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April 10, 2000

'00 APR 10 P3:00
OFFICE OF ZONING
DISTRICT OF COLUMBIA

VIA HAND-DELIVERED

Sheila Cross-Reid, Chairperson
District of Columbia
The Board of Zoning Adjustment
441 4th Street
Room 210-South
Washington, DC 20001

Re: BZA Appeal No. 16533
4512 28th Street, N.W.
Square 2251, Lot 29

Dear Ms. Reid:

Enclosed please find the original and nine copies of The Findings Of Fact And Conclusions Of Law Of Appellants. I have also enclosed a copy to be stamped in as received and returned.

Thank you for your courtesies in this matter. Please feel free to contact me if you have any questions.

BZA
Case No. 16533
Exhibit No. 39

Sincerely yours,

George R. Clark

GRC/ydw
Enclosures

cc: John Patrick Brown, Esq.

Board of Zoning Adjustment
District of Columbia
CASE NO.16533
EXHIBIT NO.39

BOARD OF ZONING ADJUSTMENT

IN RE: 4512 28th Street, N.W. Square 2251, Lot 29	)	BZA Appeal No. 16533 ANC-3F
Appeal of	)	
George and Mary Clark Stuart Sloame and Ellen Seeherman James D. and Emily Baker	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF APPELLANTS

'00 APR 10 P3:50
OFFICE OF ZONING
DISTRICT OF COLUMBIA

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

IN RE: 4512 28th Street, N.W.	)	
Square 2251, Lot 29	)	BZA Appeal No. 16533
	)	ANC-3F
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George and Mary Clark	)	
Stuart Sloame and Ellen Seeherman	)	
James D. and Emily Baker	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF APPELLANTS

INTRODUCTION

Forest Hills LLC admits that its original application for a permit at 4512 28th Street NW contained a serious mistake when it claimed that the new house would only be three stories in height. The Department of Consumer and Regulatory Affairs ("DCRA") admits that the original permit was improperly issued (Feb. 2 Tr. 169-70, 234-35).[1] DCRA admitted to Councilmember Patterson in September 1999 that 4512 was an illegally high four-story building in a zone allowing only three stories in height (Ex. 1). Armando Lourenco testified that he could understand why the neighbors would object to the size and siting of 4512 (Feb. 2 Tr. 232 & Ex. 1 p. 3). He also testified that he could understand why someone would think that the original building permit application was misleading and that DCRA was

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[1] References to the transcript of February 2 and 23, 2000 are "Feb. 2 Tr.____" and "Feb. 23 Tr.___")

mislead (Feb. 2 Tr. 234). He "empathizes with the neighbors," who are the Appellants here. (Ex. 1 p. 3).

The Appellants were the first to point out to DCRA that the plans and permits for the new house did not comply with the zoning laws. DCRA agreed, but what did DCRA decide to do? Instead of enforcing the law as written, it went out of its way to suggest to the developer that the problem literally could be buried by covering up a portion of the lowest story. It decided that even though Forest Hills,[2] its architect, and DCRA were the culpable parties, it would make the taxpaying neighbors forever bear the burden of the mistakes made by those other parties. Nothing in logic or fairness supports this result.

In an attempt to add insult to serious injury, the developer has taken the outrageous position before this Board that the appeal in this case was filed too late. The developer even asked the Board to preclude any testimony from being taken, in an apparent attempt to keep the sordid facts from reaching the public record (Feb. 2 Tr. 13). But the record showed that the developer was on notice of the objections of the neighbors well before it started construction -- without a valid permit -- on the fourth floor. Likewise, Mr. Lourenco testified that the developer had gone ahead at its "own risk" because Mr. Lourenco did not give the final approval for the project until

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2 Forest Hills LLC is referred to as "Forest Hills," the developer or the Intervenor.

approximately September 8 or 9, 1999. His approval was for height, side yards and whether the construction "significantly deviated" from the approved plans (Ex. 1). This appeal was filed November 3, 1999. The law in the District of Columbia is that an appeal is presumptively timely if it is filed within 60 days of the issuance of the permit, which in this case was not done until September 17, 1999 (and was not publicly available until the beginning of October 1999).

The Board, not DCRA, is charged with interpreting the zoning laws. D.C. Code § 5-424(g)(4); Murray v. District of Columbia Board of Zoning Adjustment 572 A.2d 1055, 1057 (D.C. 1990). It should overturn DCRA's decision to issue the permits and order the fourth story removed, as well as that portion of the three story addition which was not built on the existing footprint.

The record shows that the permits issued here allow a clear expansion and an extension of a nonconforming structure. If DCRA's interpretation is allowed to stand, it will "defeat one of the major purposes of the Zoning Regulations, namely, ' the gradual elimination of … existing (nonconforming) structures." Lenkin v. District of Columbia Board of Zoning Adjustment, 428 A.2d 356, 358 (D.C. 1981), quoting Wood v. District of Columbia, 39 A.2d 67,69 (D.C. App. 1944). There is a clear regulatory objective against nonconforming structures. Silverstone v. District of Columbia Board of Zoning Adjustment, 372 A.2d 1286, 1290 (1977), affirmed, 396 A.2d 992 (D.C. 1979);

Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, 411 A.2d 959, 963 (D.C. 1979).

DCRA's decision can be overturned on at least five independent grounds. First, it is undisputed that the original permit allowed an illegally high four-story house. In an attempt to cover up its mistake, DCRA has now attempted to convert it into a three-story one. Nothing in the regulations says that the "finished grade" is anything other than the grade when the permit is issued. And even DCRA could not point to any example of converting a basement to a cellar for height limitation purposes in a residential zone. The result sought by DCRA would lead to extremely mischievous results that make a mockery of the zoning height regulations, as has taken place here.

Second, 11 DCMR § 2001.3 prohibits an addition to a non-conforming structure unless that addition is conforming. 11 DCRM § 405.8 is of no avail with respect to the nonconforming side yards that were not built on the pre-existing footprint. Unless § 405.8 is so interpreted, new nonconforming structures, such as this one, will pop up like spring dandelions. As was set forth above, the policy of the District of Columbia is to eliminate nonconforming structures rather than to enable a new nonconforming structure to exist for another 100 years in the guise of an "addition." Moreover, the very definition of "building" in the regulations precludes DCRA's reliance on this

provision because there was no building that was being expanded or added to.

11 DCMR § 2001.3 prohibits extending any existing nonconforming aspect of the structure (i.e. the less than 8 foot side yard), or creating any new nonconformity of structure. But 4512 as built does both. The three-story addition that was not built on the preexisting footprint has a less than 8 foot side yard on each side. The new one story addition has a less than 8 foot side yard on one side. These new 8 foot side yards are either an extension of the existing nonconforming aspect or a new nonconformity.

11 DCMR § 405.8 does not change that result. 11 DCMR § 405.8 by its own terms does not allow the extension of any nonconforming aspect of the structure. What 11 DCMR § 405.8 allows is an extension or addition to the building as long as the existing side yard is not decreased. In other words, the three story addition which was built on top of the existing footprint is permissible because it does not decrease the width of the existing side yard. Absent § 405.8, those three stories could not be built because 11 DCMR § 2001.3 prohibits an addition to a nonconforming structure unless the addition conforms to current zoning. That is all 11 DCMR § 405.8 means. In fact, it is why the original building permit application stated that the house was going to be built on the existing footprint, with a separate one story addition.

Third, it is uncontested that the additional three stories at 4512 were not built on the existing footprint. The original permit allowed only that. But 4512 has 3 stories which are 6.8 feet by 50 feet that were not built on the original footprint.

Fourth, under 12 DCMR § 105.2 Forest Hills was required to restore the original grade in the case of a demolition. It did not do so.

Fifth, 11 DCMR § 223 required that the developer come to the BZA for approval prior to the issuance of even the first building permit. That section requires that when a lot is undersized or does not meet minimum side yards requirements that the BZA, rather than DCRA, approve the construction. The history of this regulation makes it obvious that it was intended to apply in the R-1-A zone, and was designed to protect the integrity of the neighborhood. DCRA has admitted that 4512 adversely impacts on the neighborhood.

In the unlikely event that the BZA finds that 4512 is in reality a three-story house, Appellants are still entitled to relief. The developer and DCRA have interpreted the regulations in a manner so that the house still is four stories in height to the entire world, but "technically" may not be because it may be only three stories in height at a single measuring point. But nothing in the regulations allows a basement to be converted to

a cellar merely by measuring it at a single point or even a few points. If 4512 is allowed to keep its fourth story, at a minimum the BZA should order that the four cellar windows be bricked in and the berm be extended across the entire front of the house so as to cover the garage. That way both the letter and the intent of the law would be fulfilled and the house would be three stories instead of four. Any claim for lost value by Forest Hills should be made against its architect.

FINDINGS OF FACT

PRINCIPAL FINDINGS

The following principal findings of fact are sufficient to support a ruling in Appellants' favor. The detail for these findings is set forth in the numbered findings which follow below them.

A. 4512 28th Street NW ("4512") is located in an R-1-A zone, which restricts building height to three stories or 40 feet. 11 DCMR § 400.1.

B. Forest Hills purchased 4512 with full knowledge of building and zoning for the property. 11 DCMR § 401.1.

C. The lot for 4512 is 7494 square feet, which is below the minimum building lot size for the R-1-A zone. (Ex. 3).

D. The side yards at 4512 are less than eight feet, which is below the minimum side yard requirement in the R-1-A zone.

E. The April 1999 application for the original permit for 4512 28th Street NW was incorrect, and could easily be seen as misleading, when it stated that the three new stories would be built on the existing footprint.

F. The April 1999 application for the original permit for 4512 28th Street NW failed to disclose that the side yards on the north side of the house were less than 8 feet and that the developer planned on extending the existing nonconforming aspect of the side yards.

