GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 16521 of Charles A. Sisson, pursuant to 11 DCMR § 3103.2, for a variance from the allowable percentage of lot occupancy of a dwelling under § 1543.2, the front yard setback requirements of § 1543.4, and the nonconforming structure requirements of § 2001.3, 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).

HEARING DATES: December 8, 1999; May 3, 2000; May 16, 2000; May 24, 2000; June 20, 2000; October 17, 2000; and December 5, 2000

DECISION DATES: January 2, 2001; July 3, 2001; July 31, 2001; November 6, 2001; December 4, 2001

DECISION AND ORDER

Charles A. Sisson, the owner of Lot 70 in Square 1621, with a street address of 3020 43rd Street, N.W., is seeking after-the-fact zoning relief from the Board of Zoning Adjustment in order to retain a roof over a front porch addition to a one-family dwelling in the WHOD/R-1-A District. Mr. Sisson was represented at various stages of these proceedings by the law firm, ShawPittman. After a public hearing, the Board denied the application for the reasons stated herein.

PRELIMINARY AND PROCEDURAL MATTERS

Application. Charles A. Sisson filed an application with the Board on October 7, 1999, seeking a special exception under 11 DMCR § 223.1 and a variance from the front yard setback requirements of § 1543.4 to allow, after-the-fact, the construction of a two-story rear addition, an accessory private garage, and a front porch addition in the WHOD/R-1-A District. The zoning relief requested in the application was self-certified. The applicant filed this application following the Board's June 16, 1999, decision meeting in BZA Appeal No. 16405, at which the Board determined that the Zoning Administrator erred in approving the issuance of five building permits relating to the rear addition, garage, and porch.

BZA
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Exhibit No. 88

Board of Zoning Adjustment
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CASE NO.16521
EXHIBIT NO.88

On October 11, 2000, the Department of Consumer and Regulatory Affairs issued the applicant an after-the-fact, remedial building permit for the construction of the rear addition and garage and for the removal of the roof over the front porch.[1]

As a result of the remedial building permit, the applicant is only seeking zoning relief to retain the roof over the front porch. The Board therefore amended the application to consist of requests for area variances from the requirements of §§ 1543.2 and 1543.4, the maximum percentage of lot occupancy and minimum front yard setback requirements in the Wesley Heights Overlay District; and from the requirements of § 2001.3, which restricts additions to nonconforming structures.

Party Status. The Board granted Mildred R. Crary, an adjacent property owner and the appellant in BZA Appeal No. 16405, party status to oppose the application. Mrs. Crary is represented in these proceedings by Greenstein, DeLorme & Luchs, P.C.

Notice of Application and Notice of Hearing; Procedural History. By memoranda dated October 26, 1999, the Office of Zoning advised the Zoning Administrator; D.C. Office of Planning; and Advisory Neighborhood Commission (ANC) 3D, the ANC for the area within which the property that is the subject of the application is located, of the filing of the application.

The Board scheduled a public hearing on the application for December 8, 1999. Pursuant to 11 DCMR § 3113.13, the Office of Zoning, on October 28, 1999, mailed the applicant, the owners of all property within 200 feet of the subject property, ANC 3D, and the affected ANC Single-Member District Commissioner and Ward Councilmember notice of hearing. Notice of hearing was also published in the *D.C. Register* on October 29, 1999, at 46 DCR 8738. The applicant's affidavit of posting indicates that on November 19, 1999, a zoning poster was placed in front of the property, in plain view of the public.

On November 24, 1999, the applicant requested a continuance of the hearing pending receipt of a Zoning Administrator's memorandum confirming the required zoning relief. By letter dated December 8, 1999, the Zoning Administrator also advised the Board that it would be premature to proceed with the application until the issuance of the Board's written decision in BZA Appeal No. 16405. Mrs. Crary requested the Board to dismiss the application as premature or, alternatively, to deny the application on the grounds that the application was incomplete and that the applicant had not demonstrated that he could meet his burden of proof. On December 8, the chairperson postponed the hearing pursuant to 11 DCMR § 3117.3 to allow for the issuance of the Decision and Order in BZA Appeal No. 16405 and the preparation of the Zoning Administrator's memorandum.

