GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

**Appeal No. 16646 of Daniel Serwer and James W. McBride,** pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs, made approximately April 18, 2000 (Building Permit No. B426044), to approve a two-story garage addition and on August 8, 2000 (Building Permit No. B428648), to approve a covered walk connection. Appellants allege that the construction of the garage addition and covered walk connection and the unauthorized commercial use of the addition do not conform to the Zoning Regulations in an R-1-A District at premises 5655 Moreland Street, N.W. (Square 2307, Lots 801 and 802).

**HEARING DATE:** December 19, 2000

**DECISION DATES:** February 6, 2001; February 20, 2001

## DECISION AND ORDER

Daniel Serwer and James W. McBride filed an appeal with the Board of Zoning Adjustment on September 14, 2000, from the decision of the Zoning Administrator to approve building permits for a two-story garage addition and a covered walk connection in an R-1-A Zone District at 5655 Moreland Street, N.W., property owned by Thomas and Linda Shiner. Mr. McBride represented himself and Mr. Serwer in these proceedings. Toye Bello, from the Department of Consumer and Regulatory Affairs, Zoning Review Branch, appeared on behalf of the Zoning Administrator. The Shiners are represented by Arnold & Porter. After a public hearing, the Board granted the appeal in part as to the necessity for Department of Public Works review and clearance prior to the issuance of the building permits, since the lot upon which the garage addition is constructed is an assessment and taxation lot encumbered by the highway plan. The Board denied the appeal in part as to whether the garage addition constitutes an accessory building.

### Preliminary and Procedural Matters

Notice of Appeal and Notice of Public Hearing. By memoranda and letters dated September 28 and 29, 2000, the Office of Zoning advised Messrs. Serwer and McBride, the appellants; the Zoning Administrator; the Shiners, owners of the subject property; D.C. Office of Planning; Advisory Neighborhood Commission (ANC) 3G, the ANC for the area within which the subject property is located; the affected single-member district ANC commissioners; and the Ward 3 councilmember of the filing of the appeal.

#37



Board of Zoning Adjustment
District of Columbia
CASE NO.16646
EXHIBIT NO.37

The Board scheduled a public hearing on the appeal for December 19, 2000. Pursuant to 11 DCMR § 3112.14, the Office of Zoning, on November 9, 2000, mailed the appellants, the Zoning Administrator, the property owners, and ANC 3G notice of the hearing. Notice of hearing was also published in 47 DCR 9019 (Nov. 10, 2000).

Appellants' Case. The appellants focused on three arguments: first, they argued that since the subject property is not a record lot, the Zoning Administrator erred in approving the building permit applications; second, that the garage addition is actually an accessory building that is constructed in the front yard, that it is too tall, and that it will be used for commercial purposes, in violation of the Zoning Regulations; and third, that the property is encumbered by the District of Columbia highway plan. The appellants complained that the Zoning Administrator should have referred the application to the Department of Public Works (DPW) for review and clearance before approving construction on assessment and taxation lots encumbered by the highway plan.

Zoning Administrator's Case. Mr. Bello responded to Board questions concerning the permits. He described the Zoning Administrator's practices regarding assessment and taxation lots and the distinction between an addition and an accessory building.

Property Owners' Case. Mr. Shiner discussed the design and construction of the garage addition and covered walkway, and gave an account of the permitting process. The Shiners, through counsel, objected to testimony and argument regarding the highway plan and the necessity of DPW approval as outside the jurisdiction of the Board. The Board declined a request to recognize Mr. Shiner as an expert witness as any opinion testimony on the ultimate issues of this case would have been self-serving.

Public Agency Reports. There are no public agency reports in this case.

ANC Report. There is no ANC report in this case.

Closing of the Record. The record closed at the conclusion of the December 19, 2000, hearing, with the exception of documentation from the appellants to substantiate their contention that prior DPW approval is required and the Shiners' response.

After the appellants submitted their Record Supplement dated January 16, 2001, the Shiners filed a response on January 24, 2001, that contained additional arguments related to the glass-covered walkway. The appellants then moved to strike this material as unrelated to the DPW referral issue. The Board agrees that the arguments contained on page 3 of the Shiners' response relating to the walkway are beyond the scope of the information requested by the Board and orders them stricken from the record. *See* 11 DCMR §§ 3121.5, 3121.9.

