GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal No. 16679-A of Spring Valley Wesley Heights Citizen's Association, pursuant to 11 DCMR §§ 3100 and 3101 from the decision of the Zoning Administrator, DCRA, for the issuance of Building Permit No. B430091, dated October 11, 2000, to Charles A. Sisson for construction of a partial front porch, rear addition and accessory garage to an existing single family dwelling in a WHOD/R-1-A District at premises 3020 43rd Street, N.W. (Square 1621, Lot 70).

HEARING DATES: January 15, 2003, June 10, 2003
DECISION DATE: October 2, 2001, January 2, 2002, June 10, 2003

ORDER

BACKGROUND, PRELIMINARY AND PROCEDURAL MATTERS

This appeal was brought by the Spring Valley Wesley Heights Citizen's Association ("Spring Valley" or "Appellant") on November 28, 2000. The property that is the subject of the appeal ("subject property") belongs to the Intervenor, Charles A. Sisson, and is located in an R-1-A Zoning District within the Wesley Heights Overlay District ("Overlay District").

Background

The subject property was the focus of two earlier Board of Zoning Adjustment ("BZA") cases. The first of these earlier cases was BZA Case No. 16405, in which Mr. Sisson's neighbor, Mrs. Mildred Crary, appealed the issuance of five separate building permits to Mr. Sisson between January and October, 1998. The Board orally granted the appeal at its June 16, 1999 decision meeting, concluding that all five building permits had been issued in error. The written order reflecting the Board's June 16, 1999 decision was dated December 28, 1999 and Mr. Sisson appealed it to the Court of Appeals. On August 29, 2002, the Court upheld the Board's decision in its entirety.

On October 7, 1999, Mr. Sisson filed an application with the Board for special exception and variance relief necessitated by the Board's decision in Case No. 16405 that the five permits had been issued erroneously. This application, BZA Case No. 16521, if granted, would have permitted the retention of the roof over the front porch which two of the five building permits had ostensibly permitted. Mr. Sisson sought special exception relief under § 223.1 of Title 11 of the District of Columbia Municipal Regulations ("DCMR") and a variance from the front yard setback requirements of 11 DCMR § 1543.4 to allow,

BZA
CASE No. 16679
40

Board of Zoning Adjustment
District of Columbia
CASE NO. 16679
EXHIBIT NO. 40

after-the-fact, the construction of the front porch roof. By written order dated December 13, 2001, the Board denied the special exception and variance relief requested in Application No. 16521.

The instant appeal

Before the Board's denial of Application No. 16521, on November 28, 2000, the Appellant filed the instant appeal, alleging the erroneous issuance of a sixth building permit for the subject property, Permit No. B430091. DCRA issued this permit on October 11, 2000, retroactively approving the rear addition and garage on the subject property, but requiring removal of the front porch roof. Appellant alleges six grounds for appeal: (1) the permit application is unsigned and therefore void, (2) the permit approval is incomplete and inconsistent with the Board's decision in Appeal No. 16405,[1] (3) the permit violates the lot occupancy provisions of the Overlay District and the ZA does not have any flexibility regarding these provisions, (4) the permit violates side yard restrictions and the ZA misused his flexibility with regard to such restrictions, (5) the permit violates private driveway width and grade restrictions, and (6) the permit violates access and off-street parking restrictions.

The Office of Zoning ("OZ") notified interested parties of the filing of Appeal No. 16679 and informed them that a hearing would likely be scheduled for March or April, 2001. After some delay, on August 27, 2001, Intervenor[2] Sisson filed a Motion to Dismiss the appeal as moot because, he claimed, all the issues raised by the Appellant had already been decided by the Board in Case No. 16521. By letter dated September 7, 2001, Appellant opposed the Motion and claimed that the above six issues were still to be decided. Appellant, however, requested that further action on Appeal No. 16679 be deferred until after the written order was issued in Case No. 16521 and until after the Court of Appeals rendered a decision in the appeal of Case No. 16405.

