variable distance from the front lot line, the portion of the definition for “*Yard, rear, depth of*” that is set forth in § 199.1 is pertinent, as follows:

“the mean horizontal distance between the rear line of a building and the rear lot line”

In the case of an irregularly-shaped lot, the minimum depth of the required rear yard setback may be determined by means of an average calculation as follows:

Total square feet in area of portion of lot behind a line drawn at the farthest point of the rear building line parallel to the rear property lot line, divided by the linear distance of the line so drawn at the points at which the line intersects the two side property lot lines; consistent with the graphic and numerical illustration attached as drawing SK-Z1.

Based on this drawing and applicable calculations, I have determined that the proposed depicted rear yard setback complies.

Minimum Side Yard Setback Requirement: The R-5-B zone district does not require a side yard setback, but if one is provided, it shall not be less than 3 inches per foot of height, but not less than eight feet (8ft.) in any event. The proposed project is required to provide a minimum twelve feet and six inches (12 ft- 6 inches), based on a proposed building height of fifty feet (50 ft.), ($3 \text{ inches} \times 50 = 150 \text{ inches} \div 12 = 12.5 \text{ ft.}$). The proposed project provides fourteen feet and two inches (14ft- 2inches) of side yard setback, and therefore complies.

Conclusion

After careful consideration of the representations made in the PDRM, review of the revised submitted preliminary project plans attached herein, and based on all the foregoing above, including the applicable provisions of the Zoning Regulations, it is my determination that the

proposed project may be constructed as a matter of right, provided that the project plans at the time of filing for a building permit do not substantially deviate from the preliminary plans, except for interior reconfiguration as may be dictated by the demands of other applicable District of Columbia regulations.

Please let me know if I can be of further assistance.

