BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal

OFFICE OF ZONING
DISTRICT OF COLUMBIA
00 JUL -7 P12:35

Appeal of EDWARD M. POTTER	)	
	)	
Appellant,	)	BZA Appeal No. 16588
	)	
	)	

MOTION TO DISMISS APPEAL AS UNTIMELY UNDER 11 DCMR §3315.2

Mohammed Ghafoorian, the property owner of 4900 Indian Lane, N.W. which is the subject of this appeal and a person with a direct interest in this appeal, moves this Board in accordance with the provisions of 11 DCMR §3315.2 to dismiss this appeal of appellant Edward M. Potter ("Potter") as untimely.

I. STATEMENT OF FACTS.

1. Mohammed Ghafoorian ("Ghafoorian") purchased 4900 Indian Lane, N.W. (the "Property") in November 1997 for renovation and use as his personal residence.

2. Permits for renovation were obtained in the summer of 1998, and interior renovations begun on the Property at that time. A copy of Building Permit No. B 415922 is attached as Exhibit 1.

3. In the spring, 1999, Ghafoorian applied for a building permit to change the existing garage at the Property and to build a new three-car garage. This building permit provided for construction of retaining walls for a slab-on-grade to be built as part of the construction of the new garage. A copy of Building Permit B422926 is attached as Exhibit 2.

4. Accompanying the application for Building Permit B422926 were construction plans for the new garage, including its site location, dimensions, and location of retaining walls and related structures. The construction plans showed the distance of the new garage from the side lot line and rear lot line of the Property.

5. Construction began on the new garage in April 1999.

6. The building permit applications and construction plans were continuously on file with the Building and Land Regulation Administration of the Department of Consumer and Regulatory Affairs ("DCRA") and public knowledge commencing April 1999.

BZA
Case No. 16588
Exhibit No. 22

Board of Zoning Adjustment
District of Columbia
CASE NO.16588
EXHIBIT NO.22

7. In April 1999, Potter demanded that a building inspector from the Construction Inspection, Permit Issuance and Zoning Branches of the DCRA stop Ghafoorian's work claiming the construction violated the D.C. Municipal Zoning Regulations which are the subject of this appeal.

7. On April 16, 1999, Robert Shelton, a D.C. construction inspector, issued a stop work order.

8. On April 19, 1999, the DCRA through Vincent Ford, the zoning inspector, issued a second stop work order.

9. After a DCRA review of the plans and construction again, the stop work orders were vacated and released.

10. Potter did not appeal either the issuance of the Building Permit B422926 or the vacating of the stop orders.

11. On May 7, 1999, Potter filed a suit in the Superior Court of the District of Columbia seeking to halt construction at the Property based upon violations of the same D.C. Municipal Zoning Regulations for which Potter had sought the earlier stop orders. A copy of the suit is attached as Exhibit 3.

12. In May 11, 1999, Potter had obtained an *ex parte* temporary restraining order from the Court preventing further construction at the Property, but Judge Herbert Dixon subsequently vacated the TRO and denied a preliminary injunction on May 19, 1999, finding no violations of the D.C. Municipal Zoning Regulations. A copy of Judge Dixon's opinion is attached as Exhibit 4.

13. Potter did not appeal Judge Dixon's ruling or findings.

14. Construction continued on the new garage and Ghafoorian applied for and received Building Permit No. B423964 on May 24, 1999, making corrections to the earlier permit. The permit application was accompanied by corrected construction plans. A copy of Building Permit No. B423964 is attached as Exhibits 5. The construction plans did not change the location, dimensions, height or other elements of the new garage. A copy of the construction plans are attached as Exhibit 6.[1/]

15. Potter did not appeal Building Permit No. B423964.

[1/] The April and May 1999 construction plans were identical as to the size, location, height, construction methods, etc. The differences involved correction of elevation dimensions above a baseline point set in the street, not any change in building dimension or height. For this reason, only one copy of the construction plans has been attached.

16. On September 13, 1999, Potter complained to his Advisory Neighborhood Commission about the alleged Zoning Regulation violations involving rear and side yard setbacks, building height, and building area, exhibiting his knowledge and awareness of the existence of these matters at that date. A copy of this complaint letter is attached as Exhibit 7.

17. In December 1999, Potter again asked the DCRA to stop construction based on claims of the same violations of the D.C. Municipal Zoning Regulations previously denied by Judge Dixon and shown in the construction plans and covered by Building Permit Nos. B422926 and B423964.

18. On December 7, 1999, the DCRA, Building and Land Regulation Administration, Building Inspection Division again issued a stop work order. After review by Edgar T. Nunley and James Shelton, the Chief Building Inspector and Chief, Zoning for Building and Land Regulation Administration, Building Inspection Division, the stop work order was released on December 9, 1999. A copy of the stop work order and release is attached as Exhibit 8.

19. In March 2000 a hearing on a preliminary injunction to halt construction at the Property by reason of the same violations of the D.C. Municipal Zoning Regulations which are the subject of this appeal were heard before Superior Court Judge Richard Levie.

20. Judge Levie denied the preliminary injunction, ruling there were no violations of the D.C. Municipal Zoning Regulations. A copy of his opinion are attached as Exhibits 9.

21. Potter did not appeal the ruling of Judge Levie.

22. About April 10, 2000, Potter filed this appeal from the December 1999 actions of the Building and Land Regulation Administration, Building Inspection Division in vacating the stop work orders.

23. By April 10, 2000, construction of the new garage was substantially complete.

II. ARGUMENT: Potter's Appeal Is Entirely Untimely.

This appeal is based on alleged violations of 11 DCMR §§ 101[2/], 199[3/], 200[4/], 201[5/], 404.1[6/], 405.9[7/] and 2500.4[8/]. In April and May 1999, Ghafoorian obtained Building Permits Nos. B422926 and B423964. From these permits and accompanying construction plans in the public record, all matters about which Potter now complains were discernable including the location of the new garage with respect to the rear and side lots, the area in square footage of the garage, the height of the garage above the finished grade, and the location of the garage door. Over a year after building permits and construction plans were filed with the District of Columbia and known to Potter, he first appealed the building permits and construction plans by filing an appeal in April 2000.

Potter's appeal is untimely under the Zoning Regulations because:

1. Potter knew as early as April 1999 about the matters which he claimed to be violations of the Zoning Regulations regarding side and rear yard setbacks. He instigated stop work orders by the BLRA based on these alleged violations, but filed no

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[2/] Interpretation and Application.

[3/] Definitions of Garage, private; Lines, lot; Lot; Yard; Yard, rear; and Yard, side.

[4/] R-1 Districts.

[5/] Uses as a Matter of Right (R-1) [201.1 (h)].

[6/] Rear Yards.

[7/] Side Yards.

[8/] Accessory Uses and Buildings.

appeal from the building permit issuance or vacation of the stop work orders. That was the point at which appeals should have been taken because construction was at a very early stage of construction and Ghafoorian had not incurred substantial expense.

2. Potter could and was on notice as of April 1999 regarding the square footage and height of the Ghafoorian's new garage as shown on the construction plans on file with the District of Columbia. Even if Potter did not know in April 1999, by the end of May 1999 with the issuance of a second building permit and plans, and his ability to observe the state of construction at the Property, he could and should of known sufficient information to appeal to the BZA. He did not.

3. In September 1999, Potter identified matters to the ANC which he alleged constituted violations of the Zoning Regulations regarding setbacks and building height. Still not appeal to the BZA was filed.

4. Potter instigated renewed stop orders by the BLRA in December 1999 based on setback, building square footage, and building height. When these were vacated, Potter did not appeal on these actions until over 4 months later in April 2000.

It is clear what Potter has done and what strategic decisions he has made in pursuing these claimed violations of the Zoning Regulations. He elected not to appeal the April 1999 and May 199 building permit issuance and the April 1999 stop order decisions until he had taken the opportunity to pursue court action in the hope of obtaining a court ruling finding violations of the zoning regulations. He entirely and deliberately ignored the procedures to appeal those decisions before this Board which has primary jurisdiction. Potter elected not to appeal the December 1999 vacation of the stop work orders, but again pursue an injunction in court.

In each case, Potter delayed an appeal to this Board which has primary jurisdiction in matters of interpretation and application of the Zoning Regulations[9/], while construction continued and waited until construction was complete on the garage before taking this current appeal after his court actions have failed. He waited to see if court action would give him the relief he sought and, only when it did not because two judges found no violation of the Zoning Regulations based on the testimony of the Acting Zoning Administrator Armondo Lourenco, he now comes before this Board for a third bite at the apple.[10/]

The issues raised by the appeal are identical to the matters raised by the complaints of Potter in April and December 1999 to the Building and Land Regulation Administration and which caused all the stop work orders to be issued and vacated. But when the stop orders in April 1999 were removed, Potter took no action to appeal. Potter should have appealed the April 1999 actions on the building permits and stop orders. He did not do so. Potter should have appealed the December 1999 actions vacating the stop orders. He did not do so.