At a public meeting on October 2, 2001, the Board laid out its approach to handling Appeal No. 16679 in light of the fact that extensive records on the same facts had already been created in Cases Nos. 16405 and 16521. The Board decided to include these two records in the record of Appeal No. 16679, with the parties designating which portions of these earlier records they felt were pertinent to Appeal No. 16679. This would prevent the Board from re-hearing the same matters. The Board also decided to permit the parties to brief each of the Appellant's six stated issues on appeal. In the briefs, the parties would have the opportunity to show the Board whether the issue had been previously decided. In this way, a decision on Intervenor's Motion to Dismiss the entire appeal was held in abeyance, while the parties were permitted to submit arguments concerning

[1]Later expanded to include claimed inconsistency with Order No. 16521.
[2]Intervenor status was also granted to both of Mr. Sisson's adjacent neighbors, Mrs. Crary and Mr. Stein, as well as to the Wesley Heights Historical Society. These three intervenors, however, played a very limited role in these proceedings. Therefore, in this Order, the word "Intervenor" refers only to Mr. Sisson himself.

dismissal of specific issues. An issue-by-issue discussion of, and decision on, the Motion to Dismiss was scheduled for January 2, 2002, and a hearing, if necessary, for January 15, 2002.

On November 9, 2001, the Court of Appeals heard oral argument on Mr. Sisson's appeal of Case No. 16405. Because of this, Intervenor moved again, on December 17, 2001, (four days after the issuance of the order in Case No. 16521 denying Mr. Sisson's special exception and variance relief) to dismiss Appeal No. 16679 as moot, or, in the alternative, to postpone hearing action on No. 16679 until after the Court rendered its decision in the appeal of Case No. 16405. Appellant Spring Valley countered that the Board should summarily grant Appeal No. 16679 based on the records established in the two predecessor Board cases, Nos. 16405 and 16521.

At the January 2, 2002 decision meeting, the Board decided to defer action on Intervenor's Motion to Dismiss until the Court of Appeals had rendered a decision in the appeal of Case No. 16405. On January 15, 2002, the Board similarly decided to postpone hearing Appeal No. 16679 until the Court of Appeals' decision was received. Therefore, on February 8, 2002, the Board issued an "Order to Continue Proceedings," which continued both the decision meeting on Intervenor's Motion to Dismiss and the public hearing on Appeal No. 16679, pending receipt by OZ of the Court of Appeals' mandate in the appeal of Case No. 16405.

On August 29, 2002, the Court of Appeals issued its decision in the appeal of Case No. 16405. The Court upheld the Board's decision in its entirety. Mr. Sisson's petition to the Court of Appeals for rehearing or rehearing *en banc* was denied on February 13, 2003, and Appellant Spring Valley requested by letter dated February 19, 2003 that the Board schedule a hearing in Appeal No. 16679 at the earliest opportunity. The Board scheduled the hearing for June 10, 2003, at which time the Board resumed its simultaneous discussion of, and deliberation on, the Intervenor's Motion to Dismiss and the Appellant's Motion for Summary Granting of the Appeal.

At the June 10, 2003 hearing, the Board voted separately on each of the Appellant's six stated grounds for appeal. The first issue, whether the unsigned application for building permit No. B430091 was void on its face, the Board decided was outside its jurisdiction, and so, voted 4-0-1 to dismiss it. The second issue was whether the permit was "incomplete and inconsistent with" Orders Nos. 16405 and 16521. The Board determined that this language did not contain a definite statement of the issue, and thus the issue, as stated, was too vague to be decided. The third issue was that the permit violated the lot occupancy provisions of the Overlay. The Board concluded that this issue had already been decided in Mr. Sisson's favor in Case No. 16521 and dismissed it by a vote of 3-2-0. The fourth issue, whether the permit violated the side yard provisions of the Overlay was also dismissed, by a vote of 4-0-1, as having already been decided in Mr. Sisson's favor in Case No. 16521. The fifth and sixth issues, whether the permit

violated restrictions as to driveway width and grade and as to access and off-street parking, respectively, were both summarily granted based on the fact that they had already been decided against Mr. Sisson in Appeal No. 16405. Issues numbers five and six were voted on together and the vote was 5-0-0.