G. On April 23, 1999, Forest Hills filed its original application for permit. The application states that the developer planned to "demolish existing SFD to foundation. (Bsmt. to remain). Construct 3 floors and addition to exist. footprint. New 1 story garage." The permit as issued on June 7, 1999 contains the same language. (Ex. 4).

H. The June 7, 1999 permit for 4512 was improperly issued.

I. The June 7, 1999 permit for 4512 improperly authorized the construction of a four-story house in the R-1-A zone.

J. The April 1999 application for permit requested approval for four-story house because the lowest level counted as a story since it is a basement within the meaning of the zoning regulations.

K. The lowest level in the April 1999 application was a basement because the plans showed that it was more than four feet from the existing finished grade to the ceiling of the lowest level, thus making it a basement and counting as a story for purposes of building height.

L. The developer has not restored the existing finished grade as required by the zoning regulations.

M. The finished grade for the purposes the April 7, 1999 permit is that which existed at that time, not another grade created at a later date.

N. 4512 was and still is a nonconforming structure because it is on a lot of less than 7500 square feet, and has side yards of less than 8 feet.

O. The Appellants acted promptly and diligently in investigating, pursuing (including with DCRA) and then appealing their claims to the Board of Zoning Adjustment.

P. In June or July of 1999 Mr. Murray Cohen of Forest Hills told the Appellants that he could build 4512 as of right.

Q. Mr. Cohen told the Appellants that 4512 was not four stories in height on or about the same date (July 27 or 28, 1999) that he was told by Mr. Toye Bello of DCRA that 4512 indeed was a four-story house and could not continue to be constructed as planned.

R. Mr. Cohen never told the Appellants that DCRA had told him that 4512 was a four-story house.

S. The record supports a finding that Mr. Bello and DCRA were misled by the original application because of the representation that the new house would be only three stories in height.

T. DCRA properly relies on the honesty and integrity of applicants and the applications in the zoning process.

U. DCRA instructed the developer on how to evade the three-story height limitation by recommending that it change the finished grade by placing an earthen berm in front of part of 4512, leaving a large portion of the house fully exposed as four stories.

V. DCRA could not point to a single other incident in which a basement was converted to a cellar for building height purposes in a residential zone.

W. Mr. Bello of DCRA told Appellant Sloame in August 1999 that DCRA was conducting a review of the entire permit

process for 4512 and that he had been misled by the original application.

X. During August and early September of 1999, the Appellants contacted DCRA on virtually a daily basis, and were told that no decision had been reached by it with respect to 4512.

Y. Forest Hills did not file its application for a second building permit for 4512 until August 25, 1999, at least four weeks after Forest Hills was told by DCRA that 4512 was in violation.

Z. Forest Hills continued to build between its July 27, 1999 meeting with Mr. Bello and August 27, 1999, the date it filed for its second permit. In the interim, it did or filed nothing to show that it would try to come into compliance with the zoning laws.

AA. On August 25, 1999 Mr. Cohen received a letter from the Appellants telling him that further construction at 4512 was that his own risk because of zoning violations at the property, including for height.

BB. As of August 25, 1999, construction had not started on the fourth story at 4512.

CC. If a developer builds without a permit, even when it expects that one will be issued, it does so at its own risk.

DD. The second building permit for 4512 did not disclose the true scope of the work that was needed or planned in order to try to convert the basement into a cellar.

EE. Armando Lourenco of DCRA is the individual who made the decision for DCRA as to whether the second building permit would be issued.

FF. Mr. Lourenco's review of the permit process for 4512 included not only the issue of height, but also the side yards and whether the construction was being done on the existing footprint.

GG. Mr. Lourenco's decision approving the process for 4512 did not occur any earlier than September 7, 1999.

HH. Mr. Lourenco wrote a letter to Councilmember Patterson dated September 10, 1999, in which he stated that DCRA had now found that 4512 was in compliance and that a new permit would issue.

II. DCRA never notified the Appellants of its decision, who learned of it only through Councilmember Patterson's office.

JJ. Mr. Cohen acknowledged a September 10, 1999 that he was relying on Mr. Lourenco's September 1999 decision as the basis for his continuing construction. (Int. Ex. 14),[3].

KK. Throughout August and September, Forest Hills was aware that the neighbors were contacting DCRA, the city council, and others in their attempt to learn what DCRA was doing, and to challenge the right of Forest Hills to build as it planned at 4512.

LL. The second building permit for 4512 did not issue until September 17, 1999, it was not publicly available until October 1999.

MM. Once the Appellants learned of DCRA's decision, they acted promptly and expeditiously in pursuing their appeal rights, including by obtaining a copy of the permit and application.

NN. After obtaining copies of the permit application and the permit itself (which Forest Hills could have supplied, but did not), the Appellants properly considered whether to appeal to the BZA, including by consulting zoning counsel.

OO. The appeal in this case was filed on November 3, 1999, less than 60 days after the earliest decision which was made by Mr. Lourenco.

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[3] "Int. Ex." refers to Intervenor's exhibits.

PP. The appeal was filed in a timely fashion.

QQ. Forest Hills proceeded at its own risk when it continued construction before Mr. Lourenco approved the construction at 4512.

RR. Forest Hills proceeded at its own risk when it continued construction with full knowledge that many of the adjacent landowners were objecting to the construction.

DETAILED FINDINGS

1. In early 1999, Forest Hills acquired 4512 28th Street, N.W. ("4512") for approximately $372,000 from an estate. 4512 was a single-family home built in 1956, consisting of a finished basement with garage, a single primary living floor and an attic story. The footprint of the pre-existing house is shown on Ex. 3 (p.1), in the cross hatched area. Ex. 3 (p.2), without the cross hatching, was submitted by the developer as part of its original permit application dated April 23, 1999 (Ex. 4).

2. The original application called for removing the roof and the top floor and to build three stories on top of that for a total of four stories (Feb. 2 Tr. 236-37).

3. Boxes 14 and 17 on the permit application form are for zoning compliance, rather than building code compliance (Feb. 2 Tr. 237-40).

4. The original building permit application did not disclose that the side yards on the south side of 4512 were less than eight feet (Feb. 23 Tr. 292-93).

5. The drawings submitted by the architect for the original building permit application did not show the width of the side yards on the south side of the property (Feb. 23 Tr. 293-94).

6. Although the original permit application stated that the new house was going to be built on the existing footprint (except for a one-story addition), the developer actually built a three-story addition measuring six-foot eight inches by 49 or 50 feet, that is not on the existing footprint. (Feb. 23 Tr. 309, Exs. 3-4).

7. The April 23, 1999 application states that the developer planned to "demolish existing SFD to foundation. (Bsmt. to remain). Construct 3 floors and addition to exist. footprint. New 1 story garage" (Ex. 3).

8. The plat which was submitted by Forest Hills stated there was a pre-existing two and one-half story frame and basement structure, all outlined by a solid black line. But the existing footprint was not within the solid black line. In fact, the solid black lined area contains an undisclosed three-story addition which is 49.4' x 6.6'. This is the area outside the cross hatching in Ex. 3 (not including the single story addition) (Ex. 3).

9. The April 23, 1999 application (in box 14) states that the existing building was two stories, and in box 17 says that the proposed building would be three stories. These representations cannot be reconciled with the facts. The plans provided for a four-story building, but the permit application claimed that it was only three (Exs. 1 & 3).

10. Exhibit 3 also discloses a building restriction line of 15 feet. The exhibit discloses that the house is exactly at the building restriction line at its southeast corner. Exhibit 3 does not show that the developer was planning on a balcony which intrudes upon the building restriction line.

11. Exhibit 3 also fails to disclose that the developer has not restricted building to the original footprint, even over the pre-existing foundation. As the full architectural plans on file reveal, there is an expansion beyond the original footprint for 23.5 feet along the front of the house.

12. The drawings which were submitted for the permit applications did not disclose the steepness of the slope or the prospect for erosion at 4512 (Feb. 23 Tr. 310-12, Exs. 19, 21, March 13).

13. In late June or early July 1999, the Appellants noticed that there was activity at the site, with large trees being removed. The developer still had not identified itself or met with any of the neighbors and had not notified any of them, or the ANC, of its plans to demolish the existing home and build

a new one. The first activity by the developer was to take down several trees 75 feet or more in height so that the expansion to the existing foundation, which was not revealed on the permit or its application, could be accomplished (App. Timeline at 2).

14. In late June or early July of 1999 Mr. Cohen met with a number of the neighbors. At their request, Mr. Cohen gave them copies of the building elevations (not the plans) for the first time and there was general discussion about the project (Feb. 23 Tr. 314-15).

15. At the time of the meeting between Mr. Cohen and the neighbors, there was no way that the neighbors could tell how tall the house would be or how big it would appear to be on the site (Feb. 23 Tr. 331-33).

16. Although Mr. Cohen at first claimed during the hearing that there were no discussions with any of the neighbors concerning possible changes to 4512 after this first meeting (Feb. 23 Tr. 316), later he admitted that there were discussions with Mr. Clark in late July 1999 (Feb. 23 Tr. 352-53).

17. Mr. Murray Cohen told the Appellants, in response to a specific question, that he could build 4512 under the original permit as a matter of right and that it met all zoning requirements, including for height (Feb. 2 Tr. 91-92).

18. The Appellants raised the question of the size of 4512 the first night they met with Mr. Cohen in late June early July of 1999 (Feb. 2 Tr. 92).

19. When Mr. Cohen refused to have any discussions concerning 4512, the neighbors then decided to look at the zoning, including obtaining the zoning permit application which they found misrepresented the number of stories because the ceiling was six of more feet above the finished grade at the measuring point for height (Feb. 2 Tr. 92).