The Board issued its Decision and Order in BZA Appeal No. 16405 on December 28, 1999.[2] On March 16, 2000, after the Zoning Administrator and the applicant advised the Board that variance relief was required from the maximum percentage of lot occupancy requirements of

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[1] On May 5, 2000, the Spring Valley – Wesley Heights Citizen's Association appealed the issuance of the remedial permit in a separate case, BZA Appeal No. 16679. The Board has not as yet heard the appeal.

[2] The applicant has appealed this Decision and Order to the District of Columbia Court of Appeals.

11 DCMR § 1543.2 and the minimum front yard set back requirements of § 1543.4, the Board rescheduled the public hearing for May 3, 2000, and re-noticed the hearing by mailing a copy of the notice to the applicant, the owners of all property within 200 feet of the subject property, and ANC 3-D. Notice of hearing was also published in the *D.C. Register* on March 17, 2000, at 47 DCR 1895. The applicant re-posted the property on April 18, 2000.

At the May 3, 2000, public hearing, the Board continued the case to May 16 due to the fact that the ANC had not received timely mailed notice of the hearing, and neither the ANC nor Mrs. Crary had received any information from the applicant concerning the revisions to the application. Mrs. Crary again requested the Board to dismiss the application as premature. On May 4, the applicant re-posted the property.

On May 15, 2000, the applicant requested a postponement of the May 16 hearing to May 24, to provide an opportunity for the Zoning Administrator, the applicant and his attorney, and the attorney for Mrs. Crary to meet to determine the necessity of additional zoning relief. Mrs. Crary agreed to the continuance. At the May 16 hearing, the Board continued the case to May 24 to allow for the joint meeting. The meeting, however, did not take place. On May 22, 2000, Mrs. Crary filed a Motion to Dismiss and/or Deny the Application with Prejudice on the grounds that the application was premature, incomplete, misleading, inaccurate, and contrary to the Board's findings in BZA Appeal No. 16405.

On May 24, 2000, the Board directed the applicant to provide the Board, the Zoning Administrator, the ANC, and Mrs. Crary an as-built survey and a drawing or plat with sufficient detail to determine the correct zoning data of the property. The Board continued the hearing to June 20, and deferred making a decision on Mrs. Crary's motion to dismiss.

At the June 20, 2000, public hearing, ANC 3D and Mrs. Crary requested that the hearing be postponed to allow for additional review. The Board continued the case to October 17 and requested a final report from the ANC as well as a report from the Zoning Administrator identifying the necessary zoning relief.

On September 8, 2000, the Office of Zoning provided notice of the October 17, 2000, hearing by mailing the applicant, all owners of property within 200 feet, and ANC 3D notice of hearing. Notice of hearing was also published in the *D.C. Register* on August 25, 2000, at 47 DCR 6887. While the ANC filed its report, the Zoning Administrator did not submit the requested letter concerning the required zoning relief. At the October 17 hearing, Mrs. Crary again argued for dismissal or denial of the application. The applicant announced that the Department of Consumer and Regulatory Affairs had issued him a sixth building permit on October 11, 2000 (Permit No. B430091), a remedial permit that encompassed all the improvements he had made to the property pursuant to the five permits invalidated in BZA Appeal No. 16405, with the exception of the front porch. The permit approves the removal of the roof over the front porch. The applicant then presented his arguments for the variances that would be required in order to retain the roof over the front porch. As neither Mrs. Crary nor the ANC had had an opportunity to review the permit, the hearing was continued to December 5. Notice of the hearing was published in the *D.C. Register* on October 27, 2000, at 47 DCR 8630. At the conclusion of the hearing, the Board scheduled a decision meeting for January 2, 2001.

On January 2, 2001, the Board denied Mrs. Crary's Motion to Dismiss the Application, finding that the remedial permit covered many of the alleged zoning violations that were the subject of the motion. The Board also decided to request further clarification from the Zoning Administrator related to the required zoning relief.

At its July 3, 2001 meeting, the Board continued the decision meeting to July 31 to afford the members who had not personally heard the evidence in the case additional time to review the entire record. The Board requested additional clarification from the Zoning Administrator, with the parties provided the opportunity to review and respond to any new information submitted by the Zoning Administrator. The Board also directed that the application be re-advertised to include variance relief from 11 DCMR § 2001.3, with the record re-opened to accept additional comments.