Decision Meeting. On February 6, 2001, the Board continued its decision meeting to February 20, 2001, to allow additional time for Board Member Anne M. Renshaw to review the transcript, since she had been absent for part of the public hearing. Board Member Susan

Morgan Hinton, who was not present for the public hearing, also reviewed the transcript and record in order to participate in the decision meeting. *See* 11 DCMR §§ 3105.15.

At the February 20, 2001, decision meeting, the Shiners, through counsel, objected to Mrs. Renshaw's participation in the decision due to her knowledge of the facts of the case derived from earlier ANC meetings. The Shiners had first raised their objection towards the conclusion of the December 19, 2000, hearing. The Board's decision must be based upon the exclusive record of the proceedings before the Board, D.C. Code § 1-1509(c) (1999); 11 DCMR § 3127.2; and there was no practical means of affording the parties the opportunity to cross-examine or respond to matters discussed at the ANC meetings. After Mrs. Renshaw declined to recuse herself, the Board voted 4:1:0 to recuse her from participating in the decision meeting.[1]

The Board then voted 3:1:1 to grant the appeal in part as to the necessity of prior DPW review and clearance for purposes of invoking the highway plan exception to the record lot requirement; and 4:0:1 to deny the appeal in part as to whether the garage addition constitutes an accessory building.

## FINDINGS OF FACT

### The Subject Property

1. The property that is the subject of this appeal is located at 5655 Moreland Street, N.W. (Square 2307, Lots 801 and 802), in an R-1-A District.

2. The property is developed with a one-family dwelling and a two-story structure identified as a "garage addition." The dwelling and the garage addition front on Moreland Street. A wall and a covered walkway connect the dwelling to the garage addition.

3. Lots 801 and 802 are "assessment and taxation" lots.

4. Lot 801 is encumbered by the District of Columbia highway plan.

5. Lot 801 protrudes into Northampton Street, with a portion of the lot under paved roadway.

6. The garage addition appears to be located within the portion of Lot 801 that is encumbered by the highway plan.

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[1] The Court of Appeals recently upheld this procedure in *Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment*, No. 98-AA-1452, 2001 D.C. App. Lexis 18 (Jan. 25, 2001), a case involving the recusal of a member of the Alcoholic Beverage Control (ABC) Board who had served as an ANC chairman during ANC proceedings involving an alcoholic beverage license application that was subsequently heard by the ABC Board.

**The 1992 Building Permit**

7. When the Shiners purchased the property in 1992, it was vacant. Mr. Shiner is an architect, and he designed the dwelling as well as the structures in question.

8. To accommodate a large tree near the center of the lot, Mr. Shiner sited the garage away from the dwelling and connected it to the dwelling with a wall, a walkway, and a gate.

9. In October 1992, Mr. Shiner completed the design work and applied to the Office of the Surveyor to combine Lots 801 and 802 into a record lot. The record lot application did not proceed because Lot 801 is encumbered by the highway plan.

10. Mr. Shiner next met with Zoning Administrator Joseph Bottner and his assistant, Gladys Hicks. They advised Mr. Shiner that even though he could not combine the two lots, he would be able to build on them. Mr. Bottner and Ms. Hicks advised Mr. Shiner that the walkway connecting the garage and the dwelling would have to be covered in order to constitute a connection or "communication" between the dwelling and the garage. Otherwise, the garage would be considered an "accessory building" and not an addition to the dwelling.[2] While Ms. Hicks believed that a trellis incorporating columns would suffice as a connection, Mr. Bottner and Ms. Hicks also discussed a glass-covered walkway.

11. On October 13, 1992, Mr. Shiner filed a building permit application with DCRA to construct a one-family dwelling on the subject property. The Zoning Administrator signed off on the permit application and the surveyor's plat. The DPW Permits and Records Division and the Consumer Engineer also signed off on the application.

