BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Application of Charles A. Sisson

BZA Application No. 16521
Public Hearing: May 3, 2000
ANC-3D

DISTRICT OF COLUMBIA
2000 APR 19 P 3:23

STATEMENT OF THE APPLICANT

I.
NATURE OF RELIEF SOUGHT

This is an application pursuant to 11 DCMR Section 3103.2 for a variance from the front yard setback requirements under Subsection 1543.4 and from the allowable percentage of lot occupancy of a dwelling under Section 1543.2 for the construction of a front porch, rear addition and accessory garage in the WHOD/R-1-A District at premises 3020 43rd Street, N.W. (Square 1621, Lot 70).

II.
JURISDICTION OF THE BOARD

This Board has jurisdiction to grant the requested variance relief pursuant to Section 3103.2 of the Zoning Regulations. The requested variances are area variances and the applicant's compliance with its burden of proof is set forth below.

III.
BACKGROUND OF THE CASE

The subject site is located at 3020 43rd Street, N.W. (Square 1621, Lot 70). Copies of the Sanborn and Baist atlas maps are attached as Exhibit 1. The subject site is located within the Wesley Heights Overlay District. The site is bounded on the north, west and south by single

Board of Zoning Adjustment
District of Columbia
CASE NO.16521
EXHIBIT NO.33A1

Ex. 33

family homes. The subject site is bounded on the east by 43rd Street which intersects New Mexico Avenue and across New Mexico Avenue are high density apartment buildings. The subject site is zoned WHOD/R-1-A. (The Zoning Map is attached as Exhibit 2.)

The history of the subject site is long and complex. The applicant, Charles A. Sisson, purchased the house in 1997 and then proceeded to renovate it, much like his neighbors had done. Plans were filed with the Department of Consumer & Regulatory Affairs on January 13, 1998 and the first building permit was issued on January 29, 1998. While those plans showed the extent of the overall improvements to the property, which included the rear addition, two-car garage and front porch, the phasing of the work was such that the first permit only covered construction of the two-story rear addition. In early February, 1998, construction began on the two-story addition.

On February 9, 1998, a second building permit was issued for the garage construction and work began on the garage. Subsequently, in April 1998 a stop work order was issued by the District of Columbia on the basis of an inquiry by the next door neighbor, Mrs. Crary. A new permit application was filed to cure the deficiency in the first building permit and the stop work order was lifted and construction continued. In May 1998, the exterior construction of the two-story addition was completed and in June 1998 the construction of the garage was completed.

In August 1998, a building permit application for the front porch was issued by the city and subsequently was revised by a second building permit issued in October 1998.

In November 1998, the applicant received written notice of a public hearing on an appeal filed by the next door neighbor, Mrs. Crary. That appeal was challenged by Mr. Sisson on several procedural grounds, including timeliness and laches. After three public hearings (December 1998, February and April 1999) the Board decided the case on June 16, 1999. In its

decision, the Board decided that the District of Columbia officials had erred in granting each of the permits and that the cumulative effect of the five permits produced a structure which did not comply with the R-1-A Wesley Heights Overlay District Zoning Regulations. In its discussion, Board members stated that there was no question that the District had made "horrific mistakes" but that the Board was required to uphold the technical requirements of the Zoning Regulations. (See Exhibit 7, the transcript of the Board's June 16, 1999 decision meeting.) The Board also pointed out that Mr. Sisson had recourse in that he could apply for variance relief.[1] The Board's written Order was subsequently issued on December 28, 1999. Following the Board's suggestion, Mr. Sisson filed the subject application in order to legitimize the construction and bring to closure what has been a long and arduous process.

The record of this case indicates that Mr. Sisson attempted to meet all procedural and substantive requirements in good faith by obtaining all required approvals and permits for the renovation to the house. No less than five permits were issued by the city and each time the city inspected the property it found it to be in compliance with the Zoning Regulations. (See the notices of inspection attached hereto as Exhibit 10. The final notice which indicated that all work on the property was approved was dated December 3, 1998, which was after the appeal had been filed.) When there was a question as to whether the appropriate permits had been received (with regard to the garage and the porch), Mr. Sisson immediately filed corrected plans and obtained the new permits. Thus, at all times he acted in good faith on the affirmative acts of the city.

Mr. Sisson is now in the position of having made expensive and permanent improvements in reliance on the government approvals. All of the expenses incurred in the

[1] See page 8 of Exhibit 7 in which Board member Gilreath stated that Mr. Sisson would "have recourse to subsequently apply for a variance." This same point had been made by Board

renovation of the property would not have been incurred if the District of Columbia government had not given its approval. Nonetheless, Mr. Sisson recognizes the Board's interest in applying the regulations and is seeking variance relief in order to remove the cloud over the property. The Zoning Review Branch issued its zoning memorandum on February 29, 2000, attached as Exhibit 5, which identifies the need for two variances and both are the subject of this application.

IV.
WITNESSES

The following witnesses are expected to testify in support of the application:

1. Charles A. Sisson, Applicant.

2. Steven E. Sher, Director of Zoning Services, Wilkes Artis, Chartered.

VI.
EXHIBITS IN SUPPORT OF APPLICATION

Before proceeding with a description of compliance with the zoning requirements, the following exhibits are submitted:

Exhibit 1: Portions of the Sanborn Atlas for the area.

Exhibit 2: Portions of the Zoning Map for the area including the site and adjacent zoning.

Exhibit 3: Surveyor's plat dated August 13, 1999.

Exhibit 4: Photographs of the site and surrounding area and land use study of the area.

Exhibit 5: Memorandum of the Zoning Administrator outlining the zoning relief required.

Exhibit 6: Portions of the transcript from the May 26, 1999 public hearing.

Exhibit 7: Transcript of the Board's decision meeting on June 16, 1999.

Exhibit 8: Copy of the Board's order in Appeal No. 16405.

Exhibit 9: Copies of all building permits issued for the property.

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member King at the May 26 public hearing. (See page 294 of Exhibit 6.)

Exhibit 10: Copies of all notices of inspection and approval issued by District of Columbia officials.

Exhibit 11: Chart showing square footages of improvements.

Exhibit 12: Reduced copy of porch plans.

Exhibit 13: Outline of the applicant's testimony.

Exhibit 14: Outline of the testimony of Steven E. Sher.

Exhibit 15: Copy of BZA Order No. 15414 in which the Board granted similar relief to an applicant seeking variances to legitimize the construction of an addition to a dwelling.

Exhibit 16: Copy of the District of Columbia Court of Appeals decision in Case No. 91-AA-1280 in which the District of Columbia Court of Appeals affirmed the Board's decision in BZA Application No. 15414.

Exhibit 17: Copy of BZA Order No. 15540 in which the Board granted similar relief to an applicant seeking variances to legitimize the construction of an addition to a dwelling.

Exhibit 18: Copy of the District of Columbia Court of Appeals decision in Case No. 93-AA-00 in which the District of Columbia Court of Appeals affirmed the Board's decision in BZA Application No. 15540.

V.
APPLICANT MEETS THE REQUIREMENTS OF SECTION 3103.2 OF THE ZONING REGULATIONS SO AS TO BE ENTITLED TO THE VARIANCE RELIEF REQUESTED

The burden of proof for area variance relief is well established. The applicant must demonstrate that the subject site is affected by extraordinary or exceptional conditions, that the strict application of the Zoning Regulations will result in practical difficulties to the applicant and that the granting of the variance will not cause substantial detriment to the public good nor impair the intent, purpose or integrity of the zone plan. Palmer v. BZA, 287 A.2d 535, 541 (D.C. 1972).

A. The Subject Site is Affected by Extraordinary or Exceptional Situations or Conditions.

The subject site is affected by extraordinary circumstances which are inherent in its history and the events which impact the conditions of the property.

The subject site does not meet the area and width requirements of the zone district. The property is also unique in that it is located one house away from the intersection of three zone districts – R-5-A, WHOD/R-1-B and WHOD/R-1-A – which may have contributed to the confusion by District of Columbia officials as to which zone district to apply.

The extraordinary circumstances affecting the site are also a combination of physical and other conditions and subsequent events which are extraneous to the site itself. The D.C. Court of Appeals has recognized that the extraordinary or exceptional condition which is the basis for a variance need not be inherent in the land; it can be caused by subsequent events extraneous to the land itself. De Azcarate v. District of Columbia Board of Zoning Adjustment, 388 A.2d 1233 (D.C. 1978). In De Azcarate, the court approved the Board of Zoning Adjustment's granting of a variance due to such an extraneous situation.

Similar to the subject case, in De Azcarate, the Zoning Office found that the work on the site conformed to the Zoning Regulations and issued five permits and the owner, relying on this information, proceeded in good faith to construct the additions to the single family residence. The calculations and zoning district applied by the Zoning Office were later found to be in error. The court found that "failure of the lot to meet the width requirements could not accurately be described as a direct consequence of sole and affirmative acts of the owner where the zoning department employees played a significant part in approving three separate applications and thus self-created hardship rule did not preclude the variance." Id. at 1233, 1234. While the court and this Board have determined that the self-created hardship rule only applies to use variances,

Association for Preservation of 1700 Block of N Street, N.W. and Vicinity v. Board of Zoning Adjustment, 384 A.2d 674, 678 (D.C. 1978), it is important for the Board to recognize that the subject case does not involve a self-created hardship by the applicant.

B. Strict Application of the Zoning Regulations Results in Practical Difficulties to the Applicant.

The strict application of the Zoning Regulations would impose a practical difficulty since it would require the demolition of the front porch and would prevent reasonable use of the land.

As the facts in this case clearly indicate, the applicant acted in good faith throughout the entire process and in no way created the hardship which is at issue. Throughout the process, the applicant reasonably relied on the District records, the issuance of permits, the statements of District officials, and the inspection of its property by those officials. There was no attempt at any stage in the construction of the addition to subvert the legal process. Further, after this Board granted the appeal, the applicant did everything possible to quickly seek variance relief in a timely manner. The subject application was filed on October 7, 1999 and the applicant was anxious to proceed forward to public hearing as quickly as possible. Unfortunately, due to circumstances beyond the applicant's control, it took many months for the Zoning Administrator's memorandum to be issued. That memorandum was received on February 29, 2000 and on March 2, 2000 the applicant filed it with this Board and requested a public hearing.