20. The existing basement for 4512 was considered by the developer's architect, Neil Duncan, to be basement space of the type that normally be used for a boiler room, a mechanical room, and some storage (Feb. 23 Tr. 273).

21. The space at the front of the existing basement was "leftover" in the design, and was called a den (Feb. 23 Tr. 273).

22. The architect acknowledged that the lowest level was a basement, and thus should have been counted as a story in the original submission to DCRA for a building permit, making the house four stories in height (Feb. 23 Tr. 276).

23. The first permit was issued improperly because it allowed the building of the four-story home in a three-story R-1-A zone (Feb. 2 Tr. 169-171).

24. Mr. Lourenco was acting Zoning Administrator when the original permit was issued (Feb. 2 Tr. 233).

25. There was a clear discrepancy between the first application and the first set of drawings (Feb. 2 Tr. 234).

26. Mr. Lourenco agreed that "someone reasonably can infer" that the original permit application "may mislead someone" (Feb. 2 Tr. 234).

27. The original permit was issued in error (Feb. 2 Tr. 235).

28. Mr. Murray Cohen of Forest Hills lives in Rockville, Maryland and is responsible on a day-to-day basis for building 4512 (Feb. 23 Tr. 312-13).

29. Mr. Cohen rejected moving the balcony, the windows, and the dormers and his discussions with Mr. Clark in late July 1999 (Feb. 23 Tr. 353).

30. At the time of the meeting on July 27, 1999 with Mr. Clark, there were no walls built above the existing basement (Feb. 23 Tr. 354).

31. Mr. Clark told Mr. Cohen at that meeting that Forest Hills was planning on building a four-story house and that it was illegal (Feb. 23 Tr. 394).

32. Mr. Clark suggested to Mr. Cohen on July 27 or 28 1999, before any new walls were constructed, that he could

reduce the impact of the house by making some changes in the plans to move the dormers to the back and eliminate the front balcony. Mr. Cohen ignored that suggestion (Feb. 2 Tr. 92).

33. In late July 1999 Mr. Cohen heard from his permit expediter, Rick Gangloff, that there was a problem with the property and that a stop work order might be issued (Feb. 23 Tr. 316-17). At that time there were no walls built above the existing basement (Feb. 23 Tr. 354).

34. Mr. Cohen understood that a stop work order was being issued (Feb. 23 Tr. 323).

35. Mr. Cohen had a meeting with Mr. Toye Bello of DCRA on approximately July 28, 1999, at which time he was told that some of the neighbors had raised issues with respect to the side yard, height and building on the existing footprint at 4512 (Feb. 23 Tr. 317, 355).

36. Mr. Bello "instructed" Mr. Cohen at that meeting that he could convert the basement into a cellar if the grade was less than four feet to the ceiling of the lower level, so that it would no longer count as a story (Feb. 23 Tr. 317-18).

37. Mr. Bello proposed regrading the property and using a berm to convert the basement into a cellar. Prior to that time Mr. Cohen knew nothing about regrading as a potential solution to the four-story problem (Feb. 23 Tr. 325).

38. Mr. Cohen considered that the solution proposed by Mr. Bello was to change the grade (Feb. 23 Tr. 326).

39. Forest Hills knew nothing about a potential regrading to change the basement into a cellar when it filed its original building permit application in April 1999 (Feb. 23 Tr. 364).

40. Mr. Bello does not keep notes of conversations about events in his office (Feb. 2 Tr. 181-82).

41. If the developer did not want to convert the basement into a cellar, its only option was to have a stop work order issued or for the developer to appeal to the BZA (Feb. 2 Tr. 183-84).

42. The name of Mr. Robert Chen did not come up at the time of Mr. Cohen's meeting with Mr. Bello (Feb. 23 Tr. 355).

43. Mr. Chen's name did come up later (Feb. 23 Tr. 355), and the second permit states that burying part of the basement to remove one story was "per Robert Chen." (Ex. 16 & Int. Ex. 20).

44. The second permit did not describe any of the work that was being done to convert the basement into a cellar, even though that would normally be expected. It seemed like the permitting process was "done fast and loose" (Feb. 23 Tr. 419).

45. Despite the fact that virtually the entire existing house was demolished, Mr. Bello of DCRA thought that the permit application was one for "alteration or repair" (Feb. 2 Tr. 168).

46. Once Mr. Bello told the developer that the permit was improper, the developer could remedy the situation or go to the BZA (Feb. 2 Tr. 171).

47. Although the meeting between Mr. Bello and the developer was approximately July 27, 1999, the application for the second permit was not filed until August 25, 1999 (Ex. 16, Int. Ex. 8).

48. Construction continued at 4512 after Mr. Cohen's meeting with Mr. Bello, even though no new permit application was filed until August 25, 1999 (Feb. 2 Tr. 172-173).

49. The house as planned by the developer in the original permit application called for four stories (Feb. 2 Tr. 175).

50. Reducing the number of stories by berming up the basement to convert into a cellar altered a condition that was established in 1956 when the original house was built because the basement portion of the original house was still present (Feb. 2 Tr. 175-76).

51. If an owner voluntarily demolishes a nonconforming building at its property, that building cannot be expanded or altered in any way other than that which would be consistent with the current zoning regulations (Feb. 2 Tr. 176-77).

52. Mr. Bello did not determine that the side yards were conforming until he saw the wall check, which was not performed until August 1999, well after the issuance of the original permit in June 1999 (Ex. 14, Feb. 2 Tr. 185-86).

53. The only example that DCRA could give that allowed a basement to be converted into a cellar was in a commercial zone (Feb. 2 Tr. 187).

54. At the time that the original permit was issued, Mr. Bello thought that the lot for 4512 exceeded 7500 square fee and this was in compliance with the lot size requirements (Feb. 2 Tr. 192-93,214).

55. Mr. Bello believed that the lot at 4512 was more than 7500 square feet in area (Feb. 2 Tr. 214).

56. Mr. Bello is the person who suggested and instructed the developer to put a berm in front of the property (Feb. 2 Tr. 194).

57. Mr. Bello never suggested to the developer, even as an option, that it just convert the house to three stories by not building the fourth story (Feb. 2 Tr. 95).

58. The developer had a licensed and registered architect who submitted the original plans for the first building permit (Feb. 2 Tr. 196-97).

59. Mr. Bello did not issue a stop work order after his meeting with the developer and its permit expediter Mr. Gangloff because he did not want "to be unusually punitive" towards them (Feb. 2 Tr. 200).

60. Mr. Bello works with Mr. Gangloff on a "regular basis" (Feb. 2 Tr. 199).

61. Mr. Bello does not recall telling Mr. Sloame that he would allow the developer to continue construction, even though Mr. Bello promised he would keep Mr. Sloame advised of developments (Feb. 2 Tr. 200-01).

62. Even though Mr. Bello said that he allowed construction to go forward at 4512 because the developer was showing that he was moving towards compliance, the developer did not file his application for the second permit until August 25, 1999, which was four weeks after the meeting with Mr. Bello (Feb. 2 Tr. 202, Ex. 16).

63. Mr. Cohen received a hand-delivered letter from Mr. Sloame (Ex. 6), on August 25, 1999 which told him that any further construction at 4512 was illegal and at his own risk (Feb. 23 Tr. 320).

64. The garage entrance level of Mr. Sloame's house and 4512 are basically at the same height and elevation (Feb. 23 Tr. 336-37).

65. Mr. Cohen at first claimed that he had begun construction of the fourth story by August 25, 1999, but then acknowledged that construction work on that story had not begun by that date (Feb. 23 Tr. 357).

66. Mr. Cohen at first denied that he decided to go ahead with his investment and continue construction only when on September 8, 1999 he spoke with Mr. Lourenco (Feb. 23 Tr. 359).

67. Mr. Cohen also denied at first that he knew in August and September 1999 that the neighbors were protesting his building and trying to persuade DCRA that it was illegal (Feb. 23 Tr. 362).

68. Later Mr. Cohen had to change his story and admit that he had told Mr. Lourenco in September 1999 that Mr. Lourenco's input was needed on the permit because neighbors had questioned Mr. Cohen's right to build (Feb. 23 Tr. 362-63 and Int. Ex. 14).

69. Mr. Cohen's answers concerning his knowledge of the objections of the neighbors to construction at 4512 were not credible.

70. Mr. Cohen waited until Mr. Lourenco made his approval on September 7 or 8, 1999 before proceeding with his investment (Int. Ex. 14).

71. Forest Hills correctly stated the number of stories (two) of the existing structure when it filed its original building permit application (Ex. 4 box 14), but incorrectly

stated the number of stories for the proposed building (three) (Ex. 4 box 17). No one at Forest Hills could explain why this was so (Feb. 23 Tr. 370-71, 375-76).

72. Mr. Cohen denied that he knew how many stories there were in the existing home when he purchased 4512, even though he agreed that he is an astute businessman and was planning on building a new house on that property (Feb. 23 Tr. 371-73).

73. Mr. Cohen's statement that he did not know how many stories there were in the existing house at 4512 was not credible.

74. Forest Hills plans on gaining economic advantage from having the fourth story at 4512 (Feb. 23 Tr. 374).

75. Although Mr. Bello ascribed the delay in filing for the second permit to architectural plans (Feb. 2 Tr. 203), those plans were a single sheet of paper (Int. Ex. 9).

76. Mr. Bello is probably the one who told the permit expediter to cross off the "1/2" in box 14 of the second permit application (Feb. 2 Tr. 204-06).

77. Mr. Bello also told the permit expediter to cross off the "1/2" in box 17 of the second permit application (Feb. 2 Tr. 206).