Sincerely, Matthew LeGrant

Matthew LeGrant
Zoning Administrator

Attachments

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SCHEMATIC DESIGN

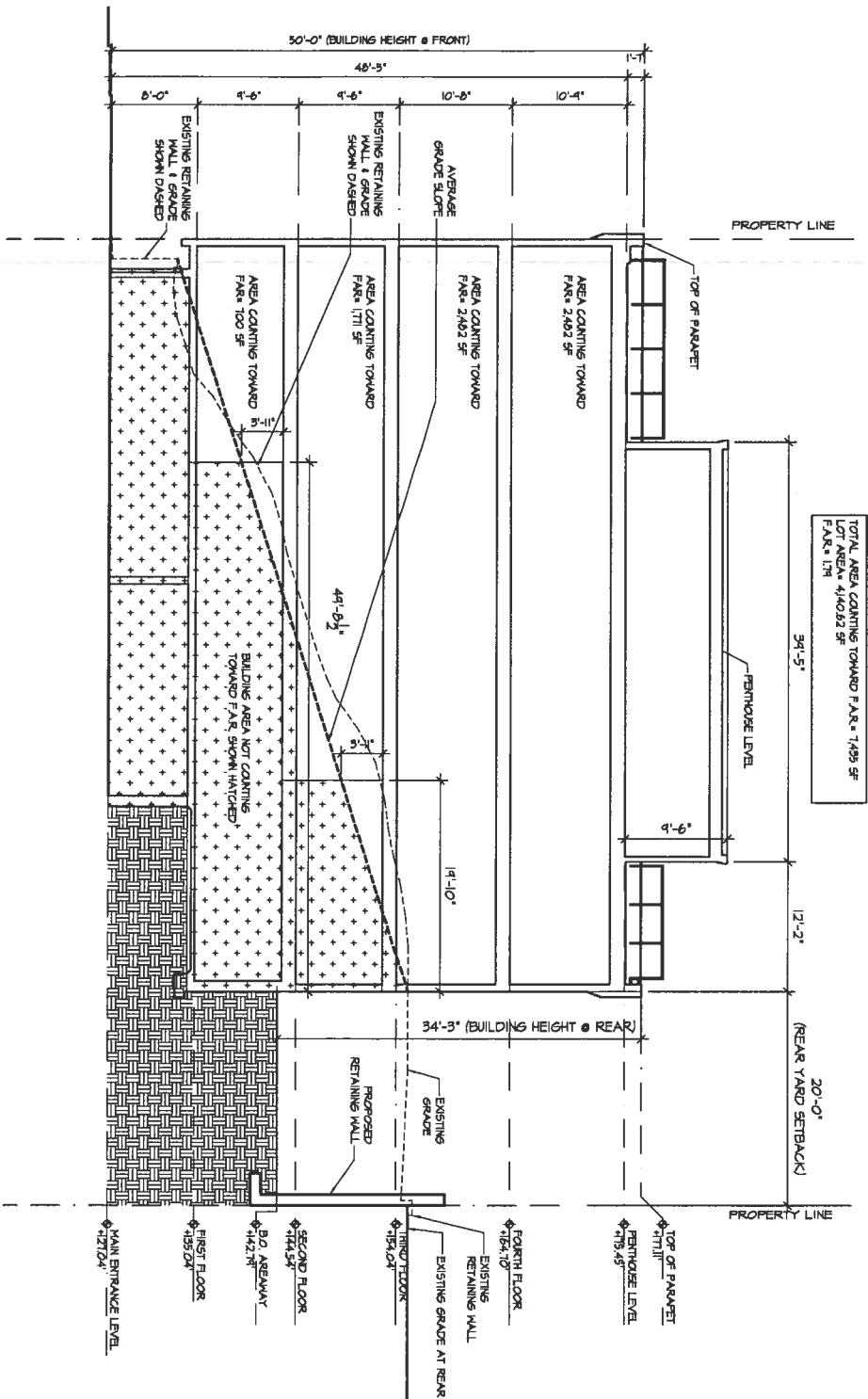
1421 FLORIDA AVENUE, NW- WASHINGTON DC

DATE: 06/06/11

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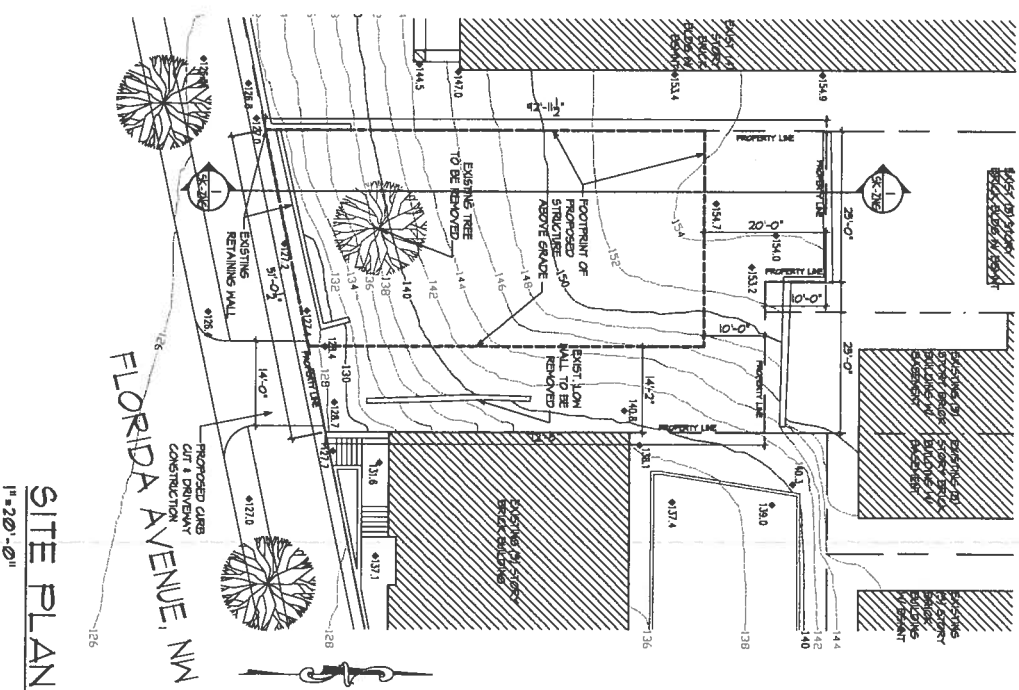
DIAGRAMATIC BUILDING SECTION

ZONING ANALYSIS



SK-ZNG

ZONING ANALYSIS			
	ACTUAL/ ALLOWABLE	PROPOSED	
ZONED USE:	R-3-B	NO CHANGE	
LOT SIZE:	41,406.62 SF	NO CHANGE	
F.A.R.:	1.8	1.79 (700 SF+ 1,771 SF+ 2,482 SF+ 2,482 SF)	
LOT OCCUPANCY:	60%	54.9% (2,482 SF)	
ALLOWABLE BUILDING HEIGHT:	50'	50'	
REAR SETBACKS:	NONE	NO CHANGE	
- FRONT:	NONE BUT IF PROVIDED (25' 1/2' BLDG HT)	14'-2"	
- SIDE:	15' (750 SF)	15' AVERAGE (750 SF DIVIDED BY 50' WIDTH)	
- REAR:	NONE		
NUMBER OF STORIES:	NONE PRESCRIBED	4 + PARKING GARAGE LEVEL	
NUMBER OF DWELLING UNITS:	NONE PRESCRIBED	0	
NUMBER OF PARKING SPACES:	1 PER 2 UNITS	4	