12. The Shiners completed the dwelling and connecting wall in June 1993. However, they were unable to build the one-story garage addition as planned due to financial constraints. Permission to construct the garage addition pursuant to the 1992 permit thus lapsed by 2000 when the Shiners were ready to proceed with construction.

**The 2000 Building Permits**

13. On March 22, 2000, Mr. Shiner applied for a building permit to construct a two-story garage addition. The application was not referred to DPW for review. The Zoning Administrator provided zoning approval of the application and plans on April 18, 2000. Permit No. B426044 issued on the same day.

14. Construction began in May 2000. On July 17, 2000, Mr. Serwer complained to the Shiners about the construction and threatened legal action.

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[2] As an accessory building, the garage could not be located in the front yard. 11 DCMR § 2500.2. It would be limited in height to 20 feet, *id.* § 2500.6; and the second-story could not be used for a home occupation. *Id.* § 2500.5. As an addition to the main building, it would not be subject to these restrictions. *See id.* § 203.2 and 400.1.

15. The DCRA Building Inspector issued a stop work order on July 27, 2000. The Shiners subsequently hired land use counsel and met with Edgar Nunley of the Zoning Administrator's Office to review the stop work order. Mr. Nunley requested a drawing showing a detail of the connection.

16. On August 8, 2000, the Shiners met with Mr. Nunley and their attorney and reviewed the requested construction detail on site. They provided Mr. Nunley with the 1992 plat that had received zoning approval. The Shiners submitted the requested detail and a revised permit application to DCRA on the same day, applying to connect the dwelling and the garage addition with a glass-covered walkway connection. The application was not referred to DPW for review. The Zoning Administrator approved the application and plans on August 8, 2000. DCRA issued Permit No. B428648 on the same day to add the detail of the glass-covered walk connection and lifted the stop work order. As of the time of the hearing, the glass installation was under contract.

17. Mr. Bello testified that for "communication" to exist, there must be a functional purpose for the connection; for example, to provide shelter between the nearest doors of the dwelling and the garage addition.

18. Mr. Bello also stated that once a trellis connection is covered, depending on the sturdiness and structural integrity of the connection, the Zoning Administrator would not consider an addition to be an accessory building.

19. The subject dwelling and the garage addition are approximately 19 feet apart. The walkway leads from the first floor of the garage to a basement entrance of the dwelling. The only way to access the second floor of the garage is from an outside staircase.

20. The glass-covered walkway connection is held up by walls and columns and by the garage wall.

21. The roofed connection physically touches the dwelling and the garage addition.

22. The garage addition is over 20 feet high.

23. Mr. Shiner intends to use the second story of the garage addition for his architecture and furniture design business. He has obtained home occupation permits to allow this use.

24. There are discrepancies between the permit applications as to gross floor area of the building, with the 1992 application showing the gross floor area as 3,200 square feet; the March 22, 2000, application showing the present gross floor area as 4,200 square feet and the proposed gross floor area as 5,200 square feet, and the August 8, 2000, application showing the present gross floor area as 247.72 square feet and the proposed gross floor area as 2304.73 square feet.

25. The appellants also allege that the permit applications show the dwelling and garage addition six feet deeper into the property than is in fact the case.

**The Highway Plan**

26. Ordinarily, the DCRA intake engineer determines whether an application should be referred to another department or agency for review.

27. The Office of the Surveyor confirms whether a lot is encumbered by a highway plan.

28. The highway plan designation on the base map of the District of Columbia indicates a long-standing proposal to complete the highway system. The current need to implement or construct these designations or plans varies by location.

29. According to DPW, the case-by-case process for making the determination whether to implement or construct a particular designation or plan involves review and clearance by the DPW Division of Transportation (DOT) through the building permit process.

30. According to DPW, the District of Columbia began condemnation proceedings in 1965 to acquire the portion of the subject property encumbered by the highway plan, but DPW has not yet determined whether the proceedings were completed or, if not, what prevented the transfer of land.

31. DPW, DOT states that prior notification of the proposed addition and covered walk connection would have alerted DOT of the need to complete condemnation proceedings or to acquire the land by purchase or dedication pursuant to D.C. Code § 7-422.