78. Even though Mr. Bello promised to keep Mr. Sloame advised of what was going on with respect to DCRA's approval

process of 4512, Mr. Bello did not advise Mr. Sloame of the new application which originally called for a "3 1/2" story house (Feb. 2 Tr. 206-07).

79. Mr. Bello never looked at 12 DCMR § 105.2 which calls for the restoration of established grades when a structure is demolished (Feb. 2 Tr. 208).

80. 4512 was a nonconforming structure because its side yards were less than eight feet (Feb. 2 Tr. 209).

81. Mr. Bello disregarded 11 DCMR § 223.1 because, as he read it, it was only applicable to districts in which a flat is permitted (Feb. 2 Tr. 210-11).

82. The plans for 4512 did enlarge the nonconforming aspect of the side yards (Feb. 2 Tr. 221-22).

83. Mr. Bello relied on the wall check to determine that the basement remained unchanged (Feb. 2 Tr. 227).

84. Stuart Sloame lives at 4508 28th Street NW, which is immediately to the south of 4512 (Feb. 2 Tr. 99).

85. Mr. Sloame is an attorney who served in the Department of Housing and Urban Development as the Deputy Assistant Secretary for Community Planning and Development and later as Deputy General Counsel of HUD (Feb. 2 Tr. 99).

86. Mr. Sloame met with Mr. Toye Bello of DCRA in August 1999. Mr. Bello told Mr. Sloame that he had been "misled"

because the permit application for 4512 indicated three stories, but the plans in fact showed four stories (Feb. 2 Tr. 100-01,102).

87. On August 11, 1999 Mr. Sloame reached Mr. Bello on the phone. Mr. Bello told him that he had spoken to Robert Shelton, the construction inspector for this area, and that he had issued a stop order that was then lifted after Mr. Bello met with the developer. The stop order was lifted based on the representation that the developer would submit revised plans to back fill the front of the property (Feb. 2 Tr. 103, 138).

88. Mr. Bello did not give the developer or the architect any specific period within which to submit those plans. Mr. Bello promised to call Mr. Sloame after he reviewed them but Mr. Bello never made that call (Feb. 2 Tr. 103).

89. DCRA allowed construction to continue even after the four-story problem was realized, because the construction had not reached the point where DCRA could not force the applicant to take some remedial steps (Feb. 2 Tr. 240).

90. Mr. Lourenco reviewed the second permit application not only for height, but also for side yard issues and whether it was being built on the existing footprint (Feb. 2 Tr. 241-42).

91. Mr. Lourenco mistakenly still believes that the three stories were built on the existing original footprint (Feb. 2

Tr. 242), even though the architect admitted and the plans show that three stories were added to the original footprint in the back of the house (Ex.3).

92. The construction of 4512 stretches to the limit the ability to develop the property (Feb. 2 Tr. 245).

93. Mr. Lourenco admits that he is not very happy with the end result and that he is going to recommend changes to the zoning code based upon the result he reached in this case (Feb. 2 Tr. 245).

94. 4512 did not need special consideration and regulatory flexibility because the site was sufficiently useful for construction to produce a house in the top five percent of cost in the District of Columbia (Feb. 2 Tr. 247-48).

95. The second building permit allowing the regrading did not provide any cost for doing that work (Feb. 2 Tr. 249-51).

96. DCRA claims there are no standards for determining whether a uilding has been demolished (Feb. 2 Tr. 252).

97. The house as built at 4512 is a problem for the neighbors (Feb. 2 Tr. 190).

98. A Polaroid photograph submitted during the hearing by Mr. Cohen (it bears no Exhibit No.), shows that Mr. Cohen began construction on the fourth floor or approximately September 7, 1999 (Feb. 23 Tr. 321). This was prior to the issuance of the

second building permit, and was prior to Mr. Lourenco's approval of that permit.

99. 4512 was built as a "spec" house (Feb. 23 Tr. 343).

100. 4512 is a very large house in square footage for this particular location (Feb. 23 Tr. 342).

101. Mr. Cohen agrees that 4512 has created a "squeeze play" on 28th Street, and has dramatically changed the sight lines along the block (Feb. 23 Tr. 348-49).

102. Although Forest Hills originally claimed that there had been no change in the walls in the basement, the architect agreed that he had expanded the existing window well on the south side of the house by at least four feet by four feet for purposes of occupancy (Feb. 23 Tr. 350).

103. Armando Lourenco, head of the Building and Land Regulation Administration, said that he could "understand the way the neighbors feel about this" because of the siting and size of 4512 (Feb. 2 Tr. 232).

104. The city and DCRA need to address issues concerning infill development (Feb. 2 Tr. 190).

105. The Zoning Administrator did not give a minor variation under 11 DCMR § 407 for 4512 (Feb. 2 Tr. 266).

106. Many new floor joists and a large portion of new subflooring placed over the existing footprint (Feb. 2 Tr. Exs. 39-40, 269-70).

107. 11 DCMR § 405.8 applies only to buildings, and a building has a roof (Feb. 2 Tr. 272).

108. DCRA "very much so" relies on the honesty and integrity of the representations made in permit applications (Feb. 2 Tr. 273).

109. DCRA did not make its final decision that 4512 was in compliance with the zoning regulations until September 7 or 8, 1999 (Feb. 2 Tr. 279-80).

110. When a developer undertakes construction without a permit, but on the expectation that a permit will be granted, it does so at its own risk (Feb. 2 Tr. 280).

111. Mr. Cohen is an experienced developer (Feb. 2 Tr. 280-81).

112. If Mr. Cohen was unable to fix the problems with the original building permit and he went ahead with construction, he did so at his own risk (Feb. 2 Tr. 281).

113. The decision to grant the second permit to allow regrading was made by Mr. Lourenco on approximately September 8, 1999 (Feb. 2 Tr. 287-88).

114. DCRA never notified the Appellants of Mr. Lourenco's decision of September 8, 1999 approving the permits at 4512 (Feb. 23 Tr. 356).

115. It is DCRA's position that under the zoning regulations a property owner can regrade its property to whatever level it chooses (Feb. 2 Tr. 91-92).

116. The regrading at 4512 has caused extreme erosion of the property (Feb. 2 Tr. 295-96 and Exs. 56-60).

117. The original grade of the property in 1956 before the original house was constructed is of no relevance (Feb. 2 Tr. 299, 301).

118. "Finished grade" means the grade in existence at the time of the application (Feb. 2 Tr. 301).

119. Although the developer claims to have restored the original 1956 grade at the left side of the house (Feb. 23 Tr. 279-81), that is legally irrelevant. The developer did not even attempt to restore the original grade at the right side of the house where the garage is located (Feb. 23 Tr. 284).

120. DCRA told Mr. Sloame in late July or early August 1999 that a stop work order would issue and that the entire project would be looked at by DCRA (Feb. 2 Tr. 94).

121. Mr. Sloame asked Mr. Bello what his appeal rights were if a new permit was issued. Mr. Bello told him that he could appeal to Mr. Nunley, and then to the Zoning Administrator but never mentioned any appeal to the Board of Zoning Adjustment (Feb. 2 Tr. 103-104).

122. On August 13, 1999 Mr. Sloame informed the neighbors of his meeting with Mr. Bello and DCRA's suggestion that the basement be turned into a cellar (Feb. 2 Tr. 104).

123. According to Forest Hills, it began framing the house on August 16th, 1999 (Opp. Br. at 6). Mr. Clark speaks with Mr. Nunley this week before any walls go up and asks the status of DCRA's review of the project. Mr. Nunley states that the project is still under review. He does not tell Mr. Clark that no application for a revised permit has been filed by Forest Hills.

124. On August 20, 1999 Mr. Sloame wrote a letter addressed to Mr. Cohen (Ex. 6) which was signed by the other Appellants and which was delivered by hand to Mr. Cohen sometime shortly after August 20,1999 (104). That letter informed Mr. Cohen that the neighbors believed that the construction was illegal because the new house was being built beyond the existing footprint, and that these were zoning violations concerning the side yards and the number of stories (Feb. 2 Tr. 104-05).

125. The letter further informed Mr. Cohen that Mr. Bello had told Mr. Sloame that the stop order was lifted based upon an

agreement to submit plans to conform to the regulations, but that no new plans had been approved or submitted, and that accordingly to "continue the unlawful construction is at your own risk" (Feb. 2 Tr. 105, Ex. 6).

126. At the time that the August 20,1999 letter was delivered, there was no construction of a fourth floor and at most there was some framing of the first floor (Feb. 2 Tr. 105).

127. The developer did not reuse all of the joists and floor deck (Exs. 39 & 40), even though the architect admitted that his plans called for that to be done (Feb. 23 Tr. 273).

128. DCRA relied on the fact that the original floor joists and the subflooring remained in reaching the determination that the original lower level remained after demolition (Feb. 2 Tr. 254), even though the record reflected that many of the joists and a large portion of the subflooring were removed (Exs. 39 & 40).

129. DCRA determined that the project here was an addition, even though only a portion of the original basement remained (Feb. 2 Tr. 253-54).

130. Although the plans called for keeping the existing joists and floor deck, Forest Hills replaced a large portion of the joists and deck (Feb. 23 Tr. 313-14).

131. Mr. Bello's approval of the permit for 4512 relied on the fact that the frame of the basement "was left untouched" (Feb. 2 Tr. 217).

132. On August 25, 1999, Forest Hills filed its new application for a building permit at 4512 to convert the basement to a cellar (Int. Ex. 8). Per Mr. Edgar Nunley, this application is not publicly available.

133. After its meeting with Mr. Bello on July 28, 1999, Forest Hills poured the footings for the three-story and the one-story additions in the back, delivered concrete block, started and completed the foundation for the rear additions, and has begun to frame the house. (Opp. Br. at 5-6). All of this took place without a new permit application having been filed.