Based on these facts, and wholly apart from the highly inequitable and unjust nature of his conduct, this appeal is simply untimely. Potter elected not to timely appeal the decisions regarding building permits in April 1999 or stop work orders in April 1999 and

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[9/] *Goode v. Antioch University*, 544 A.2d 704 (D.C. 1988). See also *Vargo v. Barry*, 667 A2d. 98 (D.C. 1995)("Under the doctrine of primary jurisdiction a statute an agency administers must first be interpreted by the agency before a court may interpret it" citing 4 Davis, *Administrative Law Treatise*, §22:11 at 120 (1983))

[10/] Parenthetically, Potter never appealed either of these adverse court rulings, although he was entitled to do so immediately under Superior Court procedures.

December 1999. He did so for strategic reasons of his own regarding his court action. Having done so and having made that election, he cannot now take and prosecute this appeal. He knew the nature of the construction for over one year based upon building permits issued and construction plans. He took no action to appeal it and his action now is too late, regardless of the extreme prejudice to Ghafoorian. This appeal should be dismissed as untimely based upon similar considerations as found in Appeal No. 16405, Mildred Rodgers Crary, decided June 16, 1999.

III. CONCLUSION

For the foregoing reasons, this Board should dismiss this appeal as untimely.

Roy J. Niedermayer, Esq. #180380
7475 Wisconsin Avenue, Suite 500
Bethesda, MD 20814
Telephone: 301-951-4456

Attorney for Mohammed Ghafoorian

(1)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT — **PERMIT NO.** B415922

Date 5/29/98 (Type) ADD./A&R

Address of work 4900 INDIAN LANE N.W. Lot 809 Square 1512

Permission is hereby granted to (Owner) MOHAMMED GHAFOORIAN

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

TOTAL PERMIT FEE $

FILING FEE $

NO. DATE

FEE PAYABLE $ 469.20

FOR INSPECTIONS CALL 727-7582

FIRST FLR. ADDITION 648 SQ FT. FOR DINNING, FAMILY AND KITCHEN, SECOND FLR. ADD. 378 SQ. FT. FOR CLOSET AND BATH ROOM. ATTIC FLR. ADDITIONS 170 SQ. FT. FOR CLOSET AND BATH ROOM. TOTAL ADDITION=1196 SQ. FT. NO CROSSING SIDEWALK WITH CONST. VECHILES. SEPARATE ELECTRICAL, PLBG AND MECH. INSTALLATION PERMITS ARE REQUIRED.

Builder Value $ No. of Rides

Width of Rides Length Height

Zone R-1-A To be occupied as SFD

No. of Stories 3 & BASEMENT

Height of terrace above grade Projections:

Address of owner 4019 HIGHWOOD CT. N.W.

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

DAVID WATTS

DIRECTOR

Chief, Permit Issuance Branch

D.MINOR

By _____ Permit Clerk

PERMIT

PENGAD-Bayonne

EXHIBIT 1

(3)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B422926

PERMIT

Date 4/6/99 (Type) A/R

Address of work 4900 INDIAN LANE N.W.

Lot 33 Square 1512

Permission is hereby granted to MOHAMMED GHAFOORIAN (Owner)

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

TOTAL PERMIT FEE $

FILING FEE $

NO. DATE

FEE PAYABLE $ 322.40

FOR INSPECTIONS CALL ~~727-7382~~ 442-4510

1- CHANGE THE EXISTING GARAGE TO LAUNDRY & STORAGE.
2- BUILD A NEW THREE CAR GARAGE. TOTAL ADDITIONAL 900 SQ FT.
(3' RETAINING WALL UNDER SEPARATE PERMIT). THIS PERMIT DOES
NOT AUTHORIZE CROSSING PUBLIC SIDEWALK WITH TRUCKS.

Builder— No. of Bldgs.

Width of Bldgs. Length Height No. of Stories 3 + BAS.

Zone R-1-A To be occupied as SFD

Height of terrace above grade Projections:

Address of owner 4019 HIGHWOOD CT. N.W.

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Chief, Permit Issuance Branch

By L. BARKSDALE
Permit Clerk

DIRECTOR JORDAN

EXHIBIT
2

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

EDWARD M. POTTER
CYNTHIA G. POTTER
4852 Indian Lane, NW
Washington, DC 20016

Plaintiffs,

V.

MOHAMMED GAHAFOORIAN
4900 Indian Lane, NW
Washington, DC 20016

Serve at:
4019 Highwood Court, NW
Washington, DC 20007

and

DISTRICT OF COLUMBIA
A Municipal Corporation
441 Fourth Street, NW
Washington, DC 20001

Defendants.

Serve: Janice Stokes
Administrative Office
Office of the Corporation Counsel
441 Fourth Street, NW
Washington, DC 20001

Civil Action No. 0003156-99

RECEIVED
Civil Clerk's Office
MAY 07 1999
Superior Court of the District of Columbia

COMPLAINT

(Injunctive Relief and Damages)

1. This Complaint involves real property in the District of Columbia and the Court has jurisdiction pursuant to Title 11 §921 of the District of Columbia Code.

2. The plaintiffs are residents of the District of Columbia.

3. The defendant, Mohammed Gahafoorian, is a resident of the District of Columbia and is the owner of the subject property located at 4900 Indian Lane, NW, Washington, DC.

4. The defendant, District of Columbia, is a municipal corporation with its

EXHIBIT 3

principal offices at One Judiciary Square, Washington, D.C. The Department of Licenses and Inspections is an agency of the defendant and has the duty to enforce the building and zoning regulations of the District of Columbia.

5. The plaintiffs, Edward M. Potter and Cynthia G. Potter own a home at 4852 Indian Lane, Washington, DC and reside therein with their three children. This property is zoned R-1-A.

6. On or about April 5, 1999 the defendant Gahafoorian commenced the construction of a garage at 4900 Indian Lane, NW, which is adjacent to the home owned by the plaintiffs, and which shares a driveway, accessible to both parties by virtue of a right of way. In the process of this construction the defendant has encroached on the right of way, poured footings on the property line, destroyed a portion of the driveway, all in violation of the Zoning Regulations for R-1-A property.

7. This garage which is being constructed by the defendant Gahafoorian intrudes on the light and air of the plaintiffs, destroys the use and enjoyment of their property, restricts the use of their driveway and reduces the value of their home. The plaintiffs have suffered and will continue to suffer irreparable injury.

8. The employees of the District of Columbia Licenses and Inspections Division have been informed of the construction, have inspected the construction site on numerous occasions and have been informed of the violations of the Zoning Regulations but have permitted the defendant Gahafoorian to continue with construction.

WHEREFORE, the plaintiffs pray:

1. That the defendant Gahafoorian be enjoined from the construction of this garage and directed to remove that portion of the structure already completed.

2. That the defendant District of Columbia be mandated to enforce the Zoning Regulations with respect to 4900 Indian Lane, NW; to inspect all additional construction and require compliance of all laws and regulations in force.

3. That the Court award appropriate and substantial damages against the defendants in the amount of One Million Dollars ($1,000,000.00) in accordance with the evidence adduced at trial.

4. That the Court award attorneys fees and cost of this action.

DISTRICT OF COLUMBIA, ss:

I, Cynthia G. Potter, being first duly sworn on oath, do depose and state that the facts stated in this Complaint are true, based on my own personal knowledge.

Cynthia G. Potter

Subscribed and sworn before me the 7th day of May 1999.

Barbara A. Nichols
Notary Public

J. Gordon Forester, Jr., Bar No. 4424
Attorney for Plaintiffs
1742 N Street, NW
Washington, DC 20036
202 293-3353

Barbara A. Nichols
Notary Public District of Columbia
My commission expires: February 28, 2001

JURY DEMAND

The plaintiffs demand a trial by jury.

J. Gordon Forester, Jr.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

EDWARD POTTER, ET AL. PLAINTIFFS. V. MOHAMMED GHAFOORIAN, DEFENDANT.	CIVIL ACTION NUMBER: 3156-99

WASHINGTON, D. C.
WEDNESDAY, MAY 19, 1999

THE ABOVE-ENTITLED ACTION CAME ON FOR A HEARING BEFORE THE HONORABLE HERBERT DIXON, ASSOCIATE JUDGE, IN COURTROOM NUMBER 210, COMMENCING AT APPROXIMATELY 9:39 A.M., PURSUANT TO THE CONTINUANCE ON TUESDAY, MAY 18, 1999.

JUN 1 2 19 PM '99
SUPERIOR COURT
D.C.
CIVIL DIV.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE, AS RECORDED.