32. In a letter to Mr. McBride dated January 12, 2001, DPW, DOT states that:

> The land under the paved roadway is needed for roadway purposes and being used for the public good to provide access. Dedication of the paved area, plus additional land for a sidewalk, needs to be accomplished immediately. The owner of the land under the paved area retains liability until the land is transferred and is responsible for maintenance and care of the land. It would be in the best interest of the property owner to work with the District toward expedited transfer. DPW, DOT does not need all of the land within the highway plan designation area for the roadway purposes, but the established building restriction line that has been created on all adjacent parcels due to pre-existing right-of-way designation may present other reasons for the need for a set-back.

Ex. 33.

33. Mr. Serwer testified that two separate zoning officials, Mr. Bello and Edgar Nunley, had advised him that no building permit could be issued for construction for property encumbered by the highway plan unless DPW signed off on the construction.

34. Mr. Bello testified that he and Zoning Administrator Michael D. Johnson may have advised Mr. Serwer that a DPW signature was necessary on the application.

## CONCLUSIONS OF LAW AND OPINION

The Board is authorized under § 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Code § 5-424(g)(1) (1994)), to hear and decide appeals where it is alleged by an appellant that an administrative officer erred in carrying out or enforcing the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§ 3100.2, 3101.5, and 3200.2. The notice requirements of 11 DCMR § 3112 for the public hearing on the appeal have been met.

The Board is required under D.C. Code § 1-261(d) (1999) to give the affected ANC's recommendation great weight. ANC 3G did not to make a recommendation in this case. The Board is therefore unaware of any specific issues or concerns that ANC 3G may have had with respect to this appeal and unable to afford ANC 3G the great weight to which it is entitled.

### The Highway Plan and DPW Review Issues

Under the Zoning Regulations, DCRA may not issue a building permit for the proposed construction of a principal structure or an addition to a principal structure unless the structure will be located on a record lot. Subsection 3202.3 provides:

> Except as provided in § 2516 [relating to the construction of two or more buildings on a single lot in a Residence District] and the Act of Congress of June 28, 1898 (30 Stat. 520, chapter 519, § 5) [relating to construction on lots encumbered by the highway plan], a building permit shall not be issued for the proposed erection, construction, or conversion of any principal structure, or for any addition to any principal structure, unless the land for the proposed erection, construction, or conversion has been divided so that each structure will be on a separate lot of record; except buildings and structures related to a fixed right-of-way mass transit system approved by the Council of the District of Columbia. Any combination of commercial occupancies separated in their entirety, erected, or maintained in a single ownership shall be considered as one (1) structure.

The full citation for the cross-reference to the 1898 Act is § 5 of An Act To amend an Act of Congress approved March 2, 1893, entitled "An Act to provide a permanent system of highways in that part of the District of Columbia lying outside of cities," and for other purposes, approved June 28, 1898 (30 Stat. 519, 520, as amended; D.C. Code § 7-114 (1995)). D.C. Code § 7-114 provides in pertinent part that:

> The owner or owners of land over or upon which any highway or reservation shall be projected upon any map filed under §§ 7-107 to 7-111 [the

> permanent highway plan] shall have the free right to the use and enjoyment of the same for the building or any other lawful purpose, and the free right to transfer the title thereof, until proceedings looking to the condemnation of such land shall have been authorized and actually begun.

Section 3202.2 of the Zoning Regulations thus provides an exception to the record lot requirement for land encumbered by a highway plan "until proceedings looking to the condemnation of such land shall have been authorized and actually begun." D.C. Code § 7-114. The other two exceptions provided in § 3202.2 relating to the construction of two or more buildings on a single lot and mass transit system facilities are not applicable in the instant case.