134. After a number of additional attempts to reach Mr. Bello, Mr. Sloame was finally able to reach him on August 31, 1999. Mr. Bello informed Mr. Sloame that the developer had submitted revised plans calling for a berm -- that is, dirt to be piled up against the building -- and that Mr. Bello was going to meet with the Zoning administrator and Mr. Nunley the next week to make a decision with respect to these plans (Feb. 2 Tr. 106).

135. Mr. Sloame objected to this "solution," and Mr. Bello told him that "as long as there are only three floors as defined in the zoning regulations, they could have as many cellar floors as they want" (Feb. 2 Tr. 106).

136. Mr. Sloame then gave Mr. Bello a hypothetical, asking him that if the developer constructed a 10 story building and put a berm in the front to cover up seven of those stories, so that only three stories were exposed, would that be legal. Mr. Bello answered "yes" (Feb. 2 Tr.107).

137. Mr. Sloame told Mr. Bello that if DCRA adhered to that position, he might have to tell his story to a Judge (Feb. 2 Tr. 113).

138. When Mr. Sloame and Mr. Bello met in early August, Mr. Bello had the plans in front of him so that he knew that the existing house was being torn down (Feb. 2 Tr. 112-13).

139. Mr. Bello believed that because the same footprint was being maintained (which is not true), that the zoning requirements for a new building would not apply, citing 11 DCMR § 401.1 (Feb. 2 Tr. 110).

140. Mr. Bello told Mr. Sloame that Robert Chen had suggested the use of the berm (Feb. 2 Tr. 114).

141. The revised permit explicitly states "change finished grade to convert basement to cellar as per Robert Chen." (Ex. 16). Robert Chen is a DCRA employee.

142. The idea to cover up all but less than four feet of the existing basement was that of Mr. Bello (Feb. 2 Tr. 115).

143. The finished grade of the original house was at elevation 108 feet and the original basement floor elevation was 106 feet (Feb. 2 Tr. 120).

144. On August 25,1999 the neighbors wrote to Mr. Nunley, the chief of zoning review (Ex. 7) requesting a decision from DCRA because construction was continuing at the site even though the developer does not have approved plans for building what DCRA would soon admit was an illegal four-story house (Feb. 2 Tr. 122).

145. The developer advertised 4512, with a list price of $1,395,000, as having four stories (Feb. 2 Tr. Ex. 7,122).

146. As of August 25, 1999, the fourth floor had not been constructed (Feb. 2 Tr. 122-23).

147. On August 27, 1999, Mr. Nunley call Mr. Clark and tells him that the project is still under review and that no decision has been reached. He promised to visit the site (App. Timeline p. 8).

148. In August and September of 1999 the neighbors were literally pleading with the city to do something and make a decision, because construction was going forward without any revised permit (Feb. 2 Tr. 123-24).

149. On September 2, 1999 Mr. Clark again wrote to Mr. Nunley (Ex. 8) saying that construction of the fourth story was about to begin, even though Forest Hills did not, and could not,

have approval under the zoning code for four stories (Feb. 2 Tr. 123).

150. Also on September 2,1999 the neighbors wrote to the Zoning Administrator (Ex. 9) asking about the status of DCRA's approval process, because no one had been able to get a call returned, including Counselperson Kathy Patterson's office (Feb. 2 Tr. 124).

151. On September 6, 1999, Labor Day, construction continued all day long. Clark writes the neighbors informing them of the status of 4512 (App. Timeline p. 9).

152. On September 7, 1999, Councilmember Patterson's office received a message late in the day that the Zoning Administrator had approved the construction of the four-story house at 4512 and was going to allow the issuance of new permits. DCRA never notified the Appellants of this decision. DCRA promised Councilmember Patterson a written explanation of its position the next day (App. Timeline pp. 9-10).

153. On September 8, 1999, Appellants wrote to the Zoning Administrator to protest his decision (Ex. 10). The Zoning Administrator leaves a voice mail message that the "purportedly" four story house will be approved even though it "looks very awkward." He promises a meeting which never takes place (App. Timeline p. 10).

154. On September 8, 1999, Councilmember Patterson wrote to Lloyd Jordan asking when a final decision will be reached because Mr. Lourenco has said that although height is not issue, he is still reviewing the plans and permits with respect to the side yard and to see if the actual structure matches the permits on file. Councilmember Patterson adds a handwritten note asking "and when will you return my calls?!" (Ex. 11).

155. On September 10, 1999, Appellants again wrote to Mr. Michael Johnson asking for some evidence of the decision from the department so that an appeal could be filed with the BZA (Ex. 12).

156. On September 10, 1999, Armando Lourenco wrote to Kathy Patterson to inform her of his decision. Mr. Lourenco admits as follows: "The structure, as it now stands and if nothing was done to remedy it, is technically a four-story building." (Ex. 1). Mr. Lourenco states that "I empathize with the neighbors" but instead of enforcing the regulations, struggles to find a way to retroactively approve what was admittedly an illegally granted permit.

157. Councilmember Patterson again wrote to Lloyd Jordan about 4512 on September 13, 1999 (Ex. 13). She ask why she did not receive Mr. Jordan's written opinion that Mr. Jordan had promised would be hand delivered to her by Friday morning September 10, 1999, but which instead was a letter from Mr. Lourenco faxed to her late on Friday September 10. She requests

a copy of the survey to which Mr. Lourenco referred in his September 10 letter. Eventually that letter was made available to her (attached as Ex. E-2 to the appeal).

158. On September 14, 1999, Appellants wrote to Mr. Lloyd Jordan asking why DCRA has allowed construction to proceed at the site without a permit and why it is going out of its way to favor a builder who had admittedly misrepresented its project in its initial permit application (Ex. 15).

159. On September 17, 1999, a new permit is issued for 4512, which is not publicly available until October.

160. On September 17, 1999, DCRA approved the wall test report for 4512 (Ex. 14).

161. Lloyd Jordan wrote to Councilmember Patterson (Ex. 17) on September 17, 1999, enclosing a copy of the wall test survey. He also notes that in his view the regulations allow property owners to regrade their lots in any fashion they choose without any permission. He makes no mention of 12 DCMR §105.2 which requires that the original grade be restored after the type of demolition which was done here. Finally he states that he would be opposed to requiring regulatory approval for regrading.

162. On September 22, 1999 Mr. Sloame called the BZA, which faxed him an appeal form and a copy of the regulations (Feb. 2 Tr. 129).

163. Mr. Sloame was finally able to get a copy of the second permit in the first week of October 1999. Previous attempts to obtain the permit had been unsuccessful (Feb. 2 Tr. 130).

164. After obtaining the second permit, the neighbors discussed whether they would go forward with an appeal to the BZA (Feb. 2 Tr. 129-30).

165. On October 24, 1999, Mr. Clark and Mr. Sloame looked at a rough draft of the completed appeal form. Mr. Clark sent the draft to a zoning attorney for review because neither Mr. Clark nor Mr. Sloame is a zoning attorney. The Appellants received some comments about the form (Feb. 2 Tr. 130).

166. The appeal was filed on November 3, 1999 (Feb. 2 Tr. 130).

167. 4512 is on almost exactly the same slope as Mr. Sloame's house (Feb. 2 Tr. 132-34, Feb. 23 Tr.).

168. There is a clear view from 4512 into Mr. Sloame's bedroom windows which was not there in the pre-existing house (Feb. 2 Tr. 134, Exs. 51-55).

169. The new home at 4512 eliminates the privacy which Mr. Sloame formally had for the hot tub on his patio (Feb. 2 Tr. 135, Exs. 51-54).

170. DCRA never notified the Appellants of its decision that the second permit would be approved, allowing back filling to create a berm to try to eliminate one of the stories (Feb. 2 Tr. 141-42).

171. The Appellants contacted DCRA on almost a daily basis in the August and September 1999 time period, but DCRA never informed any of the Appellants of its decision with respect to 4512 (Feb. 2 Tr. 141-42).

172. The construction of a wall or fence between 4512 and Mr. Sloame's property that is within the allowed height limitations would not afford Mr. Sloame the same privacy that he previously had (Feb. 2 Tr. 142-43).

173. One of the purposes of the side yard requirements is for safety so that there is room for firemen to come in to put up a ladder to rescue inhabitants of a building. Because the side yard at 4512 are barely five feet, and there are now three living floors on top of the basement, there is no room for proper fire safety (Feb. 2 Tr. 143-44).

174. In August 1999, one of the other Appellants, Mrs. Emily Baker, contacted DCRA on a very regular basis, almost daily, to try to find out what the progress was on whether a new permit would be issued for 4512 (Feb. 2 Tr. 155).

175. Mrs. Baker also contacted the ANC and Councilmember Patterson's office (Feb. 2 Tr. 156).

176. As of September 2, 1999, Mrs. Baker was told by Inspector Neal that no decision had been reached with respect to 4512 (Feb. 2 Tr. 155-56).

177. Construction at 4512 has frequently taken place on Sundays, which is not permitted under D.C. law, as well as on holidays and early in the morning before 7 a.m. (Feb. 2 Tr. 156-57).

178. DCRA has ignored the problem of "tear down" properties and infill zoning violations in Wesley Heights, as well as in Forest Hills (Feb. 2 Tr. 159-61 and Exs. 41A & 42A).

179. ANC 3F held its first meeting concerning 4512 on November 15, 1999. Forest Hills promised to deliver plans for regrading both to neighbors and to ANC.

180. On November 17, 28 and December 3, 8 and 27 and January 4, 2000, Neighbors request in writing the plans for regrading promised by Forest Hills in the ANC meeting of November 15, 1999 (App. Timeline pp. 13-14).