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

J. GORDON FORESTER, JR., ESQUIRE
WASHINGTON, D. C.

ON BEHALF OF THE DEFENDANT:

ROY I NIEDERMAYER, ESQUIRE
7475 WISCONSIN AVENUE, SUITE 500
BETHESDA, MARYLAND 20814

JANICE R. HUNT, RMR
OFFICIAL COURT REPORTER - TELEPHONE 879-1057

PENGAD-Bayonne
EXHIBIT 4

P R O C E E D I N G S

E X C E R P T S

(FOREGOING PROCEEDINGS WERE REPORTED, BUT ARE NOT TRANSCRIBED HEREIN, EXCEPT AS FOLLOWS:)

* * * * *

THE COURT: THIS MATTER IS BEFORE THE COURT ON THE MOTION FOR PRELIMINARY INJUNCTION BY THE PLAINTIFFS, EDWARD AND CYNTHIA POTTER.

A COMPLAINT WAS FILED IN THIS MATTER ON OR ABOUT MAY 7, 1999, BY THE PLAINTIFFS AGAINST THE DEFENDANT, MOHAMMED GHAFOORIAN AND THE DISTRICT OF COLUMBIA. IN THAT COMPLAINT THE PLAINTIFFS REQUESTED A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION WITH RESPECT TO CERTAIN CONSTRUCTION THAT WAS OCCURRING AT THE PROPERTY OF DEFENDANT, MOHAMMED GHAFOORIAN, LOCATED AT 4900 INDIAN LANE, NORTHWEST, WASHINGTON D.C., PROPERTY WHICH IS ADJACENT TO AN ABUTTING PROPERTY OF THE PLAINTIFFS.

THE MOTION FOR A TEMPORARY RESTRAINING ORDER WAS HEARD ON OR ABOUT MAY 11TH, BEFORE JUDGE WERTHEIM OF THIS COURT; AND AT THAT TIME HE GRANTED THE PLAINTIFFS' REQUEST AND RESTRAINED FURTHER CONSTRUCTION AT DEFENDANT GHAFOORIAN'S REAL ESTATE PENDING HEARING ON THE MOTION FOR PRELIMINARY INJUNCTION.

ON MAY 17TH, THE PARTIES APPEARED BEFORE

THIS COURT FOR THE COMMENCEMENT OF THE HEARING ON THE PRELIMINARY INJUNCTION, AT WHICH TIME ON MOTION OF THE DISTRICT OF COLUMBIA THE DISTRICT WAS DISMISSED AS A PARTY DEFENDANT IN THIS CASE. THE HEARING COMMENCED ON MAY 17TH, CONTINUED ON MAY 18TH AND CONCLUDED TODAY, MAY 19TH.

THE PLAINTIFFS, EDWARD AND CYNTHIA POTTER PURCHASED THEIR HOME AT 4852 INDIAN LANE, NORTHWEST, SOMEWHERE AROUND 1992. UPON THEIR RETURN ON EASTER SUNDAY THE POTTERS FOUND CONSTRUCTION OCCURRING AT THE ADJACENT PROPERTY. THERE WAS GRADING, DIGGING OF HOLES FOR FOOTING, SOME FORMS, WHICH APPEARED THAT WALLS WERE GOING TO BE POURED. A PORTION OF THE DRIVEWAY, ACCORDING TO THE POTTERS, WAS MISSING. A PORTION OF THEIR NORMAL PARKING WAS MISSING, AND FOOTING HAD BEEN POURED INTO THE RIGHT-OF-WAY.

THE POTTERS INDICATED THAT THIS CONSTRUCTION STARTED WITHOUT ANY DISCUSSIONS WITH THEM BY THEIR NEIGHBOR CONCERNING THE PROPOSED CONSTRUCTION.

THE NEIGHBORHOOD WAS GIVEN IN DESCRIPTION BY THE PLAINTIFFS. THE PLAINTIFFS PURCHASED THEIR HOME FOR APPROXIMATELY 1.2 MILLION DOLLARS. AND THE CHARACTER OF THE SURROUNDING PROPERTIES, AS DESCRIBED BY PLAINTIFFS, ALLOWS THIS COURT TO DRAW AN INFERENCE THAT THE PROPERTIES IN THE SURROUNDING AREA ARE OF THE

SAME CHARACTER AND OF THE SAME VALUE.

ACCORDING TO THE PLAINTIFFS, THE NEW GARAGE THAT'S BEING CONSTRUCTED MAY BE SEEN FROM THE STREET. IT'S PLACEMENT ON THE LOT OF THE NEXT DOOR NEIGHBOR IS OUT OF CHARACTER WITH THE NEIGHBORHOOD, A HUGE, APPROXIMATELY 32-BY-39 FOOT PAVED AREA WILL APPARENTLY BE A PART OF THIS CONSTRUCTION PLAN; AND IT IS UNLIKE ANY TYPE OF PAVED AREA THAT'S VISIBLE ON ANY PROPERTY IN THE NEARBY AREA.

THE VIEW THAT'S BEING BLOCKED BY THE NEW CONSTRUCTION IS ADVERSE, WHEN COMPARED WITH THE VIEW THAT EXISTED PRIOR TO THE CONSTRUCTION BECAUSE THE GARAGE WILL NOW SIT, IF IT'S BUILT, LESS THAN FOUR FEET FROM THE POOL FENCE AND VERY CLOSE TO THE POOL AREA THAT THE POTTERS HAVE IN THE REAR OF THEIR HOME.

THE COURT ALSO CONSIDERED THE ALLEGATIONS THAT HAVE BEEN MADE IN THE MOTION, THE ESSENCE OF THE ALLEGATION. AND THE REQUEST FOR RELIEF BY THE PLAINTIFFS IS FOR THE DEFENDANT TO CEASE THE CONSTRUCTION OF THIS STRUCTURE AT 4900 INDIAN LANE, NORTHWEST. THE PLAINTIFFS ALLEGE THAT THE CONSTRUCTION IS IN VIOLATION OF DISTRICT OF COLUMBIA ZONING REGULATIONS.

THE PLAINTIFFS ALLEGE THAT THE STRUCTURE IS ENCROACHING ON PLAINTIFF'S PROPERTY, AND IS ENCROACHING

IN A RIGHT-OF-WAY WHICH EXISTS AS BETWEEN THE TWO PROPERTIES.

THE COURT HEARD THE TESTIMONY OF MR. AMANDO LORENZO, WHO IS THE ACTING ZONING ADMINISTRATOR. ACCORDING TO MR. LORENZO, HE VISITED THE PROPERTY ON ONE OCCASION AT THE REQUEST OF THE CORPORATION COUNSEL. AND HE TESTIFIED ESSENTIALLY AS FOLLOWS: THAT A PERMIT DOES EXIST FOR THE CONSTRUCTION. IT APPEARS FROM THE EVIDENCE THAT THE PERMIT MAY HAVE BEEN ISSUED AFTER THE CONSTRUCTION STARTED BECAUSE THE ISSUE DATE ON THE PERMIT OF WHICH THE COURT IS AWARE IS APRIL 6TH. AND IT APPEARS FROM THE TESTIMONY THAT THE CONSTRUCTION WAS IN PROGRESS BEFORE THAT.

ACCORDING TO MR. LORENZO, THE PERMIT DOES COVER THE WALLS THAT ARE BEING CONSTRUCTED. BASED ON THE PERMIT, THE APPLICATION AND THE PLANS, HE COULD NOT FIND ANY VIOLATION OF ZONING REGULATIONS OR SET-BACK RESTRICTIONS. ACCORDING TO MR. LORENZO, THE WALL OF THE GARAGE IS APPROXIMATELY FOUR FEET FROM THE PROPERTY LINE. AND UNDER THE APPLICABLE REGULATIONS, ACCORDING TO MR. LORENZO, ACCESSORY BUILDINGS THAT ARE BUILT IN THE REAR LOT MAY BE BUILT UP TO THE PROPERTY LINE. IN THIS CASE, THE WALL OF THE GARAGE IS FOUR FEET FROM THE PROPERTY LINE, BUT IN THAT AREA THAT HAS BEEN VARIOUSLY DESCRIBED AS A RIGHT-OF-WAY OR AN EASEMENT.

MR. LORENZO TESTIFIED THAT THE PAVED AREA WHICH IS INDICATED IN THE PLANS AS A PAVED AREA, THAT NO PERMIT IS NECESSARILY REQUIRED WHEN A PAVED AREA SUCH AS THAT IS DONE AT GRADE.