Notice of the July 31, 2001 decision meeting was published in the *D.C. Register* on July 13, 2001, at 48 DCR 6332, and interested persons were given until July 23, 2001 to submit written comments relating to the newly identified variance from 11 DCMR § 2001.3. The Office of Zoning also provided written notice to Mrs. Crary, ANC 3D, and the Office of Planning on June 6, 2001, as well as to the applicant on July 3, 2001, and to all owners of property within 200 feet of the subject property on July 5, 2001. The applicant reposted the property on July 18, 2001, with notice of the public meeting.

At its July 31, 2001 meeting, the Board denied the application, finding that the applicant had not met his burden of proving that he would encounter practical difficulties in complying with the Zoning Regulations as a result of unique or exceptional conditions of the property.

Applicant's Case. Mr. Sisson presented his case for the variances required for the front porch roof. He argued that his property was unique and exceptional due to the building permit history of the improvements, as well as the fact that his dwelling with the front porch would set back farther from the street than similar properties to the south. He indicated that the strict application of the Zoning Regulations would cause him practical difficulties in that he had relied in good faith on the actions of the zoning officials during the permitting and construction process, and that removal of the front porch would require a new design approach for the front of the house. He argued that the requested variance relief could be granted without substantially impairing the public good or the zone plan since the additions had improved the property, and since many similar dwellings have shorter front yards than required.

Zoning Administrator Reports. On October 1, 1999, the Zoning Administrator signed a letter prepared by the applicant's attorney confirming that the applicant required a special exception under 11 DCMR § 223.1 for the rear addition and front porch, as well as a variance from the front yard setback requirements of § 1543.4. However, on December 8, 1999, the Zoning Administrator advised the Board that in order to prepare a zoning memorandum concerning the application, he required its written decision in BZA Appeal No. 16405, as well as-built construction drawings and other materials from the applicant.

On February 29, 2000, the Zoning Review Branch submitted a zoning memorandum and computations sheet indicating that the applicant required variance relief from the Wesley Heights Overlay District percentage of lot occupancy and front yard setback requirements, 11 DCMR §§ 1543.2 and 1543.4.

On April 23, 2001, the Zoning Administrator submitted a letter to the Board, confirming the need for the variances from the percentage of lot occupancy and front yard setback requirements in §§ 1543.2 and 1543.4, and adding a variance from the provisions of § 2001.3 relating to additions to nonconforming structures. The Zoning Administrator also stated that the applicant had "constructed the front porch addition outside the scope of DCRA permits and Zoning approval" and that "DCRA/OZA staff reviewed and approved permits based upon misinformation provided by the applicant."

On July 23, 2001, the Zoning Administrator submitted a final report, stating that relief was not required from § 2001.3 since the dwelling, without the front porch, does not exceed the maximum allowed percentage of lot occupancy. The Zoning Administrator also clarified that the applicant had demonstrated good faith in applying for the remedial building permit, and that his previous comments related to the prior permits. The Zoning Administrator also confirmed that in his opinion, the remedial permit was correctly issued.

ANC Reports. ANC 3D, in its report dated November 30, 1999, indicates that at a duly-noticed public meeting with a quorum present, the ANC voted to recommend to the Board that the remedial application was premature, since the Board had not yet issued its written decision in BZA Appeal No. 16405. The ANC stated first that the Board's findings of fact and conclusions of law would be critical to the consideration of the application. Second, the ANC argued that the materials submitted by the applicant - the application form, surveyor's plat, and self-certification form - do not provide sufficient information to evaluate the application. Third, the ANC indicated that it was greatly concerned about the impact of this case on the adjacent neighbor and on neighborhood character, which is protected through the Wesley Heights Overlay District. Finally, the ANC argued that granting zoning relief would set a dangerous precedent for future development in the Wesley Heights Overlay District with respect to after-the-fact approval of improvements constructed without proper permits.