181. The third permit issues for 4512 on December 9, 1999, this time for regrading the property and constructing new walkways from the house to the street (Int. Ex. 22). A sketch for the regrading in front of 4512 is obtained (Ex. 18). Neighbors learn of this permit only because they see it on the site in January.

182. On January 6 or 7, 2000, plans for regrading at 4512 were delivered. They show that the regrading has resulted in a 45 degree slope in front of 4512, which has already begun to fall of its own weight, and has erosion problems. (Ex. 19). (See also Exs. 20-22 and Exs. 56-57).

183. On January 10, 2000, ANC 3F meets again and adopts a resolution in support of Appellants' position.

184. The full garage at 4512 is still exposed because there was never any thought or idea of putting up any dirt or berm in front of it (Feb. 2 Tr. 128).

185. DCRA did not give notice to the ANC of the application for the original permit (Feb. 2 Tr. 261).

186. DCRA did not give notice to the ANC of the application for the second permit (Feb. 2 Tr. 261).

187. DCRA did not give notice to the ANC of the application for the third permit (Feb. 2 Tr. 261-62).

188. DCRA is required to give notice to the ANC of the applications for permits before they may be issued (Feb. 2 Tr. 263-65).

189. ANC-3F adopted a resolution unanimously on January 10, 2000 supporting the position of the Appellants in this matter (Ex. 2, Feb. 2 Tr. 72-73).

190. The ANC resolution recites that DCRA agreed that 4512 was a four-story house, but that nevertheless a revised permit was issued to enable the developer to try to avoid the three-story height limitation of the zoning laws (Feb. 2 Tr. 73).

191. The ANC found that DCRA had not adequately addressed whether 4512 improperly extended beyond the pre-existing footprint, and whether the side yards complied with the minimum requirements (Feb. 2 Tr. 73).

192. The ANC found that the issue of the impact of "tear down" construction on the character of the surrounding community is of great importance to the ANC and to the residents of the city (Feb. 2 Tr. 74).

193. The ANC found that the activities of DCRA in this case should be carefully reviewed and examined to ensure that they comply with D.C. laws and regulations that are designed to protect neighborhoods (Feb. 2 Tr. 74).

194. The ANC found that the appellants had raised strong and compelling arguments for their position, especially with respect to the way the DCRA acted carelessly in the permitting process (Feb. 2 Tr. 74-75).

195. The ANC found that the original building permit was incorrectly issue by DCRA and should never have been issued (Feb. 2 Tr. 7 5).

196. The ANC found that DCRA had come up with a convoluted scheme to throw up some soil onto the side of the building to somehow miraculously, if not mischievously, turn a one-story basement into a non-story seller (Feb. 2 Tr. 76).

197. The ANC found that DCRA had come up with this scheme in an attempt to avoid the consequences of its own error in issuing the original permit (Feb. 2 Tr. 76).

198. The new house at 4512 was not built on the pre-existing footprint (Feb. 2 Tr. 93).

CONCLUSIONS OF LAW

Quick Regulatory Overview

The following definitions are of particular significance in this matter. All are contained in 11 DCMR § 199.

Basement - that portion of a story partly below grade, the ceiling of which is four feet (4 ft.) or more above the adjacent finished grade.

Building - a structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel.

Building, height of - the vertical distance measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet.

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

Cellar - that portion of a story, the ceiling of which is less than four feet (4 ft.) above the adjacent finished grade.

Nonconforming structure - a structure, lawfully existing at the time this title or any amendment to this title became effective, which does not conform to all provisions of this title or the amendment, other than use, parking, loading, and roof structure requirements. Regulatory standards that create nonconformity of structures include, but are not limited to, height of building, lot area, width of lot, floor area ratio, lot occupancy, yard, court, and residential recreation space requirements.

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

For the purpose of determining the maximum number of permitted stories, the term "story" shall not include cellars, stair or elevator penthouses, or other roof structures;

The following additional zoning regulations have particular applicability here:

(a) 11 DCMR § 400.1, restricting height in the R-1-A zone to forty feet or three stories;

(b) 11 DCMR § 401.1 & .3, creating a minimum lot area of 7,500 square feet in the R-1-A zone, and stating that a nonconforming building existing as of May 12, 1958 "may not be enlarged or replaced by a new building unless it complies with all other provisions of this title."

(c) 11 DCMR § 405.8: "in the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building: Provided, that the width of the existing side yard shall not be decreased; and Provided further, that the width of the existing side yard shall be a minimum of five feet (5 ft.)."

(d) 11 DCMR §223.1: Enacted in 1998, this section requires that an addition to a one family dwelling that does not comply with all of the zoning requirements with respect to, among others, lot size and side yards, shall be permitted only by application to the BZA in accordance the criteria set forth in §223.2. Those criteria include that the addition shall not

have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling, including: (i) that the light and air available shall not be unduly affected; (ii) that the privacy of use and enjoyment of neighboring properties shall not be unduly compromised; and (iii) that the addition together with the original building as viewed from the street shall not substantially visually intrude upon the character, scale and pattern along the street.

(e) 12 DCMR §105.2: "Lot regulation: whenever a structure is demolished or removed, the premises shall be maintained free from all unsafe or hazardous conditions by the proper regulation of the lot, **restoration of established grades** and the erection of the necessary retaining walls and fences in accordance with the provisions of Article 30 of the Building Code." (Emphasis added.)

(f) 11 DCMR §2001.3(c): "The addition or enlargement 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."

1. Intervenor Failed To Meet Its Burden Of Proving That The Appeal Was Untimely Or Barred By Laches.

The developer has utterly failed to meet its burden of proof that the appeal in this case was either untimely or is barred by the doctrine of laches. Here the Appellants, who were never notified by DCRA of their appeal rights, filed their

appeal less than 30 days after the second building permit became available, and less than 60 days after they heard indirectly from their Councilmember that DCRA had decided to approve the project. As the Court held in Mendelson v. District of Columbia Board of Zoning Adjustment, 645 A.2d 1090,1094 (D.C. 1994) even a two-month interval between notice of an action and filing of an appeal "cannot be deemed unreasonable under these circumstances." The earliest that the Appellants were on notice of any action that could be appealed was by their indirect receipt of Mr. Lourenco's September 10, 1999 letter. Their appeal was filed 54 days later, after obtaining the relevant permit documents, and consulting with zoning counsel. Filing within that two-month period is timely. Goto v. District of Columbia Board of Zoning Adjustment, 423 A.2d 917, 924-25 (1980).

Under District of Columbia law, the Intervenor, as the party claiming prejudice, has the burden of establishing that it was prejudiced by delay and that any delay was unreasonable. American University Park Citizens Association v. Burka, 400 A.2d 737, 740 (D.C. 1979). Those defenses are disfavored. Wieck v. District of Columbia Board of Zoning Adjustment, 383 A.2d 7,10 (D.C. 1978). Estoppel to prevent enforcement of the zoning laws is "judicially disfavored." Rafferty v. District of Columbia Zoning Commission, 662 A.2d 191, 194 (D.C. 1995).

Here the facts conclusively establish that there was no delay, unreasonable or otherwise. It was Appellants who

called the errors in the original permitting process to the attention of DCRA. DCRA then undertook a review of the entire project at 4512, including height, side yards, and the existing footprint. Appellants diligently pursued those issues by contacting DCRA virtually daily, while DCRA failed to respond. When DCRA finally did reach its decision in September, it did not contact the Appellants, but instead relied upon Councilmember Patterson to do that for it. Appellants then diligently pursued their appeal rights.

Intervenor, recognizing the timeliness of the Appellants' actions, has argued in the alternative that there was no timely appeal concerning the first permit. Intervenor's argument ignores the uncontested record that starting in late July 1999 and through Mr. Lourenco's letter of September 10, 1999, DCRA had the entire project under review. His letter states that he reviewed all of the issues concerning not only height, but also the side yards and "whether the construction significantly deviated from the approve plans." (Ex. 1). Thus Mr. Lourenco's review clearly covered the entire project, resulting in DCRA's decision as stated in his letter of September 10, 1999. There was no need to appeal from DCRA's final decision before it was made.

Here the Appellants diligently worked with DCRA to try to find out what was going to take place at the property. They expressed their very strong feelings and continuing concerns about the construction, not only to DCRA, but also to Mr.Cohen.

Under these circumstances, the District of Columbia Courts have found that short delays such as here, require an "exceptional showing" of both prejudice and unreasonable for the Intervenor to prevail. Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 127 (D.C. 1990) (working and meeting with zoning officials to try to change final decision does count against appeal time).

In Beins, as here, because the Appellants were not zoning lawyers, it was "understandable" that they would spend several weeks seeking advice about the merits of the complaint, including by consulting a zoning lawyer, before initiating the appeal process. Id. at 127. Likewise, the fact that the Appellants did not tell the builder of their continued opposition before the appeal with filed was irrelevant to claim of laches. Id. at 125.

Moreover, Intervenor's claim that it has been prejudiced by its continuing construction and that it would suffer a hardship if the fourth story were ordered to be removed is totally without merit. In this case Forest Hills was on notice of of the neighbors' opposition and their contact with DCRA long before it started construction on the fourth story. Indeed Forest Hills received a letter stating that any further construction was at its own risk (Ex. 6). Forest Hills delayed one month after it met with DCRA in July before it filed its application for the second permit. And it went ahead with construction on the fourth floor before it received the final

necessary approval from Mr. Lourenco. As Mr. Lourenco testified, Forest Hills went ahead at its own risk (Feb. 2 Tr. 280).

Forest Hills applied for a permit to build a four story house it could never have a right to build. At the time it did so, it was unaware of the cellar-basement-berm option that Mr. Bello later brougt to its attention. It is the innocent Appellants/neighbors who are entitled to all of the equities in this situation.