MR. LORENZO FURTHER TESTIFIED THAT IN TERMS OF THE HEIGHT RESTRICTION, THE PLANS AND THE REGULATIONS PERMIT AN ACCESSORY BUILDING TO BE UP TO 15 FEET. AND IT APPEARED THAT THE STRUCTURE, AS IT WAS BEING BUILT, WAS GOING TO BE IN COMPLIANCE, ALTHOUGH ONE CAN NEVER TELL UNTIL CONSTRUCTION IS COMPLETED.

THE STRUCTURE IS BEING BUILT UP TO THE RIGHT-OF-WAY, ACCORDING TO MR. LORENZO, BUT THAT IS NOT IN VIOLATION OF THE REGULATIONS APPLICABLE IN THIS CASE. INDEED, MR. LORENZO MADE A POINT THAT HIS OFFICE IS NOT CONCERNED WITH WHAT HE REFERRED TO AS "PRIVATE EASEMENTS." THIS IS THE SAME AREA THAT THE PLAINTIFFS DESCRIBED AS THE "RIGHT-OF-WAY."

WHEN MR. LORENZO LOOKED AT THE FOOTERS THAT WERE BEING PLANNED FOR OR BEING POURED, HE INDICATED THAT UNDER THE REGULATIONS, FOOTERS MUST BE AT LEAST TWO-AND-A-HALF FEET UNDER THE DIRT. AND IT APPEARED THAT THERE WOULD BE COMPLIANCE THERE; THAT HIS OFFICE WOULD HAVE BEEN CONCERNED IF THE CONSTRUCTION WOULD HAVE VIOLATED THE ACCESS OF THE NEIGHBORS TO THEIR GARAGE. BUT BASED ON HIS REVIEW OF WHAT CONSTRUCTION

HAD OCCURRED, AND BASED ON HIS REVIEW ON THE PLANS, HE DID NOT SEE A VIOLATION WITH RESPECT TO THAT PARTICULAR ISSUE.

ALL AND ALL, MR. LORENZO TESTIFIED THAT HE DOESN'T SEE ANYTHING IN THE PLANS, AND HE DID NOT SEE ANYTHING IN THE CONSTRUCTION THAT VIOLATED D.C. ZONING REGULATIONS. I SHOULD MENTION THAT THERE IS TO BE BUILT AN ADDITIONAL RETAINING WALL, WHICH DOESN'T IMPACT THE PLAINTIFFS IN THIS CASE. IT APPEARS THAT THE FOOTERS HAVE BEEN POURED FOR THE RETAINING WALL, BUT THAT, ACCORDING TO MR. LORENZO, HE'S NOT AWARE THAT A PERMIT HAS YET ISSUED SEPARATELY FOR THAT RETAINING WALL.

ACCORDING TO MR. LORENZO, EVEN IF A DEVIATION OCCURS IN PLANS IN "MATTER OF RIGHT" CONSTRUCTION, AS HE DESCRIBED THIS, IF THE DEVIATION IS NOT IN VIOLATION OF THE REGULATIONS RELATING TO "MATTER OF RIGHT" CONSTRUCTION, THEN THE PLANS MAY BE AMENDED AND THE PERMIT MAY BE AMENDED ACCORDINGLY.

THE COURT HAS CONSIDERED THE ARGUMENTS OF COUNSEL, HAS REVIEWED THE FILE, HAS TAKEN A LOOK AT THE VARIOUS AUTHORITIES CITED, AND IS PREPARED TO PROCEED WITH ITS RULING.

ALTHOUGH IT'S NOT NECESSARILY STATED IN THE LAW, WE ALL KNOW THAT A FAMILY'S HOME IS A PRECIOUS

COMMODITY. AND ALLEGATIONS THAT THERE IS INTEFERENCE WITH THE PEACE, QUIET OR ENJOYMENT OF A FAMILY'S HOME MUST BE CAREFULLY CONSIDERED. AND THE COURT HAS CONSIDERED THE ISSUES THAT ARE RELATING TO THIS CASE.

THERE ARE SEVERAL ISSUES THAT HAVE BEEN RAISED: THE DEFENDANT, GHAFOORIAN, HAS MOVED, AS AN ANALOGY, FOR JUDGMENT UNDER RULE 50-A, IN ESSENCE ALLEGING THAT TAKING THE PLAINTIFF'S MOTION AS IT HAS BEEN PRESENTED, GIVING THEM THE RIGHT OF ALL REASONABLE INFERENCES, THAT AS A MATTER OF LAW THE PLAINTIFFS' MOTION MUST BE DENIED. DEFENDANTS (SIC) ALSO ALLEGE THAT THE DEFENDANTS (SIC) DO NOT HAVE STANDING TO BRING THIS ACTION.

THE COURT WILL SUMMARILY DISMISS WITH THE ISSUE OF STANDING BECAUSE WHERE THERE IS AN ALLEGATION SUCH AS HERE, WHERE THE ALLEGATION IS THAT THERE IS INTERFERENCE, BY ABUTTING PROPERTY, WITH THE PEACE, QUIET AND ENJOYMENT OF THE NEIGHBOR, THAT IS UNREASONABLE INTERFERENCE OR IN VIOLATION OF THE ZONING REGULATIONS, THERE IS STANDING BY A PARTY TO PURSUE THAT ACTION. AND SO, WITH RESPECT TO THAT ISSUE OF STANDING, THE COURT CONCLUDES THAT FOR PURPOSES OF THIS MOTION, THE MOTION FOR A PRELIMINARY INJUNCTION, THAT THE PLAINTIFFS DO HAVE STANDING.

THE BOARD OF ZONING ADJUSTMENT AND THE

VARIOUS OFFICES ASSOCIATED WITH THAT PROCESS, INCLUDING BUILDINGS AND LAND, HAVE A SPECIAL EXPERTISE WITH RESPECT TO ANALYZING ISSUES OF THIS NATURE. AND WHEN COURTS ARE CALLED UPON TO REVIEW THEIR DECISIONS, COURTS DO HAVE CONCURRENT JURISDICTION TO REVIEW THE DECISIONS THAT ARE MADE BY THOSE GOVERNMENT OFFICIALS. HOWEVER, THE COURT'S REVIEW OF THESE TYPES OF DECISIONS IS LIMITED TO A DETERMINATION OF WHETHER OR NOT THE DECISIONS ARE ARBITRARY, CAPRICIOUS OR NOT IN ACCORDANCE WITH THE LAW.

ON QUESTIONS RELATING TO THE INTERPRETATION OF REGULATIONS THAT WE'RE CONSIDERING NOW, COURTS ARE DEFERENTIAL TO THE INTERPRETATIONS OF THOSE OFFICES UNLESS THEIR DECISIONS ARE PLAINLY ERRONEOUS OR INCONSISTENT WITH THE ZONING REGULATIONS. THIS COURT DOES NOT HAVE THE AUTHORITY OR RIGHT, WITHIN A MATTER THAT IS PROPERLY WITHIN THE DISCRETION OF THE GOVERNMENT OFFICIALS, TO SUBSTITUTE ITS JUDGMENT UNLESS THE DETERMINATION BY THE GOVERNING OFFICIALS IS, AS I'VE SAID, ARBITRARY, CAPRICIOUS, OR IN VIOLATION OF EXISTING LAW.

THE TESTIMONY RECEIVED FROM MR. LORENZO, IN ESSENCE, IS THAT THERE WAS NO VIOLATION OF THE RIGHT OF ACCESS BY THE PLAINTIFFS TO THEIR PROPERTY; THAT THE GARAGE, AS IT IS PLANNED, IS PLACED BEHIND THE REAR

WALL OF THE HOUSING STRUCTURE AND THEREFORE IT IS BEING BUILT IN THE REAR YARD, AND SET-BACK RESTRICTIONS ARE NOT APPLICABLE. THE BUILDING IS WITHIN HEIGHT RESTRICTIONS. THAT IN HIS JUDGMENT AND IN HIS OFFICE'S JUDGMENT, FROM A REVIEW OF THE PLANS, THE WALL THAT CONNECTS THE NEW GARAGE STRUCTURE TO THE BUILDING ADDITION DOES NOT CHANGE THE CHARACTER OF THE GARAGE, THE ACCESSORY BUILDING, INTO AN ADDITION TO THE HOME.

MR. LORENZO ALSO TESTIFIED THAT UNDER THE REGULATIONS THAT HAVE BEEN RAISED HERE IN COURT, SPECIFICALLY, THE REGULATIONS IN THE 223 SERIES, THAT THOSE REGULATIONS APPLY IN THE CASE OF VARIANCES, THAT IS, IF THE MATTER OF RIGHT CONSTRUCTION THAT'S PROPOSED IS NOT IN ACCORDANCE WITH THE REGULATIONS APPLICABLE TO, IN THIS CASE, ACCESSORY BUILDINGS, THEN IN THAT CASE IN THE PETITION BEFORE THE BOARD OF ZONING ADJUSTMENT FACTORS SUCH AS LIGHT AND AIR, INTERFERENCE, WOULD BE TAKEN INTO CONSIDERATION.