Since the Zoning Regulations provide an exception to the record lot requirement for land encumbered by a highway plan, the Board concludes that it has jurisdiction over the highway plan and DPW referral issues presented in this appeal. When the Zoning Administrator invokes the highway plan exception to approve a building permit application involving an assessment and taxation lot, the Zoning Administrator must, in the absence of reliable information provided by the applicant,[3] refer the application to DPW to determine whether condemnation proceedings have been authorized and actually begun. In the instant case, only DPW could have provided the information necessary to make a proper determination of the status of the property. Any condemnation proceedings or other measures to acquire the property through purchase or dedication would affect the lot lines. Without accurate information as to the location of the lot lines, a proper zoning review cannot take place. *See, e.g., Parr Warehouse Co. v. Peebles*, 108 A.2d 161 (D.C. 1954), a case involving a tract of land in Maryland where a requested zoning was approved on the condition that the property owner agree to dedicate a strip of property that was encumbered by a highway plan.

The Zoning Administrator's decision to approve the issuance of the two building permits in question is therefore reversed. Following the issuance of this decision and order, the Zoning Administrator is to refer the permit applications to DPW, DOT for review and clearance. Upon clearance by DPW, DOT, the Zoning Administrator is to review the applications for compliance with the area restrictions of the Zoning Regulations, taking into account whether changes in the lot lines or the establishment of a building restriction line, if any, would affect zoning compliance. The Zoning Administrator's review should also address the discrepancies that came to light during the hearing involving the gross floor area of the building and its siting on the lot.

**The Accessory Building Issues**

The Zoning Regulations define the term building as:

> [A] structure having a roof supported by columns or walls for the shelter, support, or enclosure of persons, animals, or chattel. When separated from the ground up

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[3] Under 11 DCMR § 3202.2(b)(3), in addition to an official building plat prepared by the Surveyor of the District of Columbia marked to show all existing and proposed structures and parking and loading spaces and facilities, the applicant must submit "[o]ther information necessary to determine compliance with the provisions of this title."

> or from the lowest floor up, each portion shall be deemed a separate building, except as provided elsewhere in this title. The existence of communication between separate portions of a structure below the main floor shall not be construed as making the structure one (1) building.

11 DCMR § 199.1. An "accessory building" is defined as "a subordinate building located on the same lot as the main building, the use of which is incidental to the use of the main building." *Id.*

The glass-covered walkway connection, constructed above grade and supported by walls and columns, provides sheltered access from a basement entry of the dwelling to the first floor of the garage addition. The walkway thus constitutes a "communication" between the dwelling and the garage addition, such that the dwelling and the addition are considered one building for purposes of zoning. As observed in *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 927 n.1 (D.C. 1980), the word "communication" is typically used as an equivalent term for the word "access." The Board thus concludes that the garage addition is not an accessory building. Since the garage addition is not an accessory building, it is not necessary to reach the appellants' remaining arguments regarding accessory building area and use restrictions.

For the reasons stated above, it is hereby **ORDERED** that the appeal is **GRANTED IN PART** as to the necessity of prior referral to DPW for review and clearance for purposes of invoking the highway plan exception to the record lot requirement and **DENIED IN PART** as to whether the garage addition constitutes an accessory building. Pursuant to D.C. Code § 5-424(g)(4), the Zoning Administrator's decision to approve Building Permits B426044 and B428648 is **REVERSED** for failure to refer the applications to DPW for review and clearance.

**VOTE: 3 – 1 – 1** (Carol J. Mitten, Susan Morgan Hinton, Robert N. Sockwell, to grant the appeal as to the necessity of prior DPW review and clearance; Sheila Cross Reid, to deny; and Anne M. Renshaw, not voting, having been recused).

**VOTE: 4 – 0 –1** (Carol J. Mitten, Robert N. Sockwell, Sheila Cross Reid, and Susan Morgan Hinton, to deny the appeal as to whether the garage addition constitutes an accessory building; Anne M. Renshaw, not voting, having been recused).

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

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

**ATTESTED BY:** _____
**JERRILY R. KRESS, FAIA**
**Director, Office of Zoning**

**FINAL DATE OF ORDER:** MAR 2 8 2001

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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**BZA APPEAL NO. 16646**

As Director of the Office of Zoning, I hereby certify and attest that on MAR 2 8 2001, a copy of the foregoing Decision and Order in BZA Appeal No. 16646 was mailed first class, postage prepaid, to each party and public agency who appeared and participated in the public hearing concerning this matter and who is listed below:

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