Going ahead with construction in light of neighborhood opposition "invites application of the' self-created hardship rule.'" Murray v. District of Columbia Board of Zoning Adjustment, 572 A.2d 1055, 1058 (D.C. 1990). That rule precludes relief. And unlike the builder in Murray, the Intervenor here did not have final approval from DCRA before it went ahead with its construction. Indeed Forest Hills raced to complete construction before it even filed its second permit application. And the fact that the neighbors had expressed their opposition, in what the Intervenor now concedes was a full-scale effort with the DCRA and the City Council, made it extremely likely that an appeal would be filed. Id. at 1058.

2. 4512 Violates The Height Regulations.

It is uncontested by DCRA that the original permit for 4512 approved the building of a four-story house. This is so the basement is a story because it is more than four feet out of

the ground. DCRA and the developer claim that the basement has been converted to a cellar because after extensive regrading at the measuring point for height the basement is now less than four feet out of the ground. In other words, filling in a dirt strip a few inches wide in front of half of the house has removed a story. This "Alice in Wonderland" argument fails.

4512 remains a four-story house. The most obvious place where the building is clearly four stories is the garage, which is fully exposed, and is a story by any view or measurement (see Ex. 20). Even at the measuring point, the berm which magically converts the basement into a cellar is not even one foot deep, and then drops off at a severe angle (Exs. 21, 24-26). What DCRA has approved is an interpretation that says that as long as the number of stories is in compliance at the one measuring point, the rest of the house can be any number of stories and any number of feet in height. This is an absurd interpretation of the zoning regulations and will render them meaningless.

Nevertheless, this is the interpretation which DCRA has clearly stated on more than one occasion that as far as it is concerned, the developer could build a 10 story house as long as there was a 7 story berm in front of it at the measuring point. DCRA has also stated that the developer should be allowed to adjust the grade to any level it wants. This interpretation is wrong for three reasons.

First, this interpretation would allow the developer to build a 10 story house, 90 feet in height, in a R-1-A zone as long as the house was only three stories or 40 feet in height at the single measuring point. DCRA will be estopped from trying to enforce the zoning regulations based upon its interpretation in this case.

Second, under this interpretation an owner could remove the berm at all spots along the building except at the measuring point, and remain in compliance with the law with respect to stories and height. At this property, for example, a buyer could dig out the berm on the left side of the property, and put in a door for a walkout basement because the building would only be three stories at the single measuring point. DCRA will be powerless to stop this type of activity under the strained interpretation of the zoning regulations which it has adopted here.

Third, the developer and DCRA claim that the phrase "finished grade" means the grade after all construction has ended. They point to nothing to support this interpretation, except for commercial properties. It makes far more sense that finished grade means the grade at the time of the permit application.

Under DCRA's interpretation, the owner of a completely flat piece of property could construct a 20 foot high earthen

berm at the front of the proposed structure. The owner could then build a five-story house (perhaps, like here, with a garage alongside the berm), with the front showing only 3 stories. According to DCRA, the builder can do this as of right, and neither it nor the neighbors would have any right to object, even though a 20 foot hill and 50 foot house had been added to the property. If the construction was an expansion of a tear down, the analogy would be complete. DCRA would thus effectively rewrite the zoning laws for R-1-A zones.

And although Mr. Lourenco thought that was unlikely to happen, he admitted that Appellant Clark could tear down his house, and raise the level 20 feet so that it would be 6 stories in the back and on the sides, but only 3 in front. Some logic has to govern this situation.

DCRA's interpretation also fails to take into account 12 DCMR §105.2, set forth above, which requires that "whenever a structure is demolished" the premises are to be free from unsafe or hazardous conditions by "restoration of established grades." The permit here provided that the developer would "demolish existing" single-family dwelling. Under this regulation, the developer was required to restore the established grade. It is not given freedom to establish any new grade which it wants.

3. 4512 Is Not Built Upon The Existing Footprint And § 405.8 Does Not Allow It To Be Built.

The original permit grants permission, based on the application, to "construct 3 floors and addition to existing footprint." This means precisely what it says - three floors would be constructed on the existing foundation and a single story addition would also be constructed. As is shown on Exhibit 3, this is not what the developer planned on doing, nor what it did do.

This fact is significant because DCRA claims that this "new home," as it is advertised on the site by the developer, is just an addition or extension of an existing building and thus entitled to special consideration.

DCRA and Forest Hills incorrectly assume that 11 DCMR § 405.8 permits the construction of a three-story addition plus a single story addition, neither of which was built on the preexisting footprint, with side yards less than 8 feet. But that is not what § 405.8 allows. Indeed to interpret § 405.8 in the manner claimed by DCRA and Forest Hills runs contrary to the zoning policy of the District of Columbia, and would render 11 DCMR § 2001.3 a nullity, which violates basic principles of administrative law and statutory construction.

11 DCMR § 2001.3 allows an enlargement or addition to a nonconforming structure only if the addition or enlargement itself conforms to current zoning requirements and "shall not

increase or expand any existing, nonconforming aspect of the structure, and shall not create any new nonconformity of structure." 11 DCMR § 2001.3(c). As interpreted by the D.C. Court of Appeals, this section means that improvements on nonconforming structures cannot "increase or extend existing nonconformities or create new ones." Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 124 (1990). In Beins, the house was a nonconforming structure because it was built before the 1958 code and did not conform to the then current minimum rear yard requirement. Id.

If DCRA's interpretation is allowed to stand, it will "defeat one of the major purposes of the Zoning Regulations, namely, ' the gradual elimination of … existing (nonconforming) structures." Lenkin v. District of Columbia Board of Zoning Adjustment, 428 A.2d 356, 358 (D.C. 1981), quoting Wood v. District of Columbia, 39 A.2d 67,69 (D.C. App. 1944). There is a clear regulatory objective against nonconforming structures. Silverstone v. District of Columbia Board of Zoning Adjustment, 372 A.2d 1286, 1290 (1977), affirmed, 396 A.2d 992 (D.C. 1979); Sheridan-Kalorama Neighborhood Council v. District of Columbia Board of Zoning Adjustment, 411 A.2d 959, 963 (D.C. 1979).

DCRA agrees that 4512 is and was a nonconforming structure. As such, 11 DCMR § 2001.3 precludes the construction which was approved here. This is true for three reasons.

11 DCMR § 2001.3 prohibits extending any existing nonconforming aspect of the structure (i.e. the less than 8 foot side yard), or creating any new nonconformity of structure. But 4512 as built does both. The three-story addition that was not built on the preexisting footprint has a less than 8 foot side yard on each side. The new one story addition has a less than 8 foot side yard on one side. These new 8 foot side yards are either an extension of the existing nonconforming aspect or a new nonconformity.

11 DCMR § 405.8 does not change that result. 11 DCMR § 405.8 by its own terms does not allow the extension of any nonconforming aspect of the structure. What 11 DCMR § 405.8 allows is an extension or addition to the building as long as the existing side yard is not decreased. In other words, the three story addition which was built on top of the existing footprint is permissible because it does not decrease the width of the existing side yard. Absent § 405.8, those three stories could not be built because 11 DCMR § 2001.3 prohibits an addition to a nonconforming structure unless the addition conforms to current zoning. That is all 11 DCMR § 405.8 means. In fact, it is why the original building permit application stated that the house was going to be built on the existing footprint, with a separate one story addition.

Second, § 405.8 does not mean that you can extend the structure with the nonconforming side yard beyond the original nonconformity as long as you do not build the new structure any

closer to the lot line. As was shown above, regulations concerning nonconforming structures must be interpreted so as to restrict and eventually eliminate them. An interpretation which allows a completely new nonconforming addition runs contrary to that policy. And as was shown above, there is a far more direct interpretation of § 405.8 which is consistent with the policy against nonconforming structures.

Third, the three-story addition to the existing footprint, as well as the one story addition behind it, both created a new nonconforming aspect at 4512, in violation of 11 DCMR § 2001.3. Prior to the construction of those two new nonconforming additions, there was no side yard problem on those portions of the 4512 property. After construction, there are side yards of less than 8 feet on both sides of the three-story addition beyond the existing footprint said, and on the north side of the one story addition. Prior to the construction that was all open land with no side yard problem. Not even DCRA's interpretation of § 405.8 can rescue the developer here. Even § 405.8 says that the width of the existing side yard "shall not" be decreased. But the side yard has been decreased along the entire length of the additions on the north side of the house and along the entire length of three-story addition on the south side.

4. 4512 Is Not An Extension Or Addition Made To An Existing Building And Could Never Qualify For Relief Under § 405.8.

Under 11 DCMR §199, 4512 as it existed prior to its demolition was a "nonconforming structure" because it did not conform to the provisions of the zoning code in a number of respects, including lot area and side yards. Under 11 DCMR § 2001.3(c), an addition or enlargement to a nonconforming structure "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 lot at 4512, as Exhibit 3 shows, is 7,494.25 square feet. Under 11 DCMR § 401.3, the minimum building lot size in an R-1-A zone is 7,500 square feet. The side yards at 4512 are less than eight feet, and thus do not meet the requirements of 11 DCMR § 405. Thus 4512 was by definition a "nonconforming structure."

Under 11 DCMR § 401.1, in the case of a building located on a lot which is too small, as is 4512, "the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title."[4] 4512 does

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4 4512 is not saved by the provisions of 11 DCMR §407.1 which authorize the Zoning Administrator to permit a deviation not to exceed two percent of the area requirement of §401, as well as other deviations. First, the Zoning Administrator authorized no such deviation here. Although Mr. Lourenco claimed that Mr. Bello's original permit approval invoked § 407.1, Mr. Bello testified that he thought the Lot exceeded 7500 square feet.