THE COURT HAS CONSIDERED THE ADDITIONAL REGULATION THAT HAS BEEN PROFFERED BY PLAINTIFFS' COUNSEL IN THIS CASE THAT COMES FROM CHAPTER 25. THESE PARTICULAR REGULATIONS RELATE TO ACCESSORY USES AND BUILDINGS. AS AN EXAMPLE, SOME OF THE REGULATIONS SPECIFIED IN CHAPTER 25 ARE AS FOLLOWS: AN ACCESSORY BUILDING SHALL NOT ACCEDE STORY OR 15 FEET IN HEIGHT.

INDEED, THE TESTIMONY IN THIS CASE IS THAT IS THE PLAN-HELD HEIGHT OF THE BUILDING BEING ESTABLISHED.

ANOTHER REGULATION APPLICABLE TO ACCESSORY BUILDINGS IS TO THE EFFECT THAT NO MORE THAN 30 PERCENT OF THE AREA OF A REQUIRED REAR YARD OR LOT MAY BE OCCUPIED BY AN ACCESSORY BUILDING. THERE'S NO ALLEGATION IN THIS CASE THAT THAT NEW STRUCTURE, IN ANY WAY, VIOLATES THAT PARTICULAR REGULATION.

ADDITIONALLY, JUST AS ANOTHER EXAMPLE, WITHIN THAT CHAPTER THERE'S A REGULATION THAT THE ACCESSORY BUILDING SHOULD NOT BE ERECTED PRIOR TO THE TIME OF THE CONSTRUCTION OF THE MAIN BUILDING TO WHICH THE ACCESSORY BUILDING IS BEING BUILT. IN THIS CASE, THE HOME ALREADY EXISTS.

THE PARTICULAR SECTION CITED BY PLAINTIFFS' COUNSEL, HOWEVER, READS AS FOLLOWS: QUOTE, "AN ACCESSORY BUILDING SHALL NOT OBSTRUCT LIGHT AND VENTILATION REQUIRED BY OTHER REGULATIONS." INDEED, THE COURT IS NOT AWARE OF ANY OTHER REGULATION THAT IS APPLICABLE TO THIS SITUATION. MR. LORENZO TESTIFIED THAT THE REGULATIONS HE WAS ASKED ABOUT REFERRED TO CASES OF VARIANCES, AND WERE NOT APPLICABLE UNDER THESE CIRCUMSTANCES.

THE COURT FINDS THAT THE PLAINTIFFS HAVE

STANDING WITH RESPECT TO THIS MOTION. BUT TO OBTAIN AN INJUNCTION, AS A NEIGHBORING PROPERTY OWNER THEY HAVE TO DEMONSTRATE THAT THEY IN SOME WAY ARE BEING SPECIALLY DAMAGED, AND THAT THERE IS A SHOWING OF IRREPARABLE HARM.

UNDER THE FACTORS THAT THIS COURT MUST CONSIDER, THE COURT WILL NOTE THAT THERE IS SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS AND PROOF OF IRREPARABLE HARM. WITH RESPECT TO THOSE TWO FACTORS, BECAUSE OF THE TESTIMONY OF MR. LORENZO, THE PLAINTIFFS HAVE NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS. AND WITH RESPECT TO THE ISSUE OF IRREPARABLE HARM, IN THE ABSENCE OF SHOWING THAT THERE HAS BEEN SOME VIOLATION OF THE ZONING REGULATIONS, THE COURT RULES THAT FOR PURPOSES OF A PRELIMINARY INJUNCTION, AS A MATTER OF LAW, THE PLAINTIFFS HAVE FAILED TO SHOW IRREPARABLE HARM.

TO THE EXTENT THAT THERE IS ANY TYPE OF VIOLATION BY MR. GHAFOORIAN IN THE STRUCTURE THAT HE IS BUILDING THAT VIOLATES THE RIGHT-OF-WAY OR EASEMENT, THE PLAINTIFFS WILL HAVE THE RIGHT TO PROCEED ON THAT CLAIM BY WAY OF A LAWSUIT THAT HAS BEEN FILED, AND TO SEEK COMPENSATION.

LASTLY, THE COURT WONDERS, RHETORICALLY, WHETHER OR NOT THE LAWSUIT WOULD HAVE EVER OCCURRED IF

THERE HAD BEEN SOME SERIOUS AND FRANK DISCUSSIONS BETWEEN THE PARTIES WITH RESPECT TO WHAT WAS PLANNED, IN ORDER TO TAKE INTO CONSIDERATION THE SUBJECTIVE BUT WORTHY CONSIDERATIONS BY THE NEIGHBORING PROPERTY OWNER.

BEFORE THIS LAWSUIT GETS OUT OF HAND, AND IT HAS EVERY POTENTIAL TO DO THAT BECAUSE IT'S DEALING WITH A VERY PRECIOUS COMMODITY, A FAMILY'S HOME, THE COURT URGES COUNSEL TO ASSIST THESE PARTIES TO HAVE SOME DISCUSSION TO, PERHAPS, RESOLVE THIS MATTER BEFORE THE LITIGATION PROCEEDS ON A PATH OF NO RETURN.

THE COURT FINDS, HOWEVER, THAT FOR PURPOSES OF THE PRELIMINARY INJUNCTION, THE PLAINTIFFS HAVE STANDING. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS. THE PLAINTIFFS HAVE FAILED TO MAKE A SHOWING OF IRREPARABLE INJURY. AND THE MOTION FOR A PRELIMINARY INJUNCTION WILL BE DENIED. THE TEMPORARY RESTRAINING ORDER, AT THE TIME, IS DISSOLVED.

AND I THINK THAT COVERS EVERYTHING THAT I PLANNED TO RULE ON. ANY QUESTIONS ABOUT MY RULING, MR. FORESTER? THE QUESTION IS NOT WHETHER OR NOT YOU AGREE WITH IT, BUT ANY QUESTIONS?

MR. FORESTER: I KNOW THAT, YOUR HONOR. I RECOGNIZE THAT. YOU LEFT HANGING, FROM MY PERSPECTIVE,

Turning to other jurisdictions, well, more specifically the Second Circuit, which is a Circuit known for its issuance of cases dealing with injunctions, and to which both our Court of Appeals and the Circuit Court over the years have looked. In the case of Tom Doherty Associates, Inc. versus Saban Entertainment, Inc., 60 F.3d 27, a 1995 case from the Second Circuit, the Second Circuit did a more detailed explication of the requirements for mandatory injunctions. And they indicated there, and I believe this is consistent with our case law, that a movant must meet a higher standard where an injunction will alter rather than maintain the status quo, or where an injunction will provide the movant with substantially all of the relief sought, and that relief cannot be undone even if defendant prevails at a trial on the merits.

The Second Circuit as here, for mandatory injunctions, requires a clear showing that the moving party is entitled to the relief requested. And they note that that heightened standard of proof can be justified when the issuance of an injunction will render a trial on the merits largely or partly meaningless, either because of temporal concerns, or because the nature of the subject of the litigation --

or because of the nature of the subject of the litigation.

Now, given the alternative reliefs sought by the plaintiff here, that's either work stoppage or tear it down, I think I have to look at the facts and the law under both the heightened standard requiring, or attempting to require Mr. Ghafoorian to tear it down, or the normal standard requiring Mr. Ghafoorian just to stop. Under either standard, however, my conclusion would be the same.

Let me start by indicating the obvious. That in any discussion on likelihood of success on the merits, I must look at the zoning regulations, the language of those regulations. I also have to look at the interpretation or application of those regulations to this particular case.

Now the two people who testified here in connection with that, Mr. Lourenco and Mr. Williams, both were qualified as experts in the area of the zoning regulations. Indeed, I note that the defendant did not object after voir dire to the expertise of Mr. Williams.

Mr. Williams, although having spent 30 years in the Public Health Service not dealing with zoning matters, since the mid-70s have been involved with

various zoning activities, and from 1980 to '88 was on the Zoning Commission, and since 1989, according to his C.V., presents himself as a zoning expert. And he list in his C.V., which is admitted in evidence, various cases and projects on which he has worked.

Mr. Lourenco has training as a mechanical engineer and worked for DCRA in Plans Review and Approval from '86 to '94; was a code consultant for three years with a private firm; and spent a year and-a-half in Alexandria as Deputy Director of Code Enforcement. He came back to the Administration of Building and Land Regulation in June of '98, and from July of '98 to August 2nd he also acted as Zoning Administrator. Between 1990 and '94, he was involved in the processing of permits and enforcement of codes, including BOCA. Since returning he has been involved in, on a personal basis, of dealing with one to two permits a day, perhaps 400 to 800 per year.