The ANC submitted a report dated May 14, 2000, indicating that at its regularly scheduled May 8, 2000, meeting, with a quorum present and having provided two types of notice of the meeting, the ANC determined not to take action on the merits of the application, but to confirm its earlier position that further action would be premature. The ANC indicated that the applicant had not as yet provided as-built drawings or accurate information regarding the construction; that the complete nature of the zoning violations of the improperly constructed improvements must be identified based on as-built drawings before proceeding with remedial zoning relief; that the application is premature pending the Court of Appeals decision involving BZA Appeal No. 16405; that the application is inconsistent with the Board's finding and conclusions in BZA Appeal No. 16405; and that the ANC required complete, timely, and accurate information from the applicant for a meaningful review and decision.

The ANC submitted a third report dated June 13, 2000; however, the ANC acknowledged that it did not have a quorum present when it discussed the report. The ANC urged the Board to suspend any consideration of the application until resolution of the Court of Appeals case; or, alternatively, to postpone the case to a date after June 20, 2000, to afford the ANC the opportunity to review and comment on the case and to allow the Zoning Administrator time to determine the required relief.

In its fourth report dated October 6, 2000, the ANC stated that at a duly-noticed meeting with a quorum present, it voted unanimously to oppose the application. The ANC endorsed the Board's findings and conclusions in BZA Appeal No. 16405, and again argued that the application is premature. The ANC asserted that the application is inconsistent with the Board's decision in BZA Appeal No. 16405 and incomplete in that it fails to include relief from the side yard requirements, minimum driveway width requirements, driveway access requirements, and off-street parking requirements. The ANC also argued that the applicant did not meet his burden of proof with respect to the practical difficulties test. The ANC asserted that the applicant's need for the variance stems from self-created hardship brought about by having submitted five permit applications found misleading, incomplete, and inconsistent and by having constructed improvements without the required permits or beyond the scope of the permits that were issued. The ANC also argued that, given the large front yard and lot occupancy variances required, approval of the application would undermine the Zoning Regulations, the Wesley Heights Overlay District, and the zoning enforcement process.

In its fifth report dated November 28, 2000, the ANC stated that at a duly-noticed public meeting with a quorum present, the ANC voted unanimously to oppose the application. The ANC incorporated its previous filings, and in addition questioned the issuance of a sixth building permit. The ANC stated that the front porch was highly unusual in the immediate vicinity and throughout the Wesley Heights Overlay District, and that failure to strictly enforce the front yard setback would be inconsistent with the surrounding neighborhood.

Steven Griswold presented the ANC's reports at the October 17 and December 5, 2000, hearings.

Persons in Support of the Application. There are no persons or parties in support of the application.

Parties and Persons in Opposition to the Application. Mrs. Crary described the history of the construction of the porch, and explained how the applicant's overall construction has affected her interests. George Watson, president of the Wesley Heights Historical Society, and one of the principal persons involved in the adoption and enforcement of the Wesley Heights Overlay District, also presented testimony. He described the purpose of the overlay, which is to allow reasonable additions that do not adversely affect the open, well-wooded character of the neighborhood or the quality of life of the immediate neighbors. He also discussed the construction of the improvements and their failure to comply with zoning requirements.

Closing of the Record. The record closed at the conclusion of the public hearing on December 5, 2000, with the exception of the specific materials subsequently requested by the Board during the course of its decision meetings on the case.

Decision Meetings. On July 31, 2001, the Board, voting 4 – 0 – 1, denied the application. Since a majority of the Board had not personally heard the case, the Board, on November 6, 2001, issued a Proposed Decision and Order pursuant to the District of Columbia Administrative Procedure Act, D.C. Code § 2-509(d) (2001), affording the parties the opportunity to submit written exceptions and arguments concerning the Proposed Decision and Order.

On December 4, 2001, after reviewing the applicant's exceptions and arguments dated November 19, 2001, the Board voted 4 – 0 – 1, with the third mayoral appointee not present, not voting, to issue the final Decision and Order. All of the members voting to issue the Decision and Order had reviewed the transcripts and record in this case. The Board finds that this Decision and Order fully addresses the issues and arguments presented by the applicant relating to the requested variances. The remaining issues, including application of the doctrines of laches and estoppel, were addressed in the related appeal, BZA Appeal No. 16405, which is presently under review by the District of Columbia Court of Appeals. The Board will adhere to its decision in BZA Appeal No. 16405 unless and until directed otherwise by the Court of Appeals.