As the testimony in the prior appeal indicates[2], and as the Zoning Administrator's memorandum supports, the rear addition and garage construction comply with the zoning requirements. It is only when the applicant constructed the porch, which was the subject of the

[2] See page 281 of the May 2, 1999 public hearing, attached hereto as Exhibit 6, in which George Waston, the appellant's witness, testified that it was the front porch which caused the property to exceed the lot occupancy and front setback requirements.

fourth and fifth permits, that the work to the property created the need for a variance.[3] With the porch, the house exceeds the permitted lot occupancy by 253 square feet. Further, the porch extends into the required front yard by 3.3 feet. This front yard requirement is not a requirement under the R-1-A zoning district. Rather, it is a special requirement of the Wesley Heights Overlay District. Likewise, the lot occupancy requirement is a special requirement of the Wesley Heights Overlay District. Under the underlying R-1-A zoning, the front porch complies with the lot occupancy requirements. It is only when the overlay requirements are added that the front porch exceeds the regulation thus creating the need for variance relief. Since the District officials did not pick up the Wesley Heights Overlay District, they mistakenly allowed the construction to go forward. The applicant is now in the untenable position of having a front porch that does not meet the Zoning Requirements. Rather than tear down the front porch, the applicant is seeking variance relief.

C. The Requested Relief Can Be Granted Without Detriment to the Public Good and Without Substantially Impairing the Intent, Purpose and Integrity of the Zone Plan.

The relief requested will not be detrimental to the public good and will not impair the intent, purpose and integrity of the Zoning Regulations.

The applicant's purchase and renovation of the property is a vast improvement over the prior condition of the site. The addition is also similar to a number of other additions in the immediate area. Many of these were constructed prior to the imposition of the Wesley Heights Overlay District. Further inspection of sites in the subject square indicate that many of the existing houses have front yards that are in fact less than what is now the required 21 feet. In this instance, the applicant, upon reliance on District records and official statements, proceeded

[3] The fourth permit incorrectly referred to the new porch roof as repair of an existing roof. It was

in good faith with the construction of the front porch roof. Had the applicant been made aware that variance relief was required prior to construction, he would have sought this relief. Greater harm to the public good will occur from a policy standpoint if the applicant is forced to demolish the addition, which was constructed in good faith, than will occur if the addition is permitted to remain.

The front porch was an existing open porch. By constructing a roof over the porch, the porch became subject to the lot occupancy and front yard setback requirements. The porch was an existing condition, however, with the exception of the roof. From a practical standpoint, the front porch is no closer to the neighboring property than is the existing house. Since it faces the street in front of the applicant's property, it has no impact on the neighbor in terms of light and air. Practically speaking, the decrease of three feet of distance in the front yard does not in any way alter the existing privacy of the neighbor or impact adversely their home. Further, this was an existing condition.

Finally, the Board, in two similar cases, that are attached as Exhibits 15 and 17, determined that variance relief can be granted to legitimize construction that was done pursuant to District of Columbia approval. In one of these cases, the opposition argued that granting a "retroactive variance" is not allowed under applicable law, that the applicants did not rely on administrative action and that the granting of the variance relief would undermine the integrity of the Zoning Regulations by encouraging similar action in the future. In that case, the Board correctly determined that the variance relief could be granted and subsequently, the D.C. Court of Appeals upheld the Board's decision. Thus, this Board has considered this issue before.

Further, the granting of variance relief here will in no way encourage property owners to circumvent the Zoning Regulations. If anything, this case puts every property owner on notice

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corrected by the issuance of the fifth permit for construction of a new roof.

that the regulations will be upheld even in situations such as this, where a property owner has obtained the necessary permits and approvals.

D. Equitable Estoppel.

Under the facts of this case, any action by the Board ordering the applicant to remove the addition should be equitably estopped. The applicant meets the requirements for equitable estoppel as stated in Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7 (D.C. 1978). The necessary elements of estoppel are: "a party (1) acting in good faith, (2) on affirmative actions of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine. Furthermore, the reliance of the party must be justifiable. (Citing Nathanson v. District of Columbia Board of Zoning Adjustment)." Wieck at 11. See Saah v. District of Columbia Board of Zoning Adjustment, 433 A.2d 1114, 1116 (D.C. 1981); Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 925 (D.C. 1980).

Here, the applicant, in good faith, did what was required in order to obtain approval for the work. The affirmative acts of the District upon which Mr. Sisson relied in constructing the improvements were the issuance of the five building permits and the subsequent on-site inspections. In reliance on the acts of the city, Mr. Sisson proceeded to meet procedural and substantive requirements in good faith by obtaining all required approvals and permits for the renovation to the house. No less than five permits were issued by the city. Further, when the city inspected the property and determined that a third permit was required for the new garage construction, Mr. Sisson immediately filed the plans and permit application and obtained that approval. Thus, he clearly acted in good faith on affirmative acts of the city.

All of the expenses incurred in the renovation of the property would not have been incurred if the District of Columbia government had not given its approval. The specific costs incurred for just the physical improvements to the property have been approximately $250,000 since the issuance of the first permit. This only covers the physical work to the property, not the related costs in defending the appeal and in filing the subject application.

Finally, under the fourth test, the equities clearly favor the applicant. To deny the variance and require the demolition of the front porch at this time, given the time and money invested by the applicant, would be inequitable and would clearly result in a practical difficulty.

VI.
CONCLUSION

For the reasons stated above, the requested relief can be granted without substantially impairing the intent, purpose and integrity of the zoning regulations.

Respectfully submitted,

WILKES ARTIS, CHARTERED

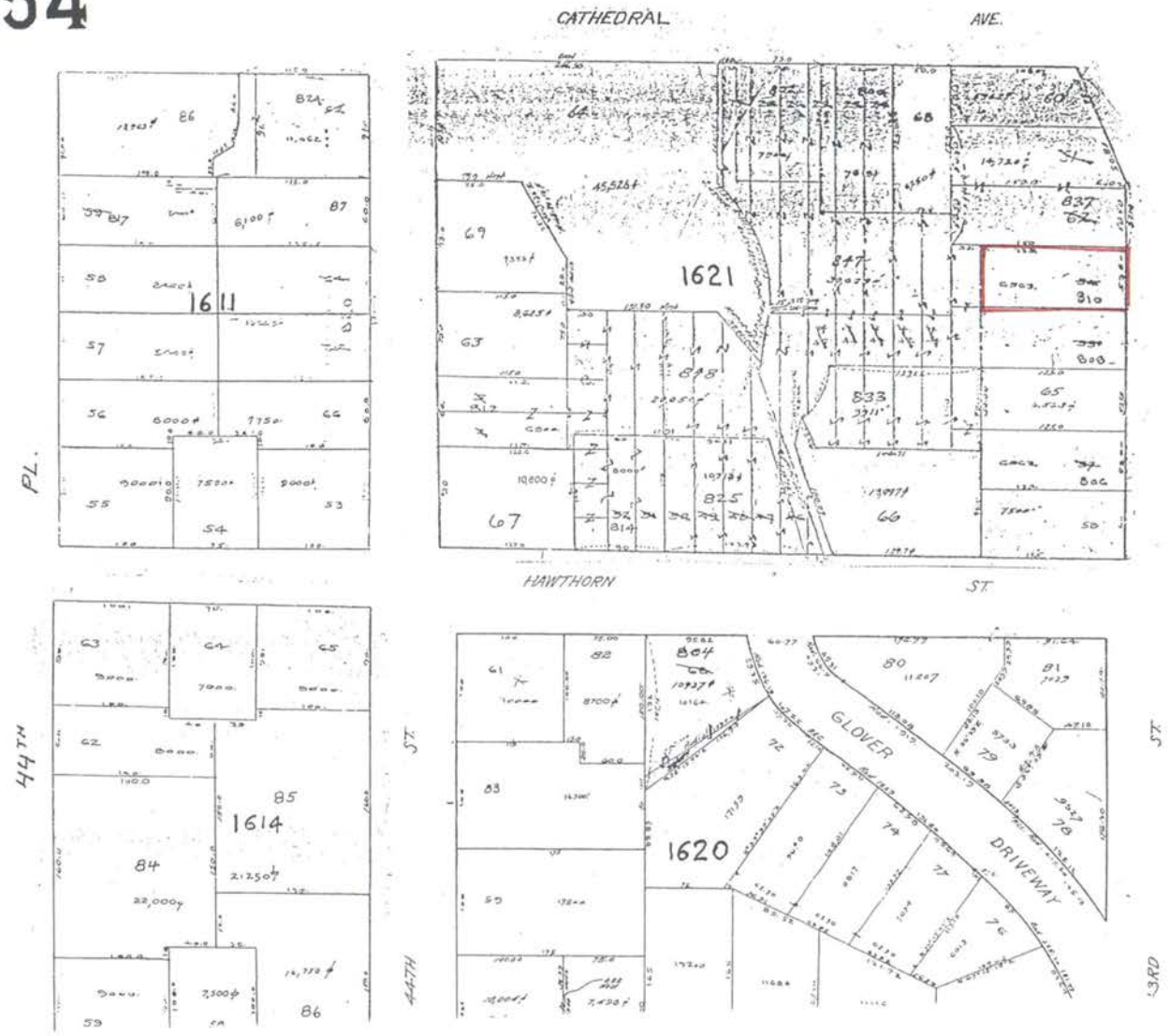
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Maureen Ellen Dwyer