1421 FLORIDA AVENUE, NW- WASHINGTON DC

SCHEMATIC DESIGN

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SK-SP

DATE: 06/06/11

SCALE: N/A

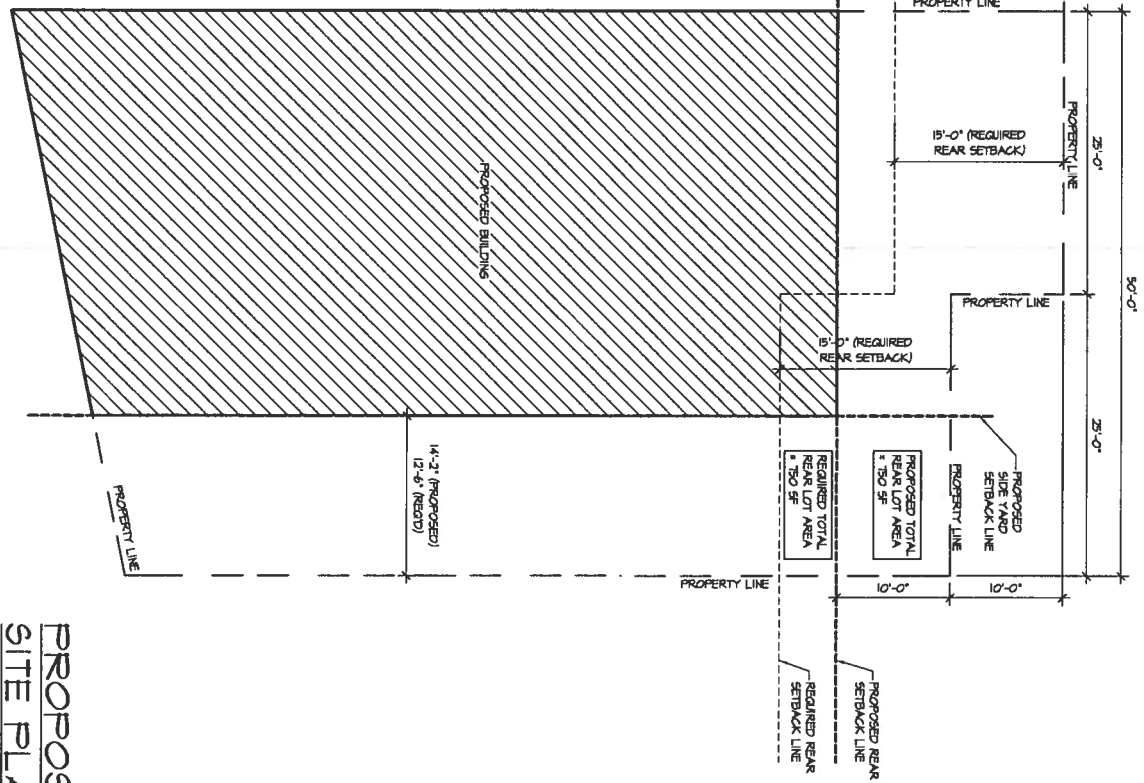
SCHEMATIC DESIGN

1421 FLORIDA AVENUE, NW- WASHINGTON DC

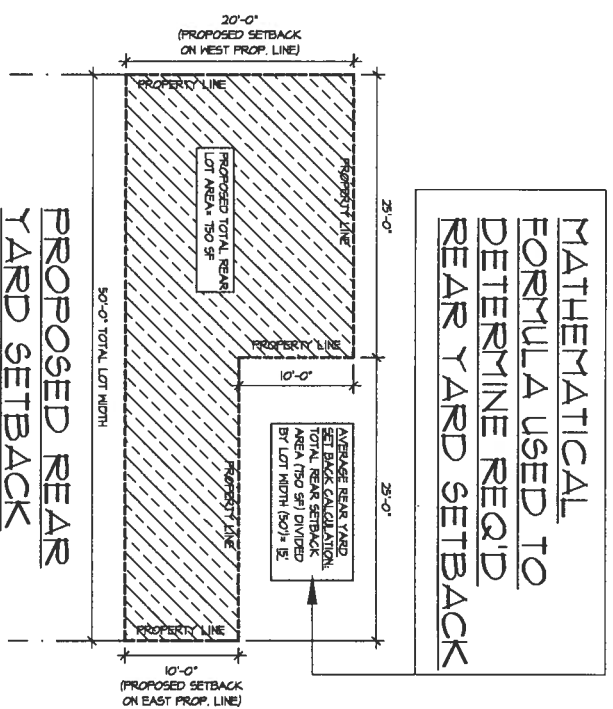
DATE: 06/06/11

SCALE: 3/32" = 1'-0"