FINDINGS OF FACT

The Subject Property

1. The subject property is a one-family detached dwelling located at 3020 43rd Street, N.W. (Square 1621, Lot 70 (formerly Lot 810)), in the Wesley Heights neighborhood.

2. After acquiring the property in 1997, the applicant constructed a two-story rear addition, accessory private garage, and front porch addition.

3. The dwelling without the applicant's improvements predates the 1958 Zoning Regulations and the establishment of the Wesley Heights Overlay District in 1992.

4. The property is zoned WHOD/R-1-A. The Wesley Heights Overlay District zoning requirements apply in combination with the R-1-A District requirements. 11 DCMR § 1542.1. When the requirements of the underlying R-1-A District and the overlay differ, the more restrictive requirements apply. *Id.* § 1542.3.

5. Under § 401.3, the required minimum lot area for all structures in the R-1-A District is 7,500 square feet, and the required minimum lot width is 75 feet. The subject property, rectangular in shape, has a lot area of 6,562.50 square feet and a lot width of 52.5 feet. *See* Ex. 63.

6. Since the lot area falls between 5,000 square feet and 6,667 square feet, the maximum percentage of lot occupancy permitted in the Wesley Heights Overlay District under § 1543.2(a) is 2,000 square feet.

7. According to the Zoning Administrator's April 23, 2001 computations (Exhibit 75), the last set of computations submitted after the applicant's June 15, 2000 survey (Exhibit 63), the dwelling has a lot occupancy of 1,968.75 square feet without the front porch. With the porch, the lot occupancy is 2,501.14 square feet.

8. The dwelling has side yards of 5.69 feet and 4.89 feet, which are less than the minimum 8-foot side yards required under §§ 405.1 and 405.9. *See* Ex. 63.

9. Pursuant to § 1543.4, the required front yard setback as depicted on the map entitled "Required Front Yard Setbacks," which is incorporated into the overlay district, is 28 feet. *See* 39 DCR 6827, 6831 (1992).

10. The depth of the front yard without the front porch is 24.85 feet. Ex. 63.

11. The porch is 41.68 feet wide. Ex. 63.

12. The porch is 7.6 feet deep for most of its width, except for the part leading to the front door, which is 9.85 feet at its maximum depth. Ex. 63.

13. The entire porch projects into the required front yard.

14. As measured under § 2503.2, the porch without the roof is not more than four feet above grade.

15. The dwelling without the porch is a "nonconforming structure" as defined in § 199.1, because its lot area, lot width, side yards, and front yard are smaller than those prescribed in the WHOD/R-1-A District.

The Front Porch Roof

16. The applicant obtained five building permits related to the rear addition, accessory garage, and front porch. The Board invalidated all five permits in BZA Appeal No. 16405, in its Decision and Order dated December 28, 1999.

17. On October 11, 2000, the Department of Consumer and Regulatory Affairs issued the applicant a remedial or after-the-fact building permit (Building Permit No. B430091, Exhibit 64) for the construction of the rear addition and garage and the removal of the roof over the front porch.

18. This permit, the sixth permit related to the improvements, approves as matter-of-right construction all the improvements made pursuant to the five invalidated permits, with the exception of the porch roof.

19. The applicant is seeking zoning relief to retain the porch roof.

Extraordinary and Exceptional Condition of the Property

20. The applicant had intended to make improvements comparable to other dwellings on his block to the south, but did not realize at the time that those improvements had been made before the establishment of the Wesley Heights Overlay District.

21. He stated that his property was affected by extraordinary or exceptional conditions in that he believed he had valid building permits for the improvements.

22. The applicant employed an architect and builder in connection with the construction, both of whom are licensed in the District of Columbia, and both of whom were aware or should have been aware of District zoning and permitting requirements.

23. Mrs. Crary testified that the applicant began construction of the porch in July 1998 by demolishing the existing covered front stoop and excavating the front yard to construct the supporting structure for the porch.