These resolutions of the issues presented in motion to dismiss and the motion to summarily grant the appeal disposed of all the issues in Appeal No. 16679. Therefore, no further hearing was required.

FINDINGS OF FACT

1. All findings of facts made in BZA Orders Nos 16405 and 16521 are incorporated herein.

2. The subject property is located at address 3020 43rd Street, N.W., in an R-1-A Zone District and is included within the Wesley Heights Overlay District.

3. Intervenor Sisson, the owner of the subject property, constructed a 2-story rear addition, a front porch addition, and an accessory private garage on the property, pursuant to five building permits issued to him by DCRA between January and October, 1998.

4. All five of these permits were the subject of BZA Appeal No. 16405, brought by Intervenor's neighbor, Mrs. Mildred Crary. On June 16, 1999, the Board orally decided that all five permits had been erroneously issued. The written order in Case No. 16405 was issued on December 28, 1999. Intervenor appealed this order to the District of Columbia Court of Appeals.[3]

5. On October 7, 1999, after the oral decision in Case No. 16405 invalidating all five permits, but before the written order, Intervenor filed Application No. 16521 with the Board for special exception and variance relief. If granted, Application No. 16521 would have permitted retention of the front porch roof.

6. On October 11, 2000, DCRA issued a "remedial" sixth permit (No. B430091) to Intervenor which purported to retroactively approve, as matter-of-right construction, the rear and garage additions to the subject property, but required the removal of the front porch roof.

[3]In the Court of Appeals, Intervenor Sisson conceded that two of the five permits, those concerning the front porch roof, were issued erroneously, and he did not contest the validity of their rejection by the Board.

7. On November 28, 2000, Appellant Spring Valley filed the instant appeal (No. 16679), claiming that the remedial permit had been issued erroneously, and alleging six specific points on appeal.
8. On August 27, 2001, Intervenor filed a Motion to Dismiss Appeal No. 16679 as moot because, he claimed, all the issues raised by the Appellant had already been decided by the Board in Case No. 16521.

9. Appellant opposed Intervenor's August 27, 2001 Motion to Dismiss and, on December 26, 2001, filed a Motion for Summary Granting of Appeal No. 16679. Appellant claimed that all issues on appeal could be summarily granted based on the records in the two predecessor cases – Nos. 16405 and 16521.

10. At a public meeting on October 2, 2001, the Board decided to include Orders Nos. 16405 and 16521, as well as the records created in those cases, in the record of this appeal. Therefore, this order is based on all the evidence in all three records and incorporates all the Findings of Fact in Orders Nos. 16405 and 16521, as well as the Conclusions of Law in those Orders which address the merits of each case.

11. By written order dated December 13, 2001, the Board denied the special exception and variance relief requested in Application No. 16521.

12. On August 29, 2002, the Court of Appeals affirmed the Board's decision in Case No. 16405 in its entirety, thereby upholding the Board's decision that the first 5 permits issued to the Intervenor were issued in error.

13. Pursuant to the Board's February 8, 2002 Order to Continue Proceedings until the Court of Appeals' decision was received, a decision meeting on the Intervenor's Motion to Dismiss and the Appellant's Motion for Summary Granting was held on June 10, 2003.

14. At the June 10, 2003 decision meeting, the Board agreed to expand the Appellant's Motion for Summary Granting to apply to all six issues on appeal, because as written, it could have been construed to have a narrower scope.

CONCLUSIONS OF LAW

An appeal may be taken by any person aggrieved by a decision of a District official based in whole or in part on the Zoning Regulations, including the granting of a building permit. D.C. Official Code § 6-641.07(f) (2001). Appellant has appealed the October 11, 2000 issuance by DCRA of Permit No. B430091, the sixth of a series of permits issued to the Intervenor for construction done at the subject property. In Case No. 16405, the Board held that the first five permits were issued erroneously. The sixth permit now

challenged attempts to cure the defects of the first five. For the reasons stated below, it did not fully succeed.

This same construction had been the subject of Appeal No. 16405 and the retention of the front porch roof was at stake in Case No. 16521, an application for special exception and variance relief required in order to retain the roof. Both of these cases were fully briefed, argued, and litigated. Both had extensive records and Appeal No. 16405 was upheld on appeal to the Court of Appeals. It is therefore possible to resolve the validity of the sixth permit without additional fact finding.