Allison C. Prince
Allison C. Prince

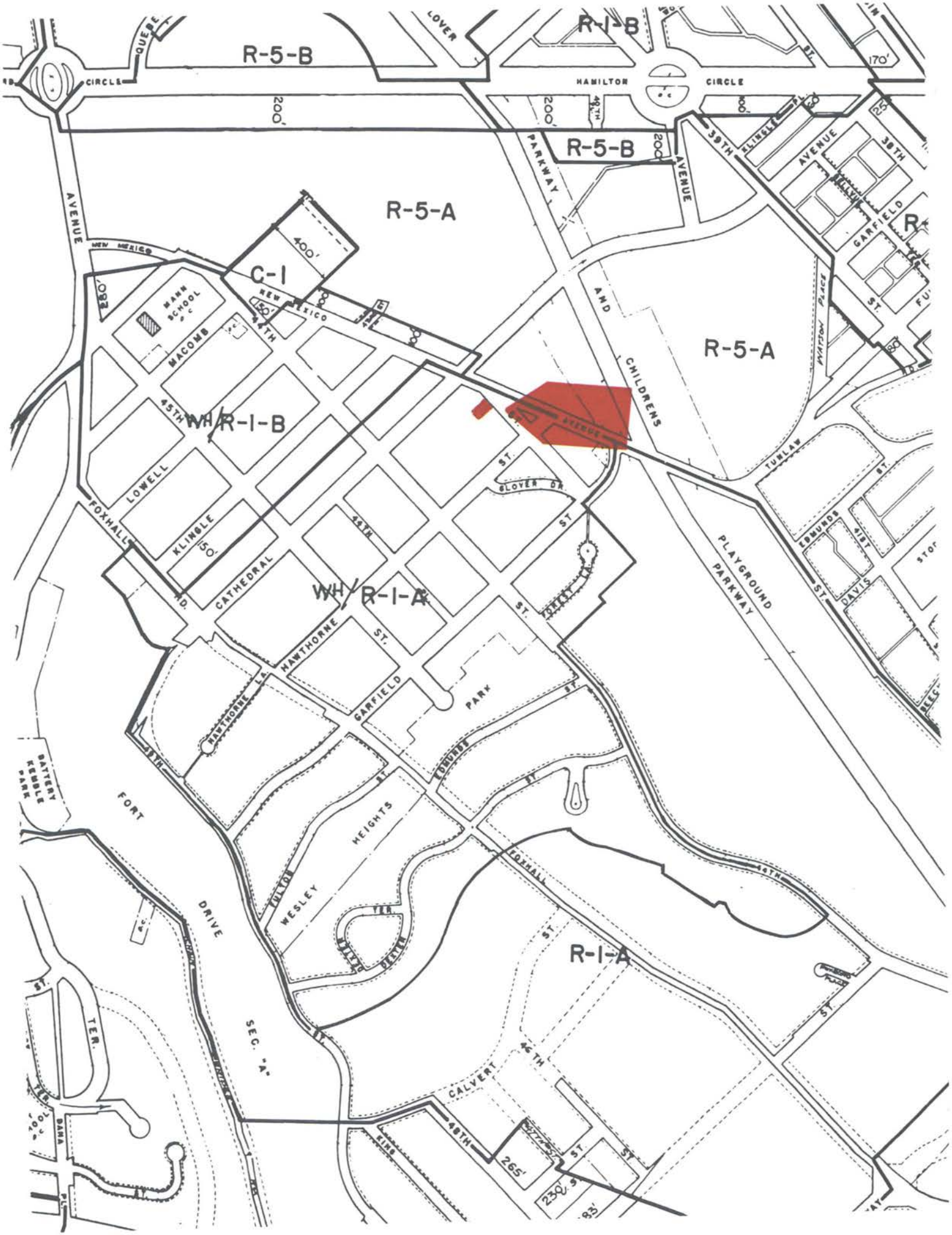
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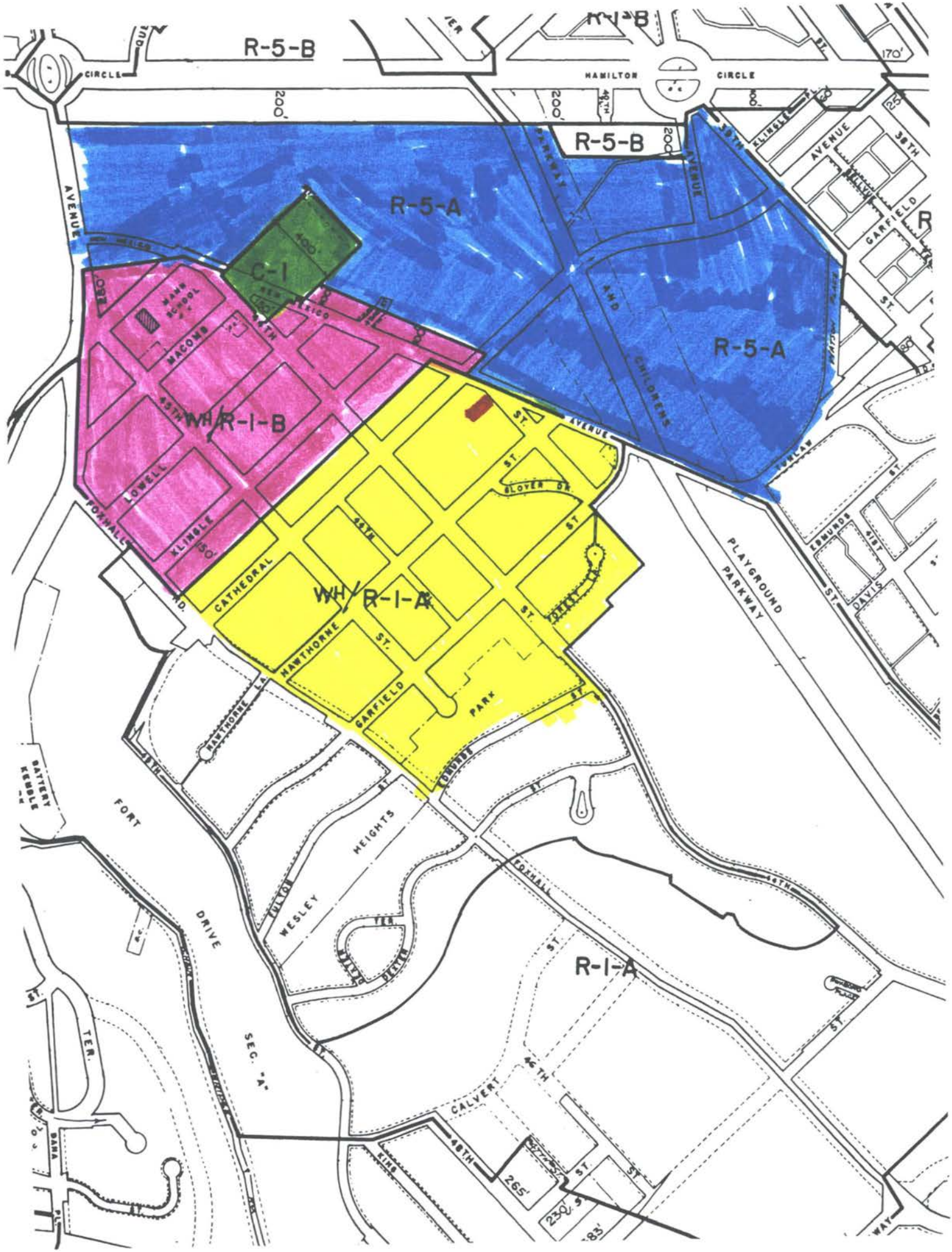
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CATHEDRAL
AVE.
1611
1621
1614
1620
HAWTHORN
ST.
PL.
44TH
ST.
GLOVER
DRIVEWAY
3RD
ST.


MACOMB N. W.
LOWELL N.W.
KLINGLE N.W.
CATHEDRAL AV. N.W.
HAWTHORNE N.W.
44TH ST. N.W.
NEW MEXICO AV.
EMBASSY PARK DR. N.W.
SUTTON PL. N.W.
TOWERS APTS. WEST & EAST
POOL
GLOVER DRIVEWAY N.W.
PARK
1601
1699


R-5-B
R-1-B
HAMILTON CIRCLE
R-5-B
R-5-A
C-1
MANN SCHOOL
MACOMB
R-1-B
R-5-A
CHILDRENS
PLAYGROUND
PARKWAY
LOWELL
KLINGLE
CATHEDRAL
R-1-A
HAWTHORNE ST.
GARFIELD PARK
FOXHALL
WESLEY HEIGHTS
FORT DRIVE
SEC. "A"
R-1-A
CALVERT
46TH
AVENUE
PARKWAY
GLOVER DR.
TUNLAW
DAVIS
EDMUNDS
GARFIELD
WATSON PLACE
NEW MEXICO
AVENUE
CIRCLE
HAMILTON
39TH
45TH
47TH
48TH
265'
230'
93'
400'
200'
170'


R-5-B
HAMILTON CIRCLE
R-5-B
R-5-A
C-1
R-5-A
WH/R-1-B
WH/R-1-A
R-1-A
MACOMB
LOWELL
XLINGLE
CATHEDRAL
HAWTHORNE ST.
GARFIELD PARK
PLAYGROUND PARKWAY
FORT WESLEY HEIGHTS
DRIVE
SEC. "A"
CALVERT
FORHALL
BLOVER DR.
CHILDRENS AVENUE
GARFIELD
DAVIS
BATTERY KEMBLE
TER.
DANA
KING
265'
230'

DISTRICT OF COLUMBIA GOVERNMENT
OFFICE OF THE SURVEYOR

Washington, D. C., 8-13 19 99

Plat for Building Permit of SQUARE 1621 LOT 70

Scale: 1 inch = 20 feet Recorded in Book 192 page 96

Receipt No. 61122

Furnished to NICK

Surveyor, D.C.