Mr. Lourenco testified that in the zoning office, Zoning Division, when faced with problems they examine research that has gone on earlier, by consulting with the staff that goes back many years. In fact, he testified that they examined prior applications of the Regulations to factual situations to derive interpretations, and in doing so draw upon

the institutional memory of the staff.

I do note that Mr. Williams testified that the zoning administrator is authorized to interpret the regulations, and to use Mr. Williams' term, Director Lourenco, has full authority to issue building permits, and that Mr. Lourenco personally or in relying upon determinations made by others on his staff, makes assessments as to compliance with the zoning regulations, that is whether proposed construction complies with regulations, and the office, whoever is the decision-maker in any particular case, bases the decision on the interpretation of how the regulations will apply to the plans presented.

As between the two, Mr. Williams and Mr. Lourenco, I find Mr. Lourenco to be qualified and to be the more credible witness. Mr. Lourenco has more than sufficient experience in application of the zoning regulations for me to credit his testimony. Moreover, he is charged by the Government with being the head of the agency intended and required to interpret those regulations. He has no stake in this outcome. He is not related to any party. He has no financial interests in the outcome of the case. There was also no basis in the evidence presented or the arguments presented for me to conclude that Lourenco's testimony

was colored by a desire to coverup any failings or inadequacies of his agency.

The fact that the zoning -- interpretations of zoning regulations rather, are not compiled in a written version, does nothing to detract from their weight. In this situation when dealing with minute detail oriented application of regulations to intensely fact specific situations, it is not unreasonable to write down every single decision in a compilation.

It's clear that Mr. Lourenco is testifying, not just on his personal experience, but on the collective institutional memory and experience of his staff as those regulations applied to specific situations.

And as I noted, this concept of reliance was not one that was challenged by Mr. Williams.

There is nothing that has been presented that establishes a prima facie or even a superficial basis for me to conclude that Lourenco's office did not correctly apply the regulations here.

There has been no evidence presented upon which I can conclude that the approval the April permit or the May permit for revisions, both apparently done on a walk-through basis, were done in any manner inconsistent with the procedures and policies of

Mr. Lourenco's office.

There has been no basis in the evidence presented for me to conclude that the conclusions reached in the approval process at stake here were inconsistent with the approvals in other situations.

In argument yesterday plaintiffs' counsel made reference to Defense Exhibit No. 1, which are the plans, to show that the garage plan on its face was for more than 900 square feet. Where as if -- well, and he argued that because the plans themselves showed that the garage was more than 900 square feet, that somehow the process by which those plans were approved was inappropriate and suspect, and should cause me to conclude that the entire process done here on a walk-through basis was inconsistent with procedures, and reached the wrong result, and that there was no evidence that anyone really looked at these plans.

Well, the evidence presented does not suggest or compel me to reach that conclusion. Indeed, as I looked at the Defendant's Exhibit No. 1, the plans for the garage say on every page 900 square feet. And if you measure, or take the measurements off the drawing, and measure from wall to wall, as Mr. Williams said you do do, then it comes out to less than 900 square feet, depending upon whether you use 35 by 24 or

35 by 25, it still comes out below 900 square feet.

I mention that both in this context, and also for later reference in the issue of whether the requirements are 450 square feet or 900. Obviously, I ultimately believe it's 900.

Let me turn to some of the specific allegations here. The first is violation of the side yard zoning regulations. Mr. Williams based his opinion on the conclusion essentially that this was a single structure including the old residence, augmented by a very substantial deck surface area with a garage, and the deck structure was more than four feet above natural grade, and is regulated as it entered -- entering -- as entering into the side yard.

He believes that when a structure or any part comes more than four feet from the existing level, it's subject to zoning regulations for side yards. And he also concluded that there was a basis for violation of rear yard requirements because of the connection with the garage for floor and platform.

Mr. Williams opined that the garage was attached to an adjacent platform, which therefore is a structure, making everything a structure. Alternatively, he said that the platform and garage were part of the house. He acknowledged, however, that

if the garage is not connected to the platform, it wouldn't violate the side or rear setback requirements.

Now looking to the definition of side yard, one looks at the zoning regulation definitions at page 125, where both side yard and yard are defined.

What we have here in this particular case is a residence, which is the main building on the property, the garage, which I find definitionally is an accessory building under the zoning regulations, and some other structure, as that term is defined in the regulations, which we have variously called a platform, which is in front of the garage.

Now Mr. Lourenco testified that the residence is not connected to the garage. He noted that there was an area of six to eight feet where there is a walkway, but there is no roof or any covering over that walkway between what we are calling the garage and the main residence. Because there is no roof, the two structures are considered to be two, and not one, under the zoning regulations. To use the words of the zoning regulations, there is no communication between them, which is under a roof.

As was noted both in argument and testimony, there is a slight overhang off the main residence over the -- literally over the platform area, but under the

regulations that does not in any way create a violation.

Certainly, as I looked at the regulations, the definitional aspect of the zoning regulations, not even reaching a question of interpretation, my reading of those definitions in the regulations causes me to credit the testimony of Mr. Lourenco in this regard, and to reach the same conclusion.

Now, staying with the issue of the side yard. As Mr. Lourenco testified, Section 2503.2 of the regulations, say that if you have a structure not more than four feet above grade, it can be put anywhere in the yard without violating the setback requirements of the regulations.

Another part of that same chapter of the zoning regulations, 2503.3, creates an exception for retaining walls, which can be put anywhere in the side walls -- in the side yard.

And Mr. Lourenco testified that his construction, his definitional explanation of the interplay of these two sections, is also consistent with a long-standing interpretation and practice of his agency.

In looking at Mr. Williams' analysis of this particular situation, his opinions were not supported,

and certainly not supported in a way that caused me to credit them by relying, by relying -- by his -- let me rephrase that. Mr. Williams' failure to rely upon specific sections of the zoning regulations, and to incorporate them both definitionally under the definition sections and the specific subsections of the code in a way that would be coherent and logical was lacking. And, therefore, I do not credit his conclusions in that regard.

Lourenco's, on the other hand, were directly supported by both the definitions of various structures, accessories, buildings, yard, rear yard, definitions contained directly in the regulations, frankly, without even reaching on this issue the question of interpretation.

With respect to the rear yard, Lourenco and Williams agreed that the garage was an accessory building. And as was brought out by reference to the regulations, definitional -- from the definitional section of the regulations, garages have different meanings, different uses.

In this particular instance, I find, based on the testimony and review of the regulations, that the private garage is an accessory building allowed under the regulations. When you look at 2500.2 and

2300.2, I conclude that this is properly located within the rear yard.

One of the definitions contained in the regulations talks about the line, the rear line of the building. The accessory building here, the garage, falls behind or below, depending upon how one looks at that. And so here I find that the garage is qualified under 2200.2. It's a permitted use when it's entirely in the back or rear yard, as it is here. I think the regulations read logically together.

I do not accept Mr. Williams' construction, both literal and physical, as to how he joins everything together here by putting the garage to the platform, the platform to the house. Therefore, it's all considered to be part of the house and above the line, which was one of his theories.

The construction urged upon me by Mr. Williams, I find is not supported by the regulations, and is inconsistent with the interpretation and application of those regulations by the Zoning Administration, Mr. Lourenco's office.

Much was made in argument about the interplay between Section 201.1(h) and other provisions of the zoning regulations. Whether the word "principal" was located in one section or another and

how you applied it, and when you applied it, and whether it applied where it wasn't written.

I find that Mr. Lourenco's explanation as to how these various sections go together was compelling and consistent with the application of these regulations by his office in a way that gives meaning to all sections of the regulations.

As I will note shortly, there were some additional arguments made about construction of the various portions of the regulations, one of which would lead to a consistent, not consistent, one of which would lead to the ability to read all the regulations together in a logical, reasonable fashion, and the other would require basically a writing out of some regulations. And the Court is not prepared to do that where it can find a way to read them together. Where regulations are in apparent disagreement, the Court logically will then look to the interpretation of those regulations in the first instance by the agency charged with that interpretation.

Again, I found nothing in this record in any instance to cause me to discredit or give less weight to the interpretations of those regulations by Mr. Lourenco's office, in this particular situation.

In talking about the rear yard and the

garage, Mr. Lourenco differentiated where a garage is sitting on a lot alone and used as a private garage versus situation where a garage is not connected to the main residence, but obviously on the same property, and thus is an accessory building. And from that he moved on to work these sections in the regulations together to conclude that when looking at the garage here one would look to the shifting bit here, to the 900 square feet as opposed to the 450 square feet.

And I, obviously, credit Mr. Lourenco's reading of the regulations and his interpretation where he ultimately concluded that this was a private garage, an accessory structure, which could go up to 900 square feet. And as built, there is no dispute, it's less than 900 square feet.