SK-Z1

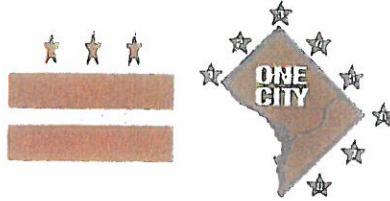


PROPOSED
SITE PLAN



PROPOSED REAR
YARD SETBACK

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR



March 19, 2014

Ronald Schneck Jr. AIA
Square 134 Architects, PLLC

VIA EMAILED PDF

Re: Zoning PDRM – 703-707 Newton Place, NW – Subject Property

Dear Mr. Schneck:

Please allow this letter and attached drawing to serve as a confirmation of our conversation on October 25, 2013 regarding the proposed development at the subject property. The conclusions that we discussed are summarized below:

A - Lot Subdivision

- 1 - The proposed building conforms to the Zoning Regulations in that the combining of the lots that overlap a zoning boundary line is allowed provided that the boundary line occurs along a lot line, i.e. along the lot line separating lots 707 and 705.
- 2 – There is no interdependence between the processes for the subdivision application and applying for a raze permit; Each can be filed individually and concurrently.
- 3 – The proposed building is conforming as shown on the attached zoning analysis and drawings as a single building is allowed on the new combined lot provided that each portion of such building adheres to the zoning requirements of that zone. See the zoning analysis below.

B - Zoning Requirements for R-4 Portion

- 1 –The R-4 portion as shown on the attached zoning analysis conforms to the Zoning Regulations in terms of FAR, lot occupancy, building height, number of stories, rear and sideyard setbacks.
- 2 - The Cellar square footage does not contribute to FAR in that is determined by using the "horizontal grade plane method," and as such, the grade outside of the areaway, not at the bottom of areaway, is considered the adjacent grade for cellar determination purposes.
- 3 – The R-4 portion of the proposed building does not create any courts, either open or closed.
- 4 – In addition, since the R-4 portion is pre-1958, and will contain one flat [or two dwelling unit use], the 900 square feet per unit requirement is not applicable. This R-4 lot can support two dwelling units even though it is less than 1,800 square feet.

C - Zoning Requirements for C-3-A Portion

1 - The C-3-A portion as shown on attached zoning analysis conforms to the Zoning Regulations in terms of FAR, lot occupancy, building height, number of stories, rear and sideyard setbacks.

2 - The Cellar square footage does not contribute to FAR in that is determined by using the "horizontal grade plane method," and as such, the grade outside of the areaway, not at the bottom of areaway, is considered the adjacent grade.

3 - The C-3-A portion of the proposed building creates an open court between the partial fourth floor and the street. Per Section 776.3; *Where a court is provided for a building or portion of a building devoted to residential uses, at any elevation in the court, the width of court shall be a minimum of four inches per foot (4 in./ft.) of height, measured from the lowest level of the court to that elevation; provided, that in no case shall the width of court be less than fifteen feet (15 ft.).* In this case, the minimum court width will exceed the most restrictive standard of four inches per foot (4 in./ft.) of height, or 15' in width, therefore it conforms as shown.

D-Parking

1 - The proposed project conforms to the parking requirements of the Zoning Regulations in that per Chapter 21 of DCMR 11, the minimum number of parking spaces required for both the R-4 portion and the C-3-A portion is one parking space per two dwelling units. The total number of dwelling unit is nine. Therefore, 5 parking spaces are required and will be provided. See attached zoning analysis for additional information.

2 -The "overlapping" parking space (parking space #2 on the attached zoning analysis) is allowed to overlap the zone boundary line as shown and conforms with the Zoning Regulations.

E - Inclusionary Zoning

1 - The proposed project is not subject to the Inclusionary Zoning requirements set forth in Chapter 26 of the Zoning Regulations because it is less than 10 dwelling units.

F - Georgia Avenue Overlay

1 - Although the project is located within the Georgia Avenue Overlay, it is not on Georgia Avenue and therefore is not required to have a 14' ceiling height and not subject to any increased density as a result, and conforms to the Zoning Regulations.

Sincerely, Matthew Le Grant
Matthew Le Grant
Zoning Administrator

Attachments- Zoning Analysis/Site Plan dated 11-4-13

File: Det Let re 703-707 Newton Pl NW to Schneck 3-19-14