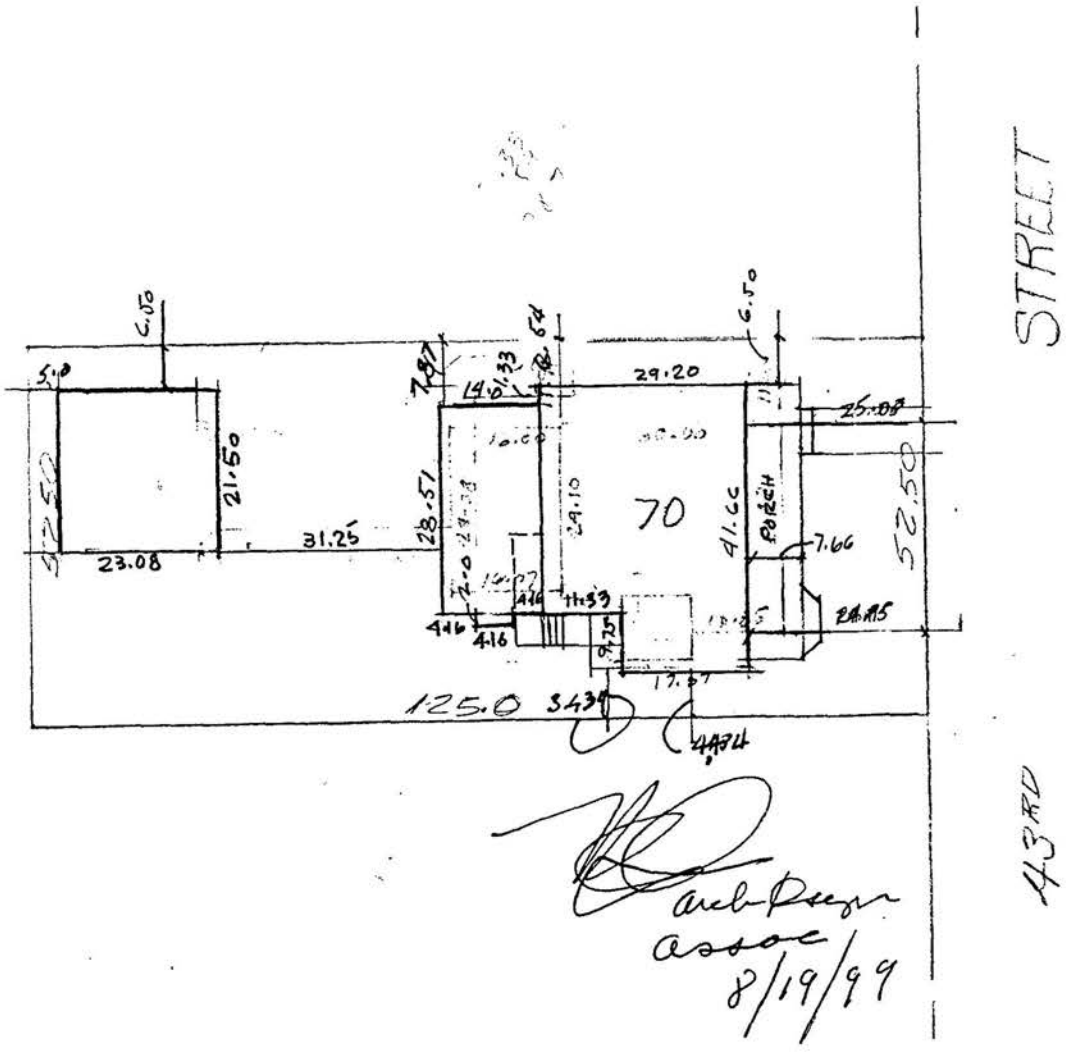
By: DA

I hereby certify that all existing improvements shown hereon, are completely dimensioned, and are correctly platted; that all proposed buildings or construction, or parts thereof, including covered porches, are correctly dimensioned and platted and agree with plans accompanying the application; that the foundation plan as shown hereon is drawn, and dimensioned accurately to the same scale as the property lines shown on this plat; and that by reason of the proposed improvements to be erected as shown hereon the size of any adjoining lot or premises is not decreased to an area less than is required by the Zoning Regulations for light and ventilation; and it is further certified and agreed that accessible parking area where required by the Zoning Regulations will be reserved in accordance with the Zoning Regulations, and that this area has been correctly drawn and dimensioned hereon. It is further agreed that the elevation of the accessible parking area with respect to the Highway Department approved curb or alley grade will not result in a rate of grade along centerline of driveway at any point or private property in excess of 20% for single-family dwellings or flats, or in excess of 12% at any point for other buildings. (The policy of the Highway Department permits a maximum driveway grade of 12% across the public parking and the private restricted property).

Date 8/10/99

(Signature of owner or his authorized agent)

NOTE: Data shown for Assessment and Taxation Lots or Parcels are in accordance with the records of the Department of Finance and Revenue, Assessment Administration, and do not necessarily agree with deed description.



PHOTOS



Front Views of
House w/ Porch





MRS. CRARY house to the right →



Driveway access to Crary house and garage



Rear Addition
to Sisson House



Side adjacent to
neighbor on
opposite side
from Mrs. Crary



View of addition on Mrs Crary side of house



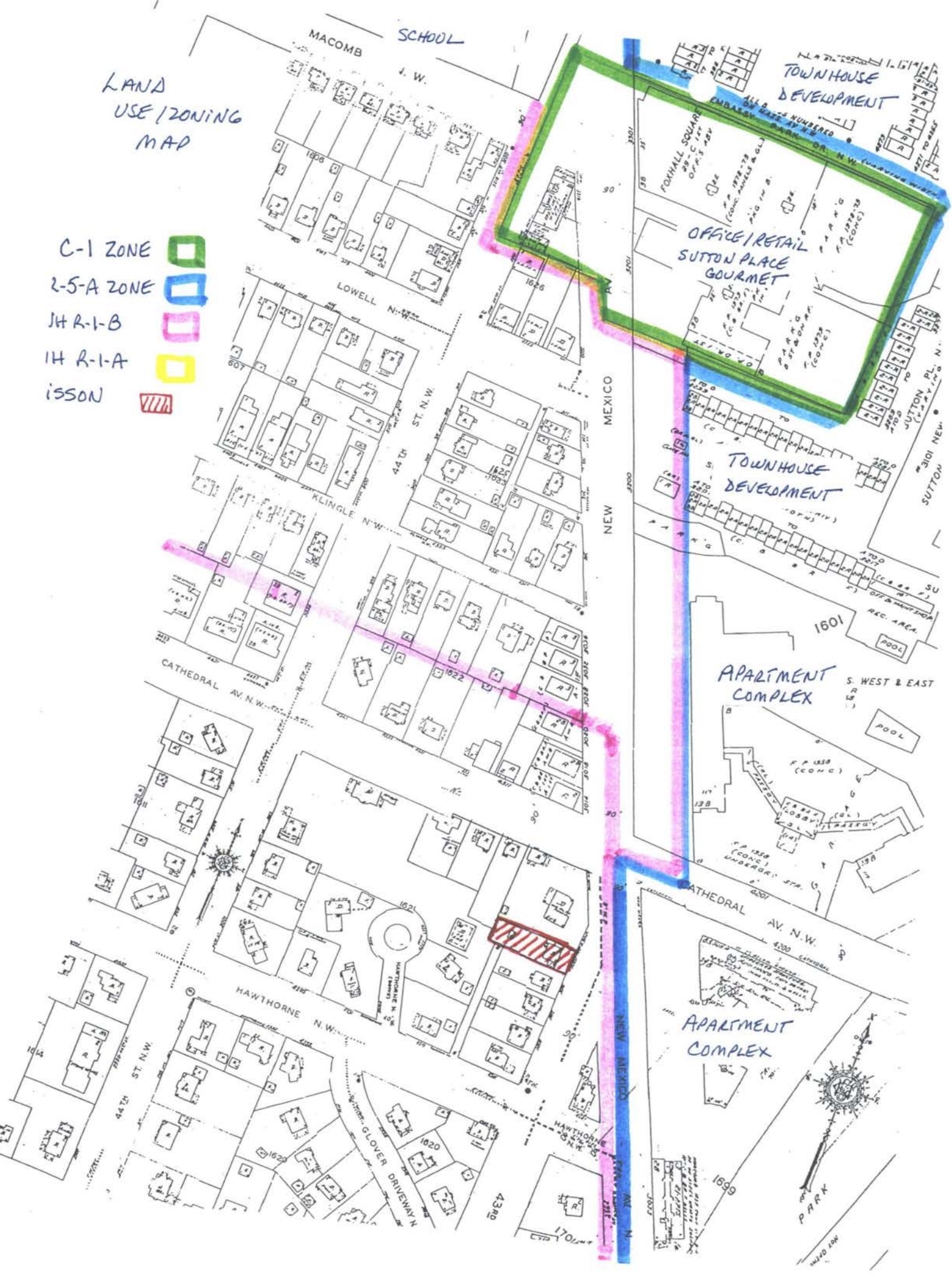
2 car garage in rear yard



Another view of garage in Sisson yard



Neighbor's 2 car garage w/ access from alley


LAND USE/ZONING MAP
C-1 ZONE
2-5-A ZONE
1H R-1-B
1H R-1-A
ISSON
SCHOOL
MACOMB
TOWNHOUSE DEVELOPMENT
OFFICE/RETAIL
SUTTON PLACE GOURMET
TOWNHOUSE DEVELOPMENT
APARTMENT COMPLEX
APARTMENT COMPLEX
LOWELL N.W.
KLINGLE N.W.
CATHEDRAL AV. N.W.
HAWTHORNE N.W.
GLOVER DRIVEWAY N.
44TH ST. N.W.
NEW MEXICO
PARK
POOL

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

February 29, 2000

MEMORANDUM

TO : Board of Zoning Adjustment

FROM : Edgar T. Nunley, Chief
Zoning Review Branch

SUBJECT : Proposed Construction of a Front Porch, Rear Addition and Accessory Garage at premises 3020 43rd Street, NW, Lot(s) 70, in Square 1621, Zoned WHOD/R-1-A

Review of plans for the proposed construction at the above subject premises indicates that the Board of Zoning Adjustment approval is required as follows:

1. Variance from the front yard setback requirements (Section 1543.4) of the Wesley Heights Overlay District (Section 3103.2).

2. Variance from the allowable percentage of lot occupancy (Section 1543.2) for a dwelling in the Wesley Heights Overlay District. (Section 3103.2)

conclude your part?

MS. DWYER: Yes, it does. Thank you very much.

CHAIRPERSON REID: Thank you.

Mr. Brown, do you have rebuttal and closing remarks?

MR. BROWN: I would like to make some brief remarks, but I would like to let Mr. Watson join me in making his.

CHAIRPERSON REID: In that regard, Mr. Brown, we will have to waive our rules to allow Mr. Watson to testify at this segment of the proceedings. If there's no objection, we will allow him to do so.

MEMBER GILREATH: No.

VICE CHAIR KING: No.

Whereupon,

GEORGE WATSON

was called as a witness, and after having first been duly sworn, was examined and testified as follows:

MR. WATSON: Good afternoon, ladies and gentlemen. I am going to try to be quite brief about this. I have been prepared --

CHAIRPERSON REID: Give your name and your address, please.

MR. WATSON: I am George Watson. I am

president of the Wesley Heights Historical Society. I am also a 30-year resident of Cathedral Avenue in Wesley Heights.

CHAIRPERSON REID: And your address would be?

MR. WATSON: 4323 Cathedral Avenue. My home is less than 300 feet from the property in question at 3020 43rd Street. I have known the Appellant, Mrs. Mildred Crary, her late husband Albert, and her son Frank, and the three Davans, two of them now deceased, who occupied the house at 3020 43rd Street, and has recently been altered. I have known them for some 27 years. I have been a frequent guest in both homes and I know the properties well.

At the outset, I should state that I am also the backyard neighbor of Mr. Angel Clarens, who sat as a member of the BZA at your 21st April meeting, when I was prepared to testify previously. It was my impression that he was no longer on the BZA, but served on the Zoning Commission. Incidently, we share a common private driveway that is analogous to the driveway in question.

My wife and I know the Clarens family very well socially, including their parents. We have been guests in their home. Nevertheless, I have not

discussed the property in question at any time with Mr. Clarens as he indicated previously. Nor have I spoken with him at all since our last meeting. My only contact with the Clarens family during that period has been two friendly greetings with his eight-year-old son Nicholas, and I have exchanged those this month.

The Wesley Heights Historical Society was established in 1989 in response to perceived over development that threatened to change the character of our neighborhood. Our members sponsored the zoning overlay that you have heard about that was adopted in 1992 by the City as a means for keeping new building or additions to existing homes to a reasonable level.

We are therefore interested in seeing to it that the existing zoning regulations as well as the Wesley Heights Zoning Overlay are followed and enforced in an even-handed manner, that also allows residents to make reasonable additions to existing homes, but does not impact negatively on the character of the neighborhood or the quality of life of the immediate neighbors. The Society supports Mrs. Crary's appeal.