Issues 1 and 2

The Board concludes that two of the six errors alleged in the appeal are not properly before it. The first, that the building permit application is unsigned, is not within the Board's jurisdiction. Section 8 of the Zoning Act of 1938 authorizes the Board to hear appeals where "it is alleged by ... that there is error in any order, requirement, decision, determination, or refusal ... in the carrying out or enforcement of any regulation adopted pursuant to" the Act. The Zoning Regulations do not specify the form of a building permit nor required that one be signed. These issues are addressed in the Building Code of the District of Columbia, D.C. Construction Codes Supplement, at Title 12A of the DCMR. *See, e.g.,* 12A DCMR §§ 103.1 and 105.3. Therefore, on its own motion, the Board hereby dismisses Issue No. 1 for lack of jurisdiction.

The Board is at a loss to decipher the precise meaning of the second issue as stated by the Appellant. The claimed "inconsistencies" between the remedial permit and the two Board Orders were never spelled out by the Appellant and therefore the Board can draw no conclusions as to whether or not they actually exist. Further, even after being afforded an opportunity to provide a more definite statement of the issue, the Appellant failed to do so. Therefore, the Board grants the Intervenor's Motion to Dismiss as to Issue No. 2 because it is too vague to be decided.

Issue No. 3 – The building permit approval violates the lot occupancy restrictions imposed by the Wesley Heights Overlay District . The Zoning Administrator is not authorized any flexibility regarding the strict application of the lot occupancy restrictions imposed by the Overlay.

This issue was fully litigated in Case No. 16521, the special exception and variance proceeding. In that case, the Board determined that the maximum lot occupancy permitted for the subject property was 2,000 square feet. *See,* 11 DCMR § 1543.2(a). Without the covered front porch, the dwelling and garage occupy 1,968.75 square feet. (*See,* Board Order No. 16521, Findings of Fact Nos. 6 and 7; Conclusions of Law and Opinion, pages 10-12, 14.) Without the roof, the front porch is effectively converted into a deck less than four feet above grade that would not be included in the lot occupancy

calculation. Therefore, if the front porch roof were removed, there would be no change in the lot occupancy calculation and no violation of the 2000-square-foot maximum. Since the building permit challenged in this appeal provided for removal of the roof, the building permit did not violate the lot occupancy restrictions. The question of Zoning Administrator flexibility does not need to be reached as no flexibility was required. Because the building permit did not violate the lot occupancy restrictions of the Overlay, the Appellant's Motion to Summarily Grant the Appeal is denied.

Moreover, the Appellant herein is bound by the Board's decision in Case No 16521 under the doctrine of collateral estoppel or issue preclusion. This doctrine "prevents the same parties from relitigating an issue actually decided in a previous final adjudication whether on the same or a different claim." *Rhema Christian Center v. District of Columbia Board of Zoning Adjustment,* 515 A.2d 189, 193 (D.C. 1986). While the Appellant herein was not a party to Case No. 16521, strict mutuality is not necessary. *See, Ali Baba Co., Inc. v. Wilco,* 482 A.2d 418 (1984) (recognizing nonmutual collateral estoppel). *See also, Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979) and *Blonder-Tongue Laboratories v. University of Illinois Foundation,* 402 U.S. 313 (1971). The Appellant is represented by the same attorney as the party opponent in Case No. 16521, with whom it is aligned. The Appellant could have sought party status or sought to participate as a person in opposition in Case No. 16521, but it did not do so. Most importantly, the precise issue of lot occupancy vis-à-vis the front porch with and without the roof was already resolved in Case No. 16521. There is no indication that this issue was not fully and fairly litigated and adjudicated in that case and the Board is precluded from re-examining it. Accordingly, the Intervenor's Motion to Dismiss is granted as to Issue No. 3.

One further point on this issue – the original permits allowing the construction of the front porch roof were invalidated in Case No. 16405 and DCRA itself, in the remedial permit, required the roof's removal. The front porch roof must be removed to bring the Intervenor's dwelling back into compliance with the lot occupancy restrictions of the Overlay. The Board expects DCRA, which has enforcement jurisdiction, to enforce Order No. 16405, as well as its own remedial permit, and require removal of the porch roof.