24. The applicant obtained Building Permit No. B417814 (Permit No. 4) on August 17, 1998, for "Repair of existing roof, roof in place, no structural change."

25. On October 5, 1998, the applicant obtained Building Permit No. B419108 (Permit No. 5) to "Build new porch roof as per plans."

26. Regardless of whether the applicant began construction of the porch before or after obtaining Permit No. 4, the applicant did not demonstrate good faith in obtaining the permits relating to the porch.

27. First, the applicant did not apply for a permit to demolish the stoop and construct the front porch addition.

28. Moreover, the applicant misrepresented to the Department of Consumer and Regulatory Affairs the scope of work to be performed. With respect to Permit No. 4, the applicant did not repair an existing roof, but rather demolished a small covered stoop and replaced it with a new front porch addition that extends the full width of the dwelling. This is a structural change that increases the nonconformity of the dwelling with the respect to the front yard setback and creates a new nonconformity with respect to the percentage of lot occupancy. With respect to Permit No. 5, the applicant did not build a new roof for an existing structure, but an entirely new structure that that increases the existing front yard nonconformity and creates the new lot occupancy nonconformity.

29. There is no evidence that would demonstrate that the property is unique or exceptional.

Practical Difficulties – Self-Created Hardship

30. The applicant states that his practical difficulties are that he added a stone façade to the front of the dwelling, and that if the front porch roof has to be demolished, he will have to reconsider the entire design of the porch.

31. Any redesign of the porch results from the applicant's affirmative actions in demolishing the existing stoop and constructing the porch without first obtaining a valid building permit.

32. There is no other evidence that would demonstrate that the applicant would confront practical difficulties if the Zoning Regulations are strictly applied.

CONCLUSIONS OF LAW

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Code § 6-641.07(g)(3) (2001)), to grant variances from the strict application of the Zoning Regulations. Charles A. Sisson is seeking area variances from maximum percentage of lot occupancy and front yard setback restrictions of 11 DCMR §§ 1543.2 and 1543.4, as well as from the provisions of § 2001.3(b) and (c) restricting additions to nonconforming structures, in order to retain a roof over a front porch addition to a one-family detached dwelling in the WHOD/R-1-A District. The notice requirements of 11 DCMR § 3113 for the public hearing on the application have been met.

The Zoning Requirements

As stated in 11 DCMR § 1541.1, the Zoning Commission established the Wesley Heights Overlay District to preserve and enhance the low density character of Wesley Heights by regulating the construction and alteration of residential and other buildings in the area. The purposes of the overlay, listed in § 1541.3, are to (a) preserve in general the current density of the neighborhood; (2) allow reasonable opportunities for the expansion of dwellings; (3) preserve existing trees, access to air and light, and the harmonious design and attractive appearance of the neighborhood.

Maximum Percentage of Lot Occupancy. Subsection 1543.2 provides:

> No structure, including accessory buildings, shall occupy an area in excess of thirty percent (30 %) of the lot; except that the following apply:
>
> (a) Structures on lots of between five thousand square feet and six thousand six hundred and sixty-seven square feet (5,000 sq. ft. and 6,667 sq. ft.) may occupy up to two thousand square feet (2,000 sq. ft.); and

(b) Structures on lots of less than five thousand square feet (5,000 sq. ft.) may occupy up to forty percent (40%) of the area of the lot.

With a lot area of 6,562.5 square feet, the subject property is allowed a percentage of lot occupancy equivalent to 2,000 square feet. Since the dwelling with the front porch addition occupies 2,501.14 square feet of the lot, the applicant requires a variance from § 1543.2.

Front Yard Setback. Under § 1543.4:

> All residential buildings shall have a front yard setback equal to or greater than the average setback of all structures on the same side of the street in the block where the building in question is located. The required setbacks are depicted in the map entitled, "Required Front Yard Setbacks," which is part of this overlay district and located in the Office of Zoning and in the Zoning Division of the Department of Consumer and Regulatory Affairs.

The map indicates that the subject property has a required front yard setback of 28 feet. 39 DCR 6827, 6831 (1992).[3] Since the porch was built in the required front yard, the applicant requires a variance from § 1543.4.