In March of last year, Mrs. Crary told me about her concerns with the alterations that were

taking place at 3020. Just before she left for an extended trip to the Orient in April, she asked me to examine the property with her. We were not able to take precise measurements. It was raining, and we did not want to trespass.

But based on my personal observations on that visit, and measurements which I did take with a measuring reel, I drew a sketch of the property showing the foundations that had been poured at that time for the addition to the back of the house and the replacement garage. That allowed me to make some rough calculations based on the 6563 square footage of the already non-conforming small lot. That information was published in the then current edition of the Lusk List, i.e. the 6563 square feet.

Incidently, all properties from the north side of Cathedral Avenue south in Wesley Heights are zoned R1A, and have a minimum lot size of 7500 square feet. I told Mrs. Crary at that time that it appears that the provisions of the R1A zoning regulations and the Wesley Heights Overlay were followed so closely in respect to the footprint and the floor area ratio of the house itself, that the architect must have had them at hand.

In addition, I noted that the side yard

set-back of the existing house, at least on the north side facing Mrs. Crary's property, seemed to be non-conforming, i.e. less than eight feet. But that the non-conformity of that existing house was grandfathered because the house was constructed before the current R1A zoning was enforced.

My eyeball calculation of the south side yard setback, that is on the side south of Mrs. Crary's, not Mrs. Crary's side, was less than four feet from an irregular fence. I also noted that the garage foundation appeared to be on or beyond the property line in the private alley. The footings, based on my measurements, and remember without trespassing, I could have access to the alley and access to Mrs. Crary's property. The footings for the garage were 26 by 25 feet at that time for a total footprint of 650 square feet.

I therefore told her that there seemed to be no cause for action by the Society. That was of course before the first and second floors of the addition and the walls of the garage were built.

After that time, the nearly full width, eight foot deep roof porch in front of the house was added, which significantly increased the footprint and thus, the construction was no longer in conformity

with the Wesley Heights Overlay on the basis of either the allowed 2,000 square foot lot coverage or the 21.3 footprint -- front yard setback for the west side of 43rd Street mandated under the overlay. My rough measurement is 2,390 square feet of coverage. The plans show a 17-foot setback for a portion of the front porch.

In addition, the north wall of the new construction, that is on Mrs. Crary's side, the new construction on the back of the house is less than eight feet from the property line, something that was not clear from the poured concrete basement walls or the plans. There was a little jag in there, at least in the poured foundation.

Mr. Brown has provided details of the measurements based on the construction plans that are on file. I have listened to his presentation before ANC 3D, and offered some comments to the ANC on behalf of the Wesley Heights Historical Society at their meetings, one of which was attended by the new owner.

In addition, I might just mention that I sent a fax to Mr. Brown giving essentially those conclusions that I presented to Mrs. Crary. The date of that is April 21, 1998. It's a handwritten one. It was sent to him at his former single practitioner

address.

This is my drawing of the floor plan for the existing house, the two-story addition, and the garage footings, measurements only, based on measurements that Mildred Crary and I made over the weekend. It seems to me that the footprint is just within the overlay limit. The floor area ratio is below the limit.

The only problem seems to be the side yard setback on the north, i.e. Mildred's side, but that depends on where Mildred's line is. The house itself seems to be less than eight feet from the line on both sides, but the addition may be okay.

Thank you very much.

CHAIRPERSON REID: Thank you. Questions?

MEMBER GILREATH: I'm not sure. It sounded like to me he is saying everything is okay.

VICE CHAIR KING: That sounds like it to me too.

MR. WATSON: Let me say that was on the 21st of April.

MEMBER GILREATH: Okay.

MR. WATSON: I noted that was before the porch went up. I am only saying that at that time, the only problem I perceived was the side yard setback

between the existing -- the addition on the back of the house. Note that that side yard setback is still less than eight feet, both for the existing house with is grandfathered, and for the addition on the back of the house, and for the non-conforming porch on the front of the house.

The porch is what tips it over as far as the zoning overlay is concerned.

VICE CHAIR KING: And it also violates the distance from the front property line?

MR. WATSON: That's what I meant.

CHAIRPERSON REID: That's the setback.

MR. WATSON: But it does also increase the footprint so that that too is about 390 square feet.

MEMBER GILREATH: How precise were your measurements? You frequently say approximately and so forth. Do you feel that your measurements are definitive? Are you saying this is a pretty good estimate?

MR. WATSON: I had mechanical drawing when I was in school. I had higher mathematics in college. I am able to figure out the sides of a parallelogram. I can pace off. Mildred held one end of the measurement as I was sitting in the alley or standing in the alley. So that measurement of 26 by 25 for the

garage, I will stand by that for the footings.

Now of course the siding on the garage must hang over the footings, otherwise the footings will decay as the previous footings seem to.

MEMBER GILREATH: Okay.

VICE CHAIR KING: That's quite clear.

MR. BROWN: I would like to conclude with brief remarks. We are in a situation, and I was subject to some questioning and scrutiny early on where I was trying to put together a case based on the facts that there was a plan to build a certain project, not what was being shown on the plans.

It is clear from Mr. Sisson's testimony, one, that he had a plan from the very beginning, that included a covered porch on the front, a two-story addition, and a new garage, two-car garage in the rear. He made that decision, and this is a critical element, he made that decision not based on just simply a wish list. He had a wish list of things he wanted, and he couldn't have them all because his architect who, he may not have explained the name to Mr. Sisson, but he knew about the Wesley Heights Overlay district in R1A. Mr. Sisson made some choices.

But instead of making choices and living

with them, what he did was he made the choices and then went ahead and did what he pleased any how. It is pretty clear that he couldn't have the front porch and the garage, but he wanted the front porch so he built it anyway. That may be harsh in sound, but that's where we're at.

Mr. Sisson's counsel says that Mrs. Crary should have known that on January 29, 1998, when he got his first permit and started working. Well, that's impossible, because by his own admission, as to the front porch, he didn't start work on that, and the dates vary, but taking him at his word for a moment, until sometime in August of 1998. So there is no way Mrs. Crary, myself, could have known about that very relevant issue, which in the scheme of choices in life, is pivotal, because you can have the garage, but you can't have the front porch, the covered front porch.

To say that she knew in January of 1998, but by the way it wasn't on the plans until August of 1998, and oh by the way, that was wrong too, and I got around to correcting it in October of 1998, but geez we were already done then. This, whether you are talking about the facts or difficulty of applying the law, this body and the whole purpose of our exercise

today is the integrity and enforcement of zoning regulations.

Laches, equitable estoppel, and timeliness are to give protections to people. But you don't get them for free. You have to earn them. In this case, it's pretty clear that Mr. Sisson didn't earn his protections. That he has gone about in a pattern and practice. In fairness to Mr. Sisson, he may not -- in some of these things he was directly hands-on involved. He made the decisions, but he hired the people that acted as his agent, and he is responsible.

So he wants the protections without having fulfilled the responsibility. We have got a situation that's very difficult because we have got five permits, three of which are clearly remedial, one of which Mr. Sisson says he didn't get it right then, and so he had to have another one.

There are questions about the existing permits and what was actually being done. So the timeliness issue falls, crumbles on an individual basis of the permits because the flaws with each one, and the clear pattern and practice that he has admitted what he was doing.

So without belaboring it any further, I would leave it at that. There is enough legal

argument in the briefs. I think you have had a fairly clear finally understanding of the facts. So I'll take any last questions.

VICE CHAIR KING: Yes. If you succeed in your appeal, you want him to take the roof off the porch? Is that what you want? That appears to be the only thing that violates.

MR. BROWN: Well, no --

VICE CHAIR KING: I mean accumulation of all the things that if he removed the roof from the porch, he would not be in violation of the Wesley Heights Overlay District. Is that correct? I mean Mr. Watson has essentially attested to that.

MR. BROWN: Yes, as to that element. There are plenty of other issues that have been raised by the Zoning Administrator.

The garage is an issue, not just strictly as a zoning matter, but the implications of the use of the alley and the property.

So the goal has always been --

VICE CHAIR KING: Well, we have asked Ms. Dwyer and Mr. Sisson to file the easement as part of the record, and we will receive that before we make our final decision. So you know, if your client doesn't enjoy the benefits of an easement, I am afraid

there is no redress you can come to us for under any circumstances with regard to that.

MR. BROWN: I understand. But compliance. And also to Mrs. Crary it's very important that she was left out. These were issues that should have come and she participated in, and she didn't. She was left out. To participate, she had to do this at great expense.

Do I know whether she would pick the garage or the front --

VICE CHAIR KING: I know what she would pick, but I mean what we have heard from your own friend, an expert, Mr. Watson, is that the roof off the front porch would satisfy the Wesley Heights Overlay District. Right?

MR. BROWN: That's right. If Mr. Sisson were to agree to remove the roof today, we could probably -- that would moot some of the appeal.

As you can see, there are a whole host of issues. The garage as built, as Mr. Nunley has indicated, and I'm sorry he is no longer here, may in fact not be in compliance with the access provisions.

CHAIRPERSON REID: Mr. Brown, let me ask you something in regard to the resolution of this. Mrs. King prefaced her questioning with asking you

what in fact does Mrs. Crary -- what would she like? What is the purpose of her bringing this appeal, given the fact that there is some question as to the timeliness of the filing of the appeal in regard to laches or estoppel, and that there has been some discussion about some settlement, some reconciliation of this particular issue. The buildings have been built, the addition is there. The garage is there.

There has been some discussion that somehow they broke down as a result of Mrs. Crary not being satisfied. What was the nature? In the agreement, Mr. Sisson proffered to her some type of resolution in regard to the water runoff, and with regard to the access to her property through the rear, which was not satisfactory. What was the nature of it as far as what Mr. Sisson has testified that there was some discussion about some compensation? I need to understand how that came about as a resolution to this particular issue.

MS. PRUITT-WILLIAMS: While I understand this is interesting information, that has no bearing on the case and the appeal. You need to make your decision on what's on the record. That was not on the record, nor is it something that was discussed. In fact, Mr. Clarens brought that whole point up and cut

that testimony short. I just would like to remind you of that.

MR. BROWN: Can I just interject? I think your point is well taken.

CHAIRPERSON REID: Okay. Well, let me rephrase the question. What does -- back to Mrs. King's initial question. What is it, what would she like to see?

MR. BROWN: It falls broadly under, I guess, peaceful coexistence, but measured in two ways. One, the concept of compliance with the zoning regulations. Now that doesn't necessarily mean exact compliance, strict compliance. There may be some flexibility. But again, it's got to be compliance more so than we have seen to date.