In terms of the height of the garage, there is no dispute that if you measure the height of the garage from the front of the garage, it does not exceed the 15 foot limitation.

The dispute between Mr. Lourenco and Mr. Williams here was over which face or wall, as it were, of the garage do you use to determine the proper measurement.

The regulation involved, 2500.7 talks about the middle of the side of the accessory building that

faces the main building.

Mr. Williams acknowledges that this is a question of interpretation. He chooses to use the west wall, and to basically include the retaining wall on that side as part of his height determination.

Mr. Lourenco testified that a consistent interpretation of his office has been that where the garage is in the rear yard as here, you face front, you use the front of that structure for purposes of measurement. And that was done here.

There is certainly nothing inconsistent or illogical or unreasonable about Lourenco's determination, or his office's determination, that in these circumstances rear yard garage, you face front, and that will be the basis for measuring the height.

Nothing presented that would cause me to question that or conclude that plaintiff has a likelihood of succeeding on that particular issue.

The last two issues were erosion and ponding. Basically I agree with Mr. Niedermayer's arguments that 2504.1 really isn't applicable here. There is no regulation, zoning regulation, about ponding in this particular situation. Neither of those cause me to believe there is any substantial likelihood of prevailing by the plaintiff in that particular

regard.

Judged by either standard, to stop the construction and maintain the status quo, or to order that the structure in effect be torn down to make it compliant with what plaintiff argues are the various setback requirements for both side and rear, in that regard I find, in looking at these regulations and the interpretation where applicable of these regulations, that the likelihood of success on the merits by plaintiffs is insufficiently demonstrated under either standard.

That as I look at these regulations as applied to this project, I find no violation of the project from that. I do not find that there is even, to use some of the wording in the case law, question so serious, substantial, difficult and doubtful as to make the issues ripe for litigation and deserving of more deliberate investigation, which is the language often used as a variation of the likelihood of success requirement.

So I do not find that plaintiff has carried -- plaintiffs have carried their burden under that standard.

With respect to irreparable harm, combining both the testimony of Mr. Potter, and in effect some of

the arguments made yesterday by Mr. O'Brien, I itemized basically nine factors urged by plaintiffs in support of the irreparable harm argument. The first, the Potters are extremely frustrated. Second, all they see is the garage and the parking space. Third, that this construction, as Mr. Potter said, is in his face. Fourth, damage to the driveway. Fifth, pooling of water. Sixth, invasion of privacy. Seventh, inability to let children play on part of the driveway. If I said six, that should have been seven. Eighth is invasion of Mr. Potter's property. And ninth is that the character of the property and the neighborhood has been affected.

Looking at some of the case law applicable to this particular subject in B and W Management, Inc. versus Tasea Investment Company, 451 A.2d 879, our Court of Appeals 1982, the Court notes two things of relevance here. The first in footnote 8 is that a private plaintiff must assert special damage in order to enjoin a zoning violation. And, second, they note that a claim for damage, as it was phrased there, to the aesthetics of the area based on blighting of the neighborhood, would not be an assertion of substantial interference with one's right to use and enjoy the land.

And in Ash versus Tate, 73 F.2d 518, D.C. Circuit 1934, the Court basically rejected a claim of a right to a view as being a basis for a type of injunctive relief.

Here in looking at the claims of irreparable harm, I basically don't conclude any of them are irreparable in the meaning of the law for purposes of issuance of an injunctive order.

Number one, there are money damages available if plaintiff prevails.

The, second, the children don't have a right to play on the entire driveway. Half of it's on the other side of Mr. Potter's property line, and that easement is for ingress and egress of vehicles. That aside, when talking about danger to children, this, assuming the correctness of Mr. Potter's assertion that he feels it's not safe for his children to play on the driveway, crediting that as he says, that on this evidence has hardly been demonstrated to rise to the level of irreparable injury requiring issuance of an injunctive order.

The pooling, I really haven't heard any evidence that that is any viable danger to the safety or health of anyone. It could be problematic if it freezes. For all practical purposes, I suspect

weather-wise we are pretty far past that. And this is a situation where the potential harm, if harm there be, equally flows to the defendant as to the plaintiff from the possibility of icing. But, again, considering the location of where the water is ponding, that hardly rises to the level of being a serious danger to anyone worthy of issuance of an injunctive order in this particular case.

The -- the reality of looking over the Potter's fence and seeing the top of the garage, or looking from the upper windows, as one of the photographs introduced into evidence indicated, may provide the Potters with less than the most picturesque scenic view, but I don't find anything in the facts of the law that causes me to conclude that the construction of that building constitutes irreparable harm to them.

And I really can't find anything in the evidence that would cause me to conclude that this particular garage, for want of a better term, the platform in front of it, constitute a blight on the neighborhood, or so change the character of Spring Valley that would warrant me concluding this is irreparable harm and issue an injunctive order. I just don't find it.

I think considering the status of the construction, that there would be greater harm to the defendant in either ordering him to tear it down, or even to stop construction here, than there would be for me to deny the injunction with any arguable resultant harm to the plaintiff in this particular case.

I think as one balances the equities in this particular case, they clearly favor the defendant, especially when one goes back to my finding of lack of likelihood of succeeding on the merits in this case.

What I was thinking discussing the pooling a moment ago, I know that plaintiff has argued both in papers and here in court about Mr. Ghafoorian having unclean hands in connection with the obtaining of the permit, both the April and the May permits.

I frankly don't find that as a factor in any way detracts or causes me to reach a conclusion other than the one I have in this particular case. But by the same token, just using that particular subject and relating it to the pooling of the water, I think the inability of Mr. Ghafoorian to complete the project, and to get far enough along with his subcontractors to put in that drain on the northeast corner of the platform cannot be said to be totally divorced from the actions taken by the Potters in this case to obtain

both Stop Orders and the TRO, and the effect it's had on the workmen and their ability to finish this particular project.

And the final factor, the one of public interest, on the facts of this case as presented to me here, the only conclusion I think -- the only conclusion I do reach is the public interest favors the application of the zoning regulations to the plans and the construction here, and to defer to the interpretation of those regulations by the agency charged with that responsibility. Whereas here there is no evidence that that agency exercised its decision-making process in anything other than one consistent with applications of regulations to building permits in other earlier situations.

So for these reasons, the request for preliminary injunction is denied.

MR. O'BRIEN: Your Honor, if I may, I got the impression from the way you delivered your opinion that it was almost half written. Will there be a written opinion in this matter?

THE COURT: There will not, and if you saw my notes you wouldn't have said that.

MR. O'BRIEN: Your Honor, in that case will we be given a copy of your oral remarks?

THE DISCUSSION ABOUT THE INTERFERENCE WITH THE LIGHT AND AIR THAT WAS IN CHAPTER 25. IN OTHER WORDS, YOU MENTIONED IT, BUT IT WENT NO FURTHER.

THE COURT: BASED ON MY RULING OF IT, THAT CHAPTER, THAT SECTION OF CHAPTER 25 REFERS TO OTHER APPLICABLE REGULATIONS. AND THE ONLY OTHER REGULATION THAT I HEARD ABOUT DEALINGS WITH LIGHT AND AIR WAS NOT AN APPLICABLE REGULATION. MY READING OF THIS REGULATION, IT DOES NOT IMPOSE ON THE DEFENDANT IN THIS CASE AN OBLIGATION TO COMPLY WITH REGULATIONS THAT RELATE TO VARIANCES. IT DOES NOT IMPOSE THAT ON HIM. AND THAT'S MY RULING ON THE LEGAL ISSUE.

MR. FORESTER: ALL RIGHT, THAT CLARIFIES IT. THANK YOU.

THE COURT: MR. NIEDERMAYER, I WANT YOU TO SUBMIT AN ORDER, IN ACCORDANCE WITH THIS RULING, WITHIN FIVE DAYS. SO, DO YOU HAVE ANY QUESTIONS ABOUT THE RULING?

MR. NIEDERMAYER: I DON'T BELIEVE SO, YOUR HONOR. THERE IS AN OPEN ISSUE CONCERNING THE -- BASED ON YOUR HONOR'S RULING. THERE WAS A BOND POSTED TO COMPENSATE THE DEFENDANT FOR DAMAGES SUFFERED BY WAY OF THE DELAY. YOUR HONOR HASN'T HEARD ANY EVIDENCE WITH REGARD TO THAT, AND I DON'T KNOW IF YOU'RE IN A POSITION TO MAKE A RULING ON THAT, AND I MAY HAVE TO

PERMIT

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT PERMIT NO. B423964

Date 5/24/99 (Type) FENCE/RETAINING WALL

Address of work 4900 INDIAN LANE N.W. Lot 33 Square 1512

Permission is hereby granted to MOHAMMED GHAFOORIAN (Owner) TOTAL PERMIT FEE $

FILING FEE $

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit. NO. DATE

FEE PAYABLE $ 195.00

Authorized work and conditions of performance thereof:
REVISION TO PERMIT B422926 DATED 4/6/99. TO CORRECT. FOR INSPECTIONS CALL ~~XXXXX~~ 442-4641
1-FINISH SLAB ELEVATION OF THE NEW GARAGE TO 107'.50". 2-CORRECT ALL PLANS, SECTION AND ELEVATION BASED ON NEW SLAB ELEVATION. 3-ERECT 145 L.F-7' FENCE AT THE EAST SIDE/4-ERECT 45LF 5' RET. WALL

Builder— Value $ No. of Bldgs.