Minimum Side Yard Requirements. The dwelling, without the improvements, predates the 1958 Zoning Regulations. Under § 405.8, an addition may be made to a dwelling that predates the 1958 Zoning Regulations and that has a side yard less than eight feet wide, provided the width of the existing side yard is at least five feet and the width of the existing side yard is not decreased. The porch does not decrease the width of the existing side yards. The width of one side yard at 5.69 feet complies with the requirements of § 405.8, while the width of the other side yard at 4.89 feet does not. However, the Zoning Regulations in § 2522.1(c) authorize the Zoning Administrator to permit deviations not to exceed the greater of ten percent or twelve inches of the minimum side yard requirements, provided the deviations will not impair the purpose of the requirements. With respect to the five-foot side yard requirement in § 405.8, the Zoning Administrator may thus approve up to a 12-inch deviation. The applicant therefore does not require a variance from the minimum side yard requirements for the 4.89-foot side yard, since the Zoning Administrator has approved a 0.11-foot (1.32-inch) deviation.

Nonconforming Structure Provisions. The dwelling, without the porch, is a "nonconforming structure" as defined in 11 DCMR § 199.1 because its lot area, lot width, side yards, and front yard are smaller than the minimums prescribed in the WHOD/R-1-A District. Additions may be made to a nonconforming structure pursuant to § 2001.3, provided:

(a) The structure shall conform to percentage of lot occupancy requirements;

(b) The addition . . . itself shall conform to use and structure requirements; and

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[3] In BZA Appeal No. 16405, the Board erroneously found that the minimum required front yard to be 21 feet. Subsection 1543.4 expressly states that the required setbacks are depicted on the map entitled "Required Front Yard Setbacks." The map shows that the minimum required front yard is 28 feet.

> (c) The addition . . . itself shall not increase or extend any existing nonconforming aspect of the structure, and shall not create any new nonconformity of structure and addition combined.

The dwelling, with the rear addition and garage, but without the front porch addition, conforms to percentage of lot occupancy requirements, as required by § 2001.3(a). However, the applicant requires a variance from § 2001.3(b) and (c) since the porch does not conform to front yard requirements, increases the existing front yard nonconformity, and creates a new nonconformity with respect to percentage of lot occupancy.

Removal of Roof. With the removal of the roof over the front porch, effectively making the porch a deck, the applicant would no longer require variance relief for the porch. 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. Any railing required by the D.C. Building Code shall not be calculated in the measurement of the height.

The term "building" is defined in § 199.1 to mean "a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel." Therefore, the porch, which is not more than four feet above grade, may occupy the front yard without zoning relief, provided the roof is removed.

Similarly, the term "percentage of lot occupancy" is defined in § 199.1 to consist of the portion of a lot that is or that may be occupied under the Zoning Regulations as "building area," which in turn, is defined in § 199.1 as "the maximum horizontal projected area of a building and its accessory buildings." The term does not include projections into open spaces authorized under other provisions of the Zoning Regulations, such as decks meeting the requirements of § 2503.2. Since the porch without the roof is not a "building" as defined in § 199.1 and is authorized under § 2503.2 as a projection into an open space, it would not contribute to percentage of lot occupancy.

Finally, removal of the roof would also eliminate the need for a variance from § 2001.3(b) and (c), since the dwelling would conform to percentage of lot occupancy requirements; the porch without the roof would conform to use and structure requirements; and the porch without the roof would neither increase nor extend any nonconforming aspect of the structure nor create any new nonconformity of structure and addition combined.

The Variance Test

Under the three-prong test for area variances set out in 11 DCMR § 3103.2, an applicant must demonstrate that (1) the subject property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) as a result

of the unique situation or condition of the property, the applicant will encounter practical difficulty if the Zoning Regulations are strictly applied; and (3) the variances will not result in substantial detriment to the public good or the zone plan. *See Gilmartin v. District of Columbia Board of Zoning Adjustment,* 579 A.2d 1164, 1167 (D.C. 1990).