Also, so that hand in hand with the second issue, that Mrs. Crary, who is by far the innocent here. Her only crime is she bought this house 20 or 30 years ago and lived there. So that she not suffer any prejudice. Quite frankly, there are monetary issues. There are quality of life issues. There are physical property issues. I think by letter of laying those out is in the file I believe. There is certainly a reasonableness from her approach, but it's got to work. It has got to be a two-way street.

Mr. Sisson stands to make a fair amount of money in this property. I mean that's what this is about. That is fine. But he is doing so to a large extent at Mrs. Crary's expense. So that's a fact of life. She shouldn't be prejudiced by his money-making enterprise.

MS. DWYER: Madam Chair, I would just object to that last statement. I think that goes far beyond the issues that are before you. It is inflammatory to suggest that Mr. Sisson is going through this process to make money off of Mrs. Crary.

CHAIRPERSON REID: Sustained. Ms. Pruitt-Williams had earlier objected to the question that I had about the monetary aspect of it, so I eradicated that so we could just deal with the zoning issues that we have before us. In conclusion basically, do I understand you to say that Mrs. Crary would like to have Mr. Sisson comply with the zoning regulations?

MR. BROWN: Yes.

CHAIRPERSON REID: Now that's a little nebulous, because on the one hand you say not strictly, but if not strictly, Mrs. King suggested that perhaps you would want him to remove the roof on the porch. But I am not clear, we're still not clear as to what in fact it is that she would like to see

happen.

MS. PRUITT-WILLIAMS: Excuse me, Madam Chair, I would also like to interject. While it is nice to know what she wants, the decision still should not be based on what she wants. It should be based on the facts of how the permits were issued, the sequencing, and notice and all of that.

What Mrs. Crary or Sisson gets out of this, or what they would like to see, while nice and interesting, is not germane to your decision that you have to make.

CHAIRPERSON REID: I disagree. I think it is because unless I understand what it is that we're doing here, I have no basis for which to make the decision, other than going strictly by the zoning regulations. But if that were the case, we wouldn't even be here. So I need to understand what it is.

MS. PRUITT-WILLIAMS: Madam Chair, that's what the decision should be made on strictly. That is what the decision should be made on.

CHAIRPERSON REID: I need to understand what it is, you know, typically at the end of a case, the Applicant or the Appellant will take a position. That is all I wanted to hear.

MR. BROWN: As position as to?

CHAIRPERSON REID: As to what the basis of your case is.

MR. BROWN: I mean as far as -- I mean I think the appeal has been laid out as to the individual permits as a bundle, which I think is critical.

I mean one of the things, and it's in the context of the settlement discussions that we have attempted to have, is that I have asked Mr. Sisson for an as-built survey of the property, because again, when we start talking about peaceful coexistence, we have got to know where we live. I am not able to do that. His survey is less than clear. And so we can find out and work out those issues.

I can't advise my client about the impacts on her, whether she has rights, not rights, she's lost them, definitively until we do that. There may be a way, and again, this is without her -- there may be a way based on solid information, an as-built survey, to have a peaceful coexistence where we're not ripping things down. But I can't make that decision now because I don't know.

I mean everything I have seen here and the evidence I have presented shows substantial violations. But maybe some violations are worse than

others, and some can be lived with and some can't. I don't have any idea if I said, "Mrs. Crary, you pick. You can have the garage gone or the front porch." I mean it's either or. I have no idea how she would decide that.

MS. DWYER: Madam Chair, I would just object to this whole discussion about settlement discussions. I mean either the case, the appeal is granted or it's denied. It's either dismiss on timeliness, which means you have no jurisdiction, and whatever decision you make, then these two neighbors are going to work out whatever their agreement is in the future to coexist peacefully at this property. I don't think that should be part of this.

CHAIRPERSON REID: Sustained.

MEMBER GILREATH: Mr. Brown, you seem to imply, in fact you indicate, Mr. Sisson really even though we don't have external evidence, but implicitly you are assuming that he had this planned and so forth, and he was going to go through all this, all these machinations and so forth. It is incredible to me that he would make a plan like that and go through all of these different zonings R-1-B, 5-1-A. If he had had a scheme whereby he says I'm going to try to run around zoning regulations, he would have been much

more systematic. This is so disjointed and haphazardous to me. It suggests that this was very sloppy and maybe he wasn't experienced in some of his filling out a complete plan and so forth for his changes.

But I really have a real problem. I'm not saying that zoning violations haven't occurred. But to say that he had an ulterior motive that was less than commendable, I am having real problems with that.

MR. BROWN: I mean ultimately that's your decision. I mean I think he stated very clearly that he had one objective, where he wanted A, B, C, which is shown on the first plan, but he didn't do A, B, and C. He did something less than that. He had professionals. If I want to do A, B, and C, then I do A, B, and C, is the way I would operate.

Why we have five permits is not because Mr. Sisson in my view set about and his architect said I need five separate permits. I think it's for a purpose. Three of those permits are remedial. There is no other reason than to make good something that wasn't right as a result of firmative acts of omission or commission by him.

MEMBER GILREATH: You believe it's unreasonable if you get a permit to put an addition on

this garage, and discover that the foundation or the supports, what have you, are either termite damaged or eroded, and the architect comes to him and says really it's absurd to go along with this. We have got to have some kind of remediation, and he goes to get a permit to remedy that?

MR. BROWN: But you have to take it in the context of the second permit and what was there and not there. Then the fact that, all right, it's the best I can tell 1926 garage. It was old. But when you, as he's indicated, he had an early on respect for the need for permits. I assume his contractors were licensed and had the same. When you find out that your site conditions are different, you stop. You stop and you go get the proper permit.

VICE CHAIR KING: Which would have involved his coming before the BZA to get a variance, that's all.

CHAIRPERSON REID: If he had been so directed by the Zoning Administrator. He wasn't.

MEMBER GILREATH: I agree.

CHAIRPERSON REID: That's where it gets to be very complicated.

MR. BROWN: But then you get into a situation that he did something. Number one, he

demolished a garage that was existing without permission, which is a separate permit, which is probably not within this Board's purview. Then he affirmatively went to build something he didn't have a permit for otherwise. To somehow say that he gets brownie points, for lack of a better term, for coming in and getting a permit to make that right because he got a stop work order, I think is bending over backwards, and not the way the process should work.

MEMBER GILREATH: Well, I think some of the arguments, I mean you have so much activity, I must admit, I have difficulty with your theory. I haven't made a final decision, but I don't feel that there was an ulterior motive. There were some other factors involved whether or not zoning was fully complied with and so forth. That's something we still have to assess and determine. But I must admit, I can't accept your conspiracy theory.

MR. BROWN: It raises difficult questions, but first, and I keep coming back to this, it's important, because it's Mr. Sisson, what was in his mind. I have tried to impute --

MS. DWYER: Excuse me. Can Mr. Sisson then testify as to what was in his mind if we are going to continue on?

MR. BROWN: Well then we get back to revising it.

MS. DWYER: He is the best one to know I think.

VICE CHAIR KING: I think you should sustain the objection.

CHAIRPERSON REID: Mrs. King, did you have any further comments?

VICE CHAIR KING: No comments. No questions. Let's go home.

MR. BROWN: Have a nice holiday weekend.

CHAIRPERSON REID: Same to you. So this will then conclude today's hearing. We will try to be able to have deliberations prior to our hearing on --

MR. BROWN: Third Wednesday of June?

MS. PRUITT-WILLIAMS: I thought we were going to check with Mr. Clarens. We'll try to --

CHAIRPERSON REID: I said we'll try to.

MS. PRUITT-WILLIAMS: Right. And then we'll confirm.

CHAIRPERSON REID: We'll apprise you.

One at a time.

MS. DWYER: The easement.

CHAIRPERSON REID: The easement.

MR. BROWN: Was there a request from Mr.

Sisson for his copies of his surveyor's plats, if he has them.

MS. PRUITT-WILLIAMS: Any that he has, if he has them. At that point, he was unsure of what he had. But if he has them, to submit them to us.

CHAIRPERSON REID: Okay. Thank you.

(Whereupon, at 4:30 p.m., the proceedings were concluded.)

CERTIFICATE

This is to certify that the foregoing transcript in the matter of: Special Public Hearing

Before: D.C. Board of Zoning Adjustment

Date: May 26, 1999

Place: Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.



GOVERNMENT OF THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

+ + + + +

WEDNESDAY
16 June 1999

The public meeting convened in Room 220 441 4th Street, NW, Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Sheila Cross Reid, Chairperson, presiding.

Board of Zoning Adjustment Members Present:

Sheila Cross Reid, Chairperson
Betty King, Vice Chairperson
Jerry Gilreath, Board Member
Angel F. Clarens, Commissioner

Staff Present:

Sheri Pruitt-Williams, Interim Director, Office of Zoning
John Nyarku, Office of Zoning
Beverly Bailey, Office of Zoning
Alberto Bastida, Office of Planning
Janice Skipper, Esq., Office of Corporation Counsel

A-G-E-N-D-A

Special Public Meeting, the Appeal of Mildred Rodgers Crary.

P-R-O-C-E-E-D-I-N-G-S

10:23 a.m.

MS. REID: The meeting will now come to order. This is the June 16 special meeting of the Board of Zoning Adjustment. Pardon for the delay. We met in executive sessions first and we will now proceed.

MS. PRUITT: Good morning, Madam Chair. Today before you you have the appeal of Mildred Rodgers Crary pursuant to 11 DCMR 3105, from the administrative decision of the Zoning Administrator to issue the following building permits to allow various alterations and additions to the subject property:

Permit No. B413166, dated January 29, 1998, for a "Two-story addition on the rear"; Permit No. 413424, dated February 9, 1998, for an "Addition to a garage, length 20 feet, height 14 feet"; and Permit No. B417814, dated August 17, 1998, for "Repair of existing roof, roof in place, no structural change"; Permit No. B415675, dated May 27, 1998, for a "New garage to be constructed on the same location as the previous garage"; and Permit No. B419108, dated October 5, 1998, to "Build a new porch roof as per plans."

The appellant also challenges the R-1-B

zoning classification attributed to the property by the Zoning Administrator. These permits were issued for property located at 3020 43rd Street, NW (Square 1621, Lot 810).

The case is now before you. You may proceed.

MS. REID: Okay. Is there a motion?

MR. CLARENS: Well, for the purpose of finalizing our discussion in executive session, I will move to grant the appeal.

MS. KING: I second that motion.

MR. CLARENS: In terms of discussion of the decision of the motion, and as a summary of our more extensive discussion, the question before us is whether the District erred in granting each of the permits and the cumulative effect of the five permits which have produced the present structure which the Board should find is noncompliant with the regulations.