Width of Bldgs. Length Height No. of Stories 3 + BASEMENT

Zone To be occupied as

Height of terrace above grade Projections: SFD

Address of owner 4019 HIGHWOOD CT N.W.

Deposit No. Amount $

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Chief, Permit Issuance Branch

By R. Barksdale
Permit Clerk

L. JORDAN

DIRECTOR

109019

EXHIBIT 5
PENGAD-Bayonne

EXHIBIT 6: CONSTRUCTION PLANS

(SEPARATELY ATTACHED)

Edward M. Potter
4852 Indian Lane, N.W.
Washington, D.C. 20016

September 13, 1999

The Honorable Benjamin Saft
Advisory Neighborhood Commissioner 3D-07
1 American University - Letts Hall 613
Washington, D.C. 20016-8104

Dear Commissioner Saft:

Thank you for taking the time to speak with me. I understand that you indicated that it may not be in your specific area, but you were the only Commissioner I was able to reach on the phone today. I would like to direct your attention to a serious violation of zoning regulations, and urge you to take all possible action regarding 4900 Indian Lane, NW. The situation presents a serious threat to the integrity of the zoning and permit process. It is an object lesson in violating the regulations in stages. If it is permitted to continue, it will be an object lesson in how to evade the permit process and zoning regulations.

The owner of 4900 Indian Lane has apparently deceived the building permit officials. He intends to build a 15 foot-high, three-car garage on top of a six foot-high structure in order to evade the fifteen foot height limitation for the neighborhood.

As you know, there are city-wide and neighborhood height limitations in the statutes and in the zoning regulations. The owner of 4900 Indian Lane is a professional architect who is familiar with the regulations. He is counting on the incompetence of the District to let him violate regulations and procedures. Perhaps he and others intend to violate the regulations in stages, and to thereby make a mockery of enforcement.

He has also connected the garage structure to another six foot high structure designed as a parking platform. The two connect to the side of the house and violate the eight-foot set-back rule in the zoning regulations. There are many construction projects under way in this neighborhood, and many builders looking for ways to violate the set-back rules. If ANC 3D fails to take aggressive action on 4900 Indian Lane, it will lead to widespread violations based upon this example.

Finally, to add insult to injury, the garage and parking structures are not level, and cause rain to build up, flood adjacent property, and cause substantial erosion. In addition, the owner has left the property in a state of ongoing wreckage, and appears unable or unwilling to finish any project. The neighborhood has been subjected to an ongoing eyesore.

I cannot overemphasize our objection to this project, and ask for your immediate assistance. At a minimum, can you help us get an inspector out to look at the property. We have tried to call DCRA but have found it frustrating.



If you need additional information, please call me as soon as possible.

Sincerely,

Edward M. Potter

12/9/99

Stop work order released 12/9/99.
All zoning and building code
issues resolved.

Edgar TN
442-4560

J. Shelton
442-4546

Construction Inspector

★★★ GOVERNMENT OF THE DISTRICT OF COLUMBIA
BLRA-43
(Rev. 3/83)

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION
BUILDING INSPECTION DIVISION

1:53 pm

BUILDING INSPECTORS STOP WORK ORDER

Date 12/7/99 Ticket No. 51

Premises No. 4900 Time

Builder or Owner Address INDIAN LN. NW

Permit No. Issued Percent of Job

REMARKS PER ZONING REQUEST
NO PERMIT POSTED HLI / NOT WORKING
PER PLANS
CONSUMER RIGHT TO APPEAL IS
GIVEN.

Edward W. Ball Jr
Construction Inspector

85—7P567 wd32

100020

EXHIBIT 8
PENCAD-Bayonne

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

EDWARD M. POTTER and CYNTHIA G. POTTER,	:	
vs.	:	99CA3156
MOHAMMED GHAFOORIAN,	:	
Defendant.	:	

Thursday, March 16, 2000
Washington, D.C.

The above-entitled action came on for Preliminary Injunction before the Honorable RICHARD A. LEVIE, Associate Judge, in Courtroom 516, commencing at approximately 10:06 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

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DISTRICT OF COLUMBIA
APR 6 6 41 PM '00

ANNIE R. SHAW, CSR (202) 879-1087.
Official Court Reporter

EXHIBIT 9
PENGAD-Bayonne

P R O C E E D I N G S

THE DEPUTY CLERK: Edward M. Potter, et al, versus Mohammed Ghafoorian, Civil Action Number CA-3156-99.

Counsel, identify yourselves for the record.

MR. O'BRIEN: Good morning, Your Honor, Patrick O'Brien and Lodie White for the Potters, who are not present.

MR. NIEDERMAYER: Roy Niedermayer on behalf of defendant Mohammed Ghafoorian.

THE COURT: Mr. O'Brien, I realized that I neglected to clarify one point with you yesterday, and that is something that's not discussed directly by anyone, and that is precisely what relief you are seeking.

I have the proposed injunctive order that you submitted, I guess earlier this year, with basically eight points in place. And I just want to clarify. Is that the relief you are seeking?

MR. O'BRIEN: Yes, Your Honor. And as we discussed when we were here last, in the alternative and less desirable from our standpoint, would be an order pending trial to stop all work on the platform and garage.

THE COURT: Okay. All right.

Let me start by giving bottom line, so we don't wait until the end. The bottom line is I am denying the request for preliminary injunction. And now let me go through my reasons.

I reviewed the testimony given here, the arguments of counsel, I have gone and looked at the exhibits again, reviewed the law, reviewed the zoning regulations. And based upon that, I find that the plaintiff has failed to meet any of the criteria necessary for injunctive relief.

First let me deal with the related but not dispositive issue, and that's res judicata which Mr. Niedermayer mentioned at the beginning of his closing argument yesterday.

I do not believe res judicata bars my consideration of the matters presented here, because this is in reality a far different case than that which was presented to Judge Dixon about ten months ago. So while there may or may not be some collateral estoppel effect of some of the testimony that was presented there, I don't see my ability or the necessity for me to rule as being any way inhibited by what Judge Dixon said. Indeed, the fact that then as opposed to now Lourenco's testimony was unopposed puts it all in a different light and makes it necessary for me to make

additional findings.

Let me also say before getting to a detailed discussion of my analysis and conclusions, that the closing arguments by both counsel yesterday were very helpful. And I say this because, number one, arguments aren't always helpful. And, number two, and while not wishing to elevate one argument over another, I mean Mr. Niedermayer's as I listened to it struck me as incredibly compelling, to the point that I asked the Court Reporter to basically transcribe his testimony, his argument. She did. I took it home and I read it last night and I read it this morning. And, frankly, aside from thinking it was so logical and orderly and persuasive yesterday, the reason I wanted to read it and rethink about it, both last night and very early this morning, was because your response, Mr. O'Brien, actually caused me to question Mr. Niedermayer's argument, which sounded so compelling until I heard your response, and then I started to rethink it. But when I went back and reread what he said, relooked at my notes, and especially sitting there with all the exhibits spread out, and the zoning regulations, and walking through it paragraph by paragraph of the zoning regulations applied to the issues here, number one, I concluded that Mr. Niedermayer was correct in his

analysis, number two, both counsel will hear certain direct quotes from what he said yesterday. I'm not going to quote them as his, but some of it's going to be his language.

Let me start by looking at the law that I need apply. In our jurisdiction, to my belief the most recent case discussing mandatory injunctions is found in Fountain versus Kelly at 630 A.2d 684 from our Court of Appeals in 1993. Unintentionally a case with which I had some significant involvement.

The standards basically for a mandatory injunction, whether prohibiting an act or viewed as even a preliminary injunction, start off the same. And counsel referred to them yesterday. Substantial likelihood of prevailing on the merits, irreparable harm, a balance of whether more harm will result from the denial of the injunction than from issuance, or vice versa as the case may be, and where appropriate, making sure the public interest is not disserved.

In Fountain the Court of appeals stated that where a movant seeks to alter the status quo rather than maintain it, the moving is held to a substantially higher standard than in the usual case, and they must demonstrate a clear probability that they will prevail on the merits.