In reviewing a proposed variance, the Board is required to give "great weight" to the issues and concerns raised in the recommendations of the affected ANC. *See* D.C. Code § 1-309(d) (2001). The Board has carefully considered the ANC reports in this case; however, does not agree that it is premature to decide the application before the Court of Appeals decision in BZA Appeal No. 16405, since the effectiveness of the Board's order in BZA Appeal No. 16405 is not stayed pending appeal. *See* 11 DCMR § 3130.5. Moreover, with the issuance of the remedial building permit, the zoning issues relating to the front porch can be addressed as a discrete matter. Other concerns raised by the ANC, such as the minimum driveway width, driveway access, and off-street parking requirements, are the subject of a related appeal, BZA Appeal No. 16679, and can be reviewed separately. For the reasons stated below, the Board concurs with the ANC that this application should be denied.

The Board concludes that the applicant failed to meet the variance test with respect to uniqueness and practical difficulty. While the subject property does not meet the 7,500 square feet minimum lot area requirement of the underlying R-1-A District, the Wesley Heights Overlay District regulations provide adjustments to the maximum percentage of lot occupancy restrictions for substandard lots. Thus, the applicant is limited to 2,000 square feet of lot occupancy, slightly more than the 30 percent lot occupancy allowed under § 1543.2 for lots that meet or exceed the 7,500 square foot minimum. Therefore, the applicant does not confront a practical difficulty in complying with the lot occupancy requirements as a result of lot size.

Moreover, the applicant has not demonstrated that redesigning the front of the dwelling is unnecessarily burdensome or that it rises to the level of "peculiar and exceptional practical difficulties" required for variance relief. As in *Barbour v. District of Columbia Board of Zoning Adjustment*, 358 A.2d 326, 327 (D.C. 1976), the "fact that an expansion requiring a variance is personally preferable to other methods not requiring a variance does not constitute a unique property situation."

Finally, any practical difficulties encountered by the applicant are entirely self-created. The self-created hardship doctrine precludes variance relief where the circumstances rendering the property incapable of use in accordance with the Zoning Regulations were caused or created by the property owner. *See Murray v. District of Columbia Bd. of Zoning Adjustment,* 572 A.2d 1055, 1058 (D.C. 1990). Thus in *Carliner v. District of Columbia Board of Zoning Adjustment,* 412 A.2d 52, 54 (D.C. 1980), the court recognized that the affirmative action of an applicant in making his property nonconforming can justify denial of variance relief.

In the case before the Board, the applicant employed in connection with the construction an architect and a builder, both licensed in the District of Columbia, who knew or should have known of the applicable Zoning Regulations. The applicant did not apply for a building permit to demolish the small existing front stoop or to construct the front porch addition. The two permits he sought relating to the porch did not completely or accurately reflect the nature and

scope of the work to be performed. The applicant constructed the porch, which spans the entire width of the dwelling, entirely within the required front yard, significantly increasing the existing front yard nonconformity and creating a new percentage of lot occupancy nonconformity. The Board concludes therefore that the affirmative actions of the applicant preclude variance relief with respect to the front porch.

Since the applicant has failed to meet the first two prongs of the variance test, it is not necessary to consider whether the requested variances would result in substantial detriment to the zone plan or the public good.

ORDER

For the reasons stated above, the Board concludes that the applicant has not met his burden of proof. It is hereby **ORDERED** that the application is **DENIED.**

Vote taken July 31, 2001, to deny the application for the variances relating to the front porch. addition.

VOTE: 4 – 0 – 1 (Carol J. Mitten, Anne M. Renshaw, Geoffrey H. Griffis, and David W. Levy, to deny; Sheila Cross Reid, abstaining).

Vote taken December 4, 2001, to issue the final Decision and Order, after exceptions and argument pursuant to § 2-509(d) of the D.C. Administrative Procedure Act:

VOTE: 4 - 0 - 1 (Carol J. Mitten, David W. Levy, Geoffrey H. Griffis, and Anne M. Renshaw, to issue the final Decision and Order; the third mayoral appointee not present, 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 BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: DEC 13 2001

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL AND EFFECTIVE 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 APPLICATION NO. 16521

As Director of the Office of Zoning, I hereby certify and attest that on DEC 13 2001, a copy of the foregoing Decision and Order in BZA Application No. 16521 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing and who is listed below:

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ATTESTED BY: _____
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Director