A building has been built and additions have been made to a building that in its present configuration does not comply with the R-1-A Wesley Heights Overlay District zoning regulations.

That has been the result of a number of permits issued over a period of approximately less

than a year, the total effect of which has been to produce this noncompliant. The District has erred in the issuance of these permits and, therefore, the appeal should be granted. That is the issue of the substance of the case.

In terms of the request for dismissal on the basis of timeliness, because of the nature of the way that the permits were granted and applied for and the incorrectness in the content of the applications that were submitted to the District on the basis of which the permits were issued.

It is reasonable that it was not clear to the appellant the full extent of the entire project which is what creates the nonconformity until later or late in the process of construction. It is within that framework that we find that reasonable timeliness has been complied with and, therefore, laches do not apply to this. The Board has the authority to make a finding in this case.

Do you want to add anything, Betty?

MS. KING: I was just wondering, Mr. Clarens, if we needed to because there is also before us the motion to dismiss the inference of your motion, but perhaps it should be explicit that we dismiss the motion to dismiss and grant the appeal.

MR. CLARENS: I can change the order. In talking to a corporation counsel, they suggested that we start with the substance and go to the issue of dismissal.

MS. KING: Oh, okay.

MR. CLARENS: I'm not sure what is the appropriate procedure, but if we want to do the motion on dismissal and deny the motion of dismissal first on the issues and then move on to deal with the issue of the substance of the case, that seems to me a more reasonable way of doing it, but God knows how lawyers do it. Which either way is the correct way of doing it, I would say that is what we should do and maybe we should look to the corporation counsel for guidance on that issue.

MS. KING: It's fine. Mary says it's fine.

MR. CLARENS: To do it first, the motion to deny, the motion to dismiss?

MS. KING: Dismiss the motion?

MR. CLARENS: Deny the motion to dismiss. Okay. So we first do that?

MS. REID: Um-hum. Let's agree to that.

MR. CLARENS: Okay. I'm not going to reargue the case. I'm just simply going to --

MS. KING: And I will second the motion to deny.

MS. REID: All in favor?

ALL: Aye.

MS. REID: Opposed?

(No Response.)

MS. PRUITT: The staff will record the vote is four to zero to dismiss -- the motion to deny.

MR. CLARENS: Deny the motion to dismiss. The motion made by Mr. Clarens and seconded by Mrs. King.

MS. KING: Now we have the motion previously made by Mr. Clarens and seconded by me. I absolutely concur with everything he said and I don't have to repeat it.

MS. REID: I thought that this was a very difficult case and trying to establish the basis for the pulling of the appeal or not to. However, in looking at the merits of the case and discussion with my colleagues, it became completely evident that unfortunately our charge is to interpret and defend the regulations.

Based on what was presented to us, it appears that obviously there's no denying there was errors made on the part of DCRA in granting the

permit. More importantly, when you go to looking at the basis for the actual issue was rather nebulous and confusing and, in some instances, incomplete. Based on that, I would have to concur with Mr. Clarens and Ms. King.

MR. GILREATH: Was this the second motion?

MS. REID: Yeah.

MR. GILREATH: I would like to say, first of all, I did not see any kind of ill or deceptive intent on the part of the intervenor in this case. There's no question the District, in my judgment, made horrific mistakes. Generally speaking the citizens of this city and any community have a right to rely on reasonable competence of their organizations and so forth. I have misgivings on that, but dealing with it strictly on a technical level I will support the motion.

As I understand it, the intervenor will have recourse to subsequently apply for a variance. That's up to him what he wants to do. Even though it's not a happy case, I support this motion.

MS. REID: Any further discussion? All in favor?

ALL: Aye.

MS. REID: Opposed?

(No Response.)

MS. PRUITT: The staff will record the vote as four to zero to grant the appeal, the motion made by Mr. Clarens and seconded by Mrs. King.

MS. REID: That will then conclude the special meeting for June 16, Board of Zoning Adjustment.

(Whereupon, the meeting was concluded at 10:33 a.m.)

CERTIFICATE

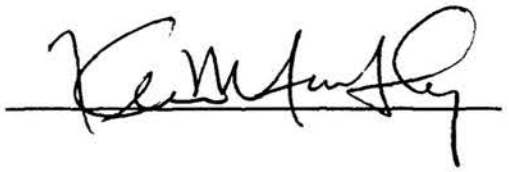
This is to certify that the foregoing transcript in the matter of: Special Public Hearing

Before: D.C. Board of Zoning Adjustment

Date: June 16, 1999

Place: Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.



GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16405 of Mildred Rodgers Crary, pursuant to 11 DCMR § 3105 (new 3100.2), from the administrative decision of the Zoning Administrator to issue the following building permits allowing various alterations and additions to the subject property: Permit No. B413166, dated January 29, 1998, for a two-story addition on the rear; Permit No. B413424, dated February 9, 1998, for an addition to a garage, length 20 feet, width 20 feet, height 14 feet; Permit No. B415675 dated May 27, 1998, for a new garage to be located on the same spot as previous garage, length 20 feet, width 10 feet 9 inches, height 8 feet; Permit No. B417814, dated August 17, 1998, for repair of existing roof, roof in place, no structural change; and Permit No. B419108, dated October 5, 1998, to build new porch roof as per plans. The Appellant also challenges the R-1-B zoning classification attributed to the property by the Zoning Administrator. These permits were issued for property located at premises 3020 43rd Street, N.W. (Square 1621, Lot 810).

HEARING DATES: December 16, 1998, February 17, 1999, April 21, 1999, May 5, 1999, May 19, 1999 and May 26, 1999

DECISION DATE: June 16, 1999

ORDER

PRELIMINARY AND PROCEDURAL MATTERS:

This Appeal was brought by Mildred R. Crary, the owner of property abutting the subject property. At the Board's December 16, 1998 public hearing, Charles Sisson, owner of the subject property, requested Intervenor status and postponement of the hearing because of a previously scheduled overseas trip. The Board granted both requests.

At the hearing held February 17, 1999, the Appellant sought to amend the Appeal to include two building permits that were discovered after the Appeal, which initially challenged three permits, was filed. The Board determined that the two newly discovered building permits were germane and directed readvertisement of the Appeal to include all five permits. Also at the February 17, 1999 hearing, the Intervenor requested dismissal of the Appeal because it was not timely filed and was also barred by the doctrines of laches and estoppel. The Board denied

Intervenor's estoppel claim on May 5, 1999,[1] but determined that the facts of the case must be heard before addressing the issues of timeliness and laches.

The Appeal was heard on May 26, 1999. Testimony was received from Mr. Edgar Nunley, chief of the Zoning Review Branch in the Department of Consumer and Regulatory Affairs, Advisory Neighborhood Commission ("ANC") 3D, and Mr. George Watson, president of the Wesley Heights Historical Society, in addition to the Appellant and the Intervenor.

FINDINGS OF FACT

1. The subject property is located at 3020 43rd Street, N.W. (Square 1621, Lot 810) in the Wesley Heights neighborhood of Ward 3. The streets that surround the property are Cathedral Avenue to the north, New Mexico Avenue and 43rd Street to the east, Hawthorne Street to the south, and 44th Street to the west.

2. The property contains 6,563 square feet of land area and is developed with a single-family, detached dwelling that was constructed in 1926. The building contains a gross floor area of 2,876 square feet.

3. The subject property is zoned WHOD/R-1-A. The Wesley Heights Overlay District (WHOD) was established to preserve and enhance the low-density character of Wesley Heights by regulating construction and alteration of residential and other buildings in the area. 11 DCMR § 1541.1. The purposes of the WHOD are: (1) to preserve in general the current density of the neighborhood; (2) to allow reasonable opportunities for owners to expand their dwellings; and (3) to preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood. 11 DCMR § 1541.3.

4. The WHOD zoning requirements apply in combination with the requirements of the R-1-A District. 11 DCMR § 1542.1. The zoning requirements applicable to the Intervenor's property are summarized in the following chart:

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[1] The elements of estoppel are: (1) expensive and permanent improvements, (2) made in good faith, (3) in justifiable and reasonable reliance upon, (4) affirmative acts of the District government, (5) without notice that the improvements might violate the zoning regulations, and (6) equities that strongly favor the party asserting the defense. *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978). In denying Intervenor's estoppel claim, the Board relied upon the principle that an innocent third party properly cannot be estopped from challenging the government's mistaken issuance of a permit, even when there has been reliance by the permittee. The Board has previously held that estoppel cannot bar a neighboring property owner (as distinct from the District government) from asserting rights under the zoning regulations. The Court of Appeals has noted that the Board has adopted this position in *Beins v. District of Columbia Board of Zoning Adjustment*, 572 A.2d 122, 125 (D.C. 1990.) This position has been accepted in other jurisdictions as well. *See Lithe v. Hidalgo*, 536 S.W.2n 898, 901-02 (Mo.App. 1976) ("unconscionable to hold that aggrieved private parties could be prejudiced by the conduct of city officials with whom they are not in privity"); *Boyd v. Donelon*, 193 So.2d 291, 298 (La. App. 1966) (citations omitted) ("neighboring property owners . . . are not estopped by any permission or representations made by the municipal employees"): *Pascale v. Board of Zoning Appeals of City of New Haven*, 186 A.2d 377, 380 (1962) (assuming that a city may be estopped from enforcing a regulation because it issued a building permit, such estoppel will not defeat the rights of an aggrieved property owner).

Zoning Requirements	R-1-A	WHOD/R-1-A	Site
Minimum Lot Area	7,500 s.f.	7,500 s.f.	6,563 s.f. (existing)
Minimum Lot Width	75 ft.	75 ft.	53 ft. (existing)
Lot Occupancy	40%	2,000 s.f., where lot size is between 5,000 s.f. and 6,667 s.f.	2,145 s.f. (existing)
Floor Area Ratio	None Prescribed	Gross floor area shall not exceed the sum of 2,000 s.f. plus 40% of lot area, with exceptions for open porches and garages	2,876 s.f.
Minimum Front Yard	None Prescribed	Equal to or greater than the average setback of all structures on the same side of the street in the same block; 21 ft. in this case	25 ft. (prior to addition); 17 ft. (after porch construction)
Minimum Rear Yard	25 ft.	25 ft.	N.A.
Minimum Side Yard	8 ft. each	8 ft. each	6 ft. each (existing)
Off–street parking	One space, accessible directly from improved street or alley or via a graded and unobstructed private driveway	One space, accessible directly from improved street or alley or via a graded and unobstructed private driveway	

5. The subject property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum.

6. The Appeal challenges five permits issued between January and October 1998 for construction at the subject property, whose main elements were a covered front porch, a rear two-story addition, and a new garage. The five permits at issue are:

(1) Building Permit No. B413166, dated January 29, 1998, for a two-story addition on the rear;
(2) Building Permit No. B413424, dated February 9, 1998, for an addition to a garage, length 20 feet, width 20 feet, height 14 feet;
(3) Building Permit No. B415675, dated May 27, 1998, for a new garage to be located on the same spot as previous garage – length 20 feet, width 10 feet 9 inches, height 8 feet;
(4) Building Permit No. B417814, dated August 17, 1998, for repair of existing roof, roof in place, no structural change;
(5) Building Permit No. B419108, dated October 5, 1998, to build new porch roof as per plans.