Continued on following page

not comply with all the zoning provisions, including most conspicuously the lot size, side yard and height provisions. Thus no permit can issue unless some other provision of the zoning code is applicable. As was shown above, 11 DCMR § 405.8 is not available. Therefore, the addition violates the zoning code.

Apparently Mr. Lourenco believes that there is a provision in the current regulations that authorizes five foot side yards. He is incorrect. There is a provision which deals with extending or adding to buildings which had less than eight foot side yards as of May 12, 1958, (11 DCMR § 405.8). But that provision does not aid the developer here.

The work at 4512 was not an addition or expansion to an existing building. Section 405.8 allows "an extension or addition … to the building" existing on or before May 12, 1958.

Continued from previous page

Second, in considering such a deviation, the Zoning Administrator is required to consider whether the deviation will "impair the purpose of the otherwise applicable regulations." 11 DCMR §407.1(b). The Zoning Administrator made no findings with respect to this issue, including the purposes of the height and minimum side yards rules. Moreover, DCRA is required to make a record that this provision was invoked, which it did not do. Melody Music, Inc. v. FCC, 365 F.2d 730, 733 (D.C. Cir. 1965).

Moreover, in granting any such deviation, the Zoning Administrator should be required to consider the factors contained 11 DCMR §223. Those factors include the light and air available to neighboring properties, the privacy of use and enjoyment of neighboring properties, and the visual intrusion upon the character, scale and pattern of houses along the street. 11 DCMR §223.2(a)-(c).

But as the application and permit state, the previous single-family dwelling was demolished. Part of the plans (see page A2 of the approved plans) provide that the developer was to "remove roof above completely." Once the roof was removed, there was no building remaining at the site within the zoning definitions. A building is a "structure having a roof supported by columns and walls for the shelter, support, or enclosure of persons...." (Emphasis added). Because there was no building to be added to or expanded, section 405.8 is inapplicable because it applies only to extensions or additions to a building.

Under DCRA's view, a developer can build a new building which is entirely a nonconforming structure, as long as the developer calls it an addition. The new building at 4512 is no addition or expansion. Indeed the developer has advertised 4512 as a "stunning **new** six bedroom home"(emphasis added, Ex. (7). To call this entirely new structure an addition or expansion of an existing building is to ignore reality in another Alice in Wonderland interpretation.

5. The Developer Built 4512 With Full Knowledge That It Had No Valid Permit.

Forest Hills filed its application and proceeded to build at 4512 with full knowledge that it was violating the three-story limitation. Its architect is licensed in the District of Columbia and is thus charged with knowledge of the three-story limitation. The plans which were submitted state

that "all work shall conform to the District of Columbia building codes and all other applicable laws, rules and regulations." (Page A1).

In addition, the developer was placed on written notice on August 20, 1999, that 4512 as planned violated the height limitation. The developer was further placed on notice that the Appellants would proceed with this appeal. All of this took place prior to the time that the fourth story was added to 4512.

A property owner cannot rely upon issuance of a building permit approved in violation of District of Columbia regulations. Rafferty v. D.C. Zoning Commission, 662 A.2d 191, 192 (D.C. 1995); Murray v. D.C. Board of Zoning Adjustment, 572, A.2d 1055 (D.C. 1990). Any alledged financial hardship on the developer caused by requiring 4512 to come into compliance is "self-created hardship" and precludes a claim by Forest Hills that it relied in good faith on the Zoning Administrator's ruling. Id. at 1058.

The developer is entitled to no sympathy here. It filed an application to build an illegal structure with a hope that DCRA would not discover that fact. The developer was successful in initially getting its false application past DCRA. When the developer was caught, it still could have applied to build a lawful structure without removing any portion of the building. Instead of complying with the law, however, it chose

to gamble and ask for the zoning regulations to be interpreted in a completely illogical way. The developer has no one to blame but itself for its illegal actions.

If the DCRA bent over backwards in approving the revised permit application out of some misguided sense of guilt in wrongfully granting the first permit, or to cover up its mistake, the builder has no equitable claim of reliance. Not only did the builder mislead the DCRA, but also it was put on notice of the proposed illegal construction by the neighbors prior to framing and was warned that it was continuing construction pursuant to the original plans at its own risk. The builder's response was to redouble its construction efforts, even having work performed on Labor Day and during a hurricane, in an effort to create "facts on the ground." To allow the builder to succeed in this charade is tantamount to taking pity on the boy who murdered his parents and claimed that the court should have sympathy for him because he was an orphan.

6. Section 223.1 Applies And The Developer Failed To Use It.

The result sought here will have no adverse impact on proper development of tear down properties. In fact there is a new zoning regulation which applies to exactly the situation presented here. Under 11 DCMR § 223, additions to single-family dwellings that do not comply with the lot size and side yard requirements are to be permitted only if approved by the BZA.

A question was raised during the hearing as to whether 11 DCMR § 223.1 applied only in districts that allowed flats. Although the placement of the commas in the regulation makes it clear that this section applies in the R-1-A zone, the history of the regulation demonstrates that even more clearly.

As originally proposed, § 223.1 read "An addition to a single-family dwelling or flat that does not comply with all the requirements…" (Ex. 46 at second page of exhibit & Ex. 48 p.2). As a result of comments by the District of Columbia Building Industry Association, the text was changed to make it clear that "there should be no implication that an addition to a single-family dwelling in a lesser [than R-4] Zone District can take the form of a flat" (Ex. 47 p.2). The proposed regulation was then modified to add the words "in those residential districts were a flat is permitted" (Ex. 45). Moreover, § 223.2 specifically states that this provision is applicable in the R-1 zone. The final order of the Zoning Commission (Ex. 44) refers many times to the application of the proposed regulation in areas of the city which are zoned R-1-A.

In considering additions, the BZA is to take into account certain considerations which show exactly why construction like that done here should not be a matter of right. A single-family dwelling which is in violation of the lot size and side yard requirements is not allowed if it has an adverse effect on several factors which are relevant here. First, the light and air available to neighboring properties

shall not be unduly affected. 4512 is so high above the other properties that it has removed all winter sunlight from the property across the street (4525) (Ex. 26). Second, the privacy and use and enjoyment of neighboring properties shall not be unduly compromised. 4512 now looks down into the most private rooms at 4508, as well as onto the patio of 4508 which contains a hot tub.

Third, the addition as viewed from the street is not to substantially visually intrude upon the character, scale and pattern of houses along the street. Even Michael Johnson stated that 4512 "looks very awkward." (September 8, 1999 voicemail message) Armando Lourenco agrees that 4512 "will certainly be the most conspicuous structure to anyone walking along the block." (Ex. 1 at p. 3). Even he "empathize[s] with the neighbors in this respect." (Ex. 1 at p. 3).

7. 4512 Violates The Building Restriction Line.

There is a 15 foot building restriction line at 4512 (see Ex. 3). As Exhibit 3 shows, the old 4512 was precisely at the building restriction line at its southeast corner, as well as at the northeast corner of the pre-existing porch, and perilously close to it everywhere else. Significantly, 4512 violates the building restriction line.

The plans for 4512 show a balcony above the front door on the third-floor of the building. This balcony is not shown on the plat which shows the building restriction line. But the

balcony as shown on the building plans extends beyond the pre-existing porch, which was at the 15 foot building restriction line (see Ex. 3 and pages A2 & 3 of the plans). Therefore the balcony, which is to be supported by beams, necessarily extends beyond the 15 foot building restriction line in violation of 12A DCMR § 506.10.2.

8. Pre-Existing 4512 Was A Nonconforming Structure.

Mr. Lourenco asserts in Exhibit 1 (page 3) that 4512 was not nonconforming because the pre-existing development was grandfathered. But that misapprehends the definition of nonconforming structure. 4512 was nonconforming because, in the words of the definition, it "does not conform to all provisions of this title." 11 DCMR §199. The definition contemplates that a conforming structure becomes nonconforming by reason of changing regulatory standards. That does not change whether the structure is grandfathered, but only determines whether other provisions come into play for additions or expansions. See Beins v. District of Columbia Board of Zoning Adjustment, 572 A.2d 122, 124 (D.C. 1990) (house was nonconforming structure because it was built before 1958 but did not meet current zoning regulations).

9. The BZA Must Grant Great Weight To The ANC's Conclusion That 4512 Is Illegal.

The ANC for 4512 has passed a resolution that the DCRA has incorrectly issued a building permit allowing a four-story

house, and "acted in such a manner as to avoid and evade the three-story limit in the DCMR.." (Ex. 2 at p. 2). The BZA is required to give "great weight" to this decision of the ANC. D.C. Code §1-261(h); Levy v. D.C. Board of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990).

The ANC has resolved that the BZA should require that 4512 come into compliance with the zoning regulations. The only way to do this is to remove the top floor and that portion of the three-story addition which does not conform to the eight foot side yard requirement. As the ANC notes, the revised permit was issued only after the fourth floor was constructed.

The ANC notes further that the issue of alleged additions to properties which have been torn down is one which requires careful consideration by the BZA. The BZA must give great weight to the ANC's conclusion that the zoning regulations must be read carefully and applied correctly with respect to so-called "tear down" properties, or else the regulations will have no integrity at all. Failure to do so is reversible error. Neighbors United for a Safer Community v. D.C. Board of Zoning Adjustment, 647 A.2d 793, 797-798 (D.C. 1994).

Relief

The BZA should order that the fourth floor of 4512 be removed and that the 3 stories added to the existing footprint also be removed. The developer has only itself to blame for any possible hardship it may allege this relief will cause. In the alternative, the berm should be extended across the entire front of the house, the basement windows bricked in, and privacy afforded to Mr. Sloame.

Respectfully submitted,

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April 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have on April 10, 2000 hand-delivered a true copy of the foregoing Findings of Fact and Conclusion of Law of Appellants to the parties listed below.

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