7. The first permit, pertaining to the rear addition, incorrectly identified the zoning classification applicable to the subject property as R-1-B instead of WHOD/R-1-A.

8. Plans submitted by the Intervenor as part of his application for the first permit did not reflect all of the construction work that the Intervenor planned to perform at the site. The Intervenor's project was developed in a piecemeal manner and the various applications were often incomplete or otherwise misleading in that they did not always reflect the Intervenor's plans for the garage, rear addition, and front porch consistently and accurately.

9. The second permit, pertaining to an addition to the existing garage, also applied the wrong zoning classification, this time R-1-A instead of WHOD/R-1-A.

10. Although the second permit authorized an addition to an existing garage, the garage was demolished without authorization, purportedly because the Intervenor's contractor discovered that the footings to the existing garage were decayed.

11. A new garage was constructed on the subject property that was larger than the approved garage addition. The second permit approved a garage with dimensions of 20 feet in length and 14 feet in height, but the dimensions of the new garage were approximately 23 feet long, 21 feet wide, and 16 feet high.

12. The third permit, for a new garage in the same location as the previous garage, was issued after the new garage was already substantially completed. The large size of the new garage also exceeded the dimensions allowed by the third building permit.

13. The Zoning Regulations require that off-street parking spaces must be accessible at all times directly from improved streets or alleys or accessible from improved streets and alleys via graded and unobstructed private driveways. 11 DCMR § 2117.4.

14. A driveway providing access to required parking spaces must meet certain standards, including that a driveway serving more than one parking space must be at least 12 feet wide if designed for one-way circulation or at least 14 feet wide if designed for two-way circulation. 11 DCMR § 2117.8.

15. A private easement extends from Hawthorne Street, along the rear of four neighboring properties, and terminates at the Intervenor's property. Following construction of the new garage, the easement is eight feet wide.

16. The Intervenor's new garage is accessible only by means of the private easement.

17. The fourth permit, pertaining to roof repair, again applied the wrong zoning classification, in this instance R-1-B instead of WHOD/R-1-A.

18. The fourth permit was issued for repairs to an existing roof over the porch but, at the time the permit was issued, the porch was open and did not have a roof. The Intervenor was instructed to obtain a new building permit after DCRA discovered that there was no roof in place.

19. The fifth building permit authorized construction of a new porch roof.

CONCLUSIONS OF LAW AND OPINION:

An appeal to the Board may be taken by any person aggrieved by any decision of DCRA granting a building permit, or any other administrative decision based on the Zoning Regulations. D.C. Code § 5-424; 11 DCMR § 3202.2. The Board's powers with regard to appeals include to decide allegations of error in any decision made by DCRA in carrying out or enforcement of any zoning regulation. D.C. Code § 5-424.

The Zoning Regulations provide that an appeal must be "timely." 11 DCMR § 3315.2. Because the Board's rules do not adopt a specific time limit on appeals, a standard of reasonableness is applicable to determine whether an appeal is timely. *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). In applying the reasonableness standard, courts have consistently held that the time for filing an appeal commences when the party appealing is chargeable with notice or knowledge of the decision complained of. *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 636 (D.C. 1985). *See also, e.g., Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

The Board concludes that the Appeal was timely with respect to all five permits. The Intervenor submitted five separate applications for building permits that all related to work performed on a single property. Because of the cumulative, piecemeal nature of the applications, the full extent of the Intervenor's construction project could not be discerned as each individual permit was issued and therefore they must be considered as a whole. The Appellant has alleged violations of the zoning regulations, such as failure to comply with lot occupancy and setback requirements, that pertain to the full extent of the work performed on the Intervenor's property, rather than merely concerning the individual components of the project. The Board is not persuaded that the first permit put the Appellant on notice of all the work to be done on the Intervenor's property or, therefore, that the work allegedly violated the Zoning Regulations.

Other factors also support our conclusion that the Appellant was not "chargeable with notice" as soon as the first permit was issued. The Intervenor's various permit applications contained errors of omission or were otherwise misleading in that they did not reflect all existing and planned improvements accurately and consistently. For example, the garage was not depicted accurately on the first application, concerning the rear addition, and the fourth application indicated that the front porch was not open but had an existing roof. Because of these errors, zoning violations arising from the failure to comply with lot occupancy and setback requirements of the Wesley Heights overlay, in particular, were not apparent until the work was substantially completed on the Intervenor's property. Moreover, some work was performed beyond the scope of the permit, as with the demolition of the existing garage and the construction of a new garage larger than the dimensions specified on the permit, and two of the permits (the third and fifth) were issued for work that was undertaken prior to receiving the permits. Therefore, the Board concludes that the Appellant was not chargeable with notice of the entire scope of work performed at the Intervenor's property until all of the permits were issued.[2]

The Intervenor argues that the Appeal is barred by laches. "Laches is a species of estoppel, being defined as the omission to assert a right for an unreasonable and unsatisfactorily explained length of time under circumstances prejudicial to the party asserting laches." *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C. 1978), *quoting* 3 RATHKOPF, LAW OF ZONING AND PLANNING, at 67-1 (3d ed. 1972). "Laches is the principle that 'equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *American University Park Citizens Association v. Burka*, 400 A.2d 737, 740 (D.C. 1979), *quoting Russell v. Todd*, 309 U.S. 280, 287, 84 L. Ed. 754, 60 S. Ct. 527 (1940). The two elements of laches are the unreasonableness of the delay and the resulting prejudice to the party asserting the defense. *See, e.g., American University Park Citizens Association v. Burka*, 400 A.2d at 741. The "entire course of events," not merely the period from the zoning official's decision to the filing of an appeal, is relevant when determining the validity of a laches defense. *Goto v. District of Columbia Board of Zoning Adjustment,* 423 A.2d at 925, n.16.

The Board finds no merit in the Intervenor's argument. As discussed above with respect to timeliness, the Appellant did not unreasonably delay the filing of the Appeal. Rather, the Appeal was filed as soon as Appellant realized the entire scope of work being performed at the Intervenor's property. The Board concludes that the Appellant did not omit to assert her right to appeal for an unreasonable and unsatisfactorily explained length of time. Any delay in filing the appeal was not unreasonable but resulted from the fact that the Intervenor applied for separate building permits for each component of the construction on his property. Thus, there was no "unexcused delay." Accordingly, because the Intervenor failed to demonstrate the first element of laches – an unreasonable delay in bringing the appeal – the Board denies Intervenor's motion to dismiss the Appeal on grounds of laches.

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[2] The fifth permit, which was issued after the appeal was filed, authorized construction of a new porch roof. That permit was purportedly issued to correct the fourth permit, which had authorized repairs to an existing porch roof, but in fact no roof was in existence when the permit was issued.

Turning to the merits of the Appeal, the five permits issued to the Intervenor violate the zoning regulations in several respects. The applicable zone district was misidentified on three of the five permits. Twice, the underlying zone was incorrectly identified as R-1-B; however, because of the similarity between R-1-A and R-1-B requirements that mistake likely had no substantive effect. A more significant oversight was the failure to recognize that the Intervenor's property is located within the Wesley Heights Overlay District. Thus, the more stringent WHOD provisions were not applied, and permits were issued that purported to allow work that does not comply with relevant lot occupancy and setback requirements. This oversight was compounded by the fact that the full scope of the work planned for the Intervenor's property was not depicted consistently and accurately on all permit applications, thus precluding an assessment of each individual permit application within the context of all existing and planned improvements.

Moreover, the Intervenor's property is nonconforming because its lot area, lot width, and setbacks are smaller than the minimums prescribed in the WHOD/R-1-A zone, and because its lot occupancy is higher than the prescribed maximum. Structural alterations to nonconforming structures are permitted. 11 DCMR § 2001.2. However, enlargements or additions made to nonconforming structures must comply with certain conditions, including that the structure must conform to percentage of lot occupancy requirements, and the addition or enlargement itself must not increase or extend any existing, nonconforming aspect of the structure, or create any new nonconformity of structure and addition combined. 11 DCMR § 2001.3. The Board concludes that the work performed on the Intervenor's property increased its nonconforming aspect with respect to setbacks and lot occupancy.

As Mr. Nunley acknowledged at the public hearing, the permits for the garage should not have been issued if the garage did not provide access in conformance with the zoning regulations. The two-car garage is accessible only through an easement that, at a width of eight feet, is narrower than the minimum width of 14 feet specified in the zoning regulations for a driveway with two-way circulation serving a parking space. 11 DCMR § 2117.8.

The Board concludes that the Zoning Administrator erred in issuing the five building permits to the Intervenor. The Zoning Administrator's decisions were not based on complete and accurate information about the Intervenor's property, reflecting all existing and planned improvements. The Zoning Administrator also failed to apply the correct zoning classification, which resulted in the issuance of permits that did not conform to applicable zoning provisions, especially the Wesley Heights Overlay District, in several material respects. The violations stemming from erroneously issued permits were compounded in this case by the fact that some work, with respect to the garage and front porch, was not performed strictly in compliance with the permits.

The motion to **DISMISS** the Appeal based on timeliness and laches is **DENIED.**

VOTE: 4-0 (Angel Clarens, Betty King, Sheila Cross Reid and Jerry Gilreath to deny.)

The Zoning Administrator erred in issuing Building Permit Nos. B413166, B413424, B415675, B417814 and B419108. Therefore, it is hereby **ORDERED** that the Appeal be **GRANTED.**

VOTE: 4-0 (Angel Clarens, Betty King, Sheila Cross Reid and Jerry Gilreath to grant.)

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

ATTESTED BY: _____
JERRILY R. KRESS
DIRECTOR

FINAL DATE OF ORDER: DEC 28 1999

UNDER 11 DCMR 3103.1 "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPEAL NO. 16405

As Director of the Office of Zoning, I hereby certify and attest that on DEC 28 1999 a copy of the order entered on that date in this matter was mailed first class, postage prepaid, to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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ATTESTED BY: _____
JERRILY R. KRESS, FAIA
DIRECTOR