Issue No. 4 – The building permit approval violates the applicable side yard restrictions. The Zoning Administrator's flexibility regarding the applicable side yard restrictions was a misuse and/or abuse of his limited discretion and substantially impairs the purpose of the otherwise applicable regulations.

This issue was fully litigated and decided in Case No. 16521. In that case, the Board determined that the dwelling on the subject property, which predates the 1958 Zoning Regulations, has side yards of 5.69 and 4.89 feet in width. (Order No. 16521, Finding of Fact No. 8.) Under 11 DCMR § 405.8, an addition may be made to a dwelling that

predates the regulations and has a side yard of less that eight feet in width, provided that side yard is at least five feet in width, and provided further that the addition does not decrease the width of the existing side yard. Intervenor's addition did not decrease the width of either side yard. While the 5.69-foot side yard complies with the requirements of § 405.8, the 4.89-foot side yard does not. The Zoning Administrator, however, has authority, unaffected by the Overlay, to permit minor deviations in side yard width of up to 12 inches. *See,* 11 DCMR §§ 407 and 2522. Therefore, the building permit was not issued in error, because the Zoning Administrator had the authority to permit the necessary 0.11-foot (1.32 inch) deviation from the minimum five-foot side yard requirement of § 405.8. (*See,* Order No. 16521, Conclusions of Law and Opinion, page 11.) Accordingly, the Appellant's Motion to Summarily Grant the Appeal is denied and Intervenor's Motion to Dismiss is granted as to Issue No. 4.

Issue No. 5 – The building permit violates Order No. 16405 and the applicable private driveway width and grade restrictions.

This issue has also already been litigated and decided by the Board, and by the Court of Appeals. With respect to the driveway width and grade restrictions of 11 DCMR § 2117, the Board made factual findings in Order No. 16405 (Findings of Fact Nos. 13-16) and ruled, at page 7, that:

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

The Intervenor's easement, at 8 feet wide, is not wide enough to provide two-way circulation to his two-car garage. The Zoning Regulations specify that a driveway or approach serving more than one parking space and designed for two-way circulation must be at least 14 feet in width. 11 DCMR § 2117.8(c)(2).[4] In Order No. 16405, the Board has already concluded that the original garage permits were erroneously issued due to the too-narrow easement width, and nothing has changed with respect to the width of the easement since this conclusion was made. The Court of Appeals upheld the Board's conclusion with respect to driveway width. *See, Sisson v. D.C. Board of Zoning Adjustment,* 805 A.2d 964, 973-974 (D.C. 2002). However, DCRA has not revoked the permit. Bringing this Appeal is the only mechanism available to Appellant to void the offending aspects of the sixth permit and, as explained earlier, under the doctrine of issue preclusion, the Intervenor is bound by the Board's earlier conclusion and cannot re-

[4]Even if one agreed with the contention that the Intervenor's driveway provides only one-way circulation, the driveway still would not meet the Zoning Regulations' 12-foot width requirement for one-way circulation. *See,* 11 DCMR §2117.8(c)(2).

litigate it. Therefore, the Appellant's Motion for Summary Granting is granted as to Issue No. 5 and the Intervenor's Motion to Dismiss is denied.

Issue No. 6 – The building permit violates BZA Appeal No. 16405 and the applicable access and off-street parking restrictions.

In Issue No. 6, the Appellant focuses not on § 2117 of the Zoning Regulations, but on §§ 2101.1 and 2117.4. Section 2101.1 merely requires that the Intervenor provide one off-street parking space and § 2117.4 requires that such space be directly accessible from improved streets or alleys or accessible from improved streets or alleys via graded and unobstructed private driveways. One must then look to § 2117.8 to determine the width and location standards for driveways.

Regardless of which sections of the Zoning Regulations the Appellant cites in support of this sixth issue, the questions of applicable access and off-street parking restrictions were already litigated in Case No. 16405. In that case, the Board decided that the two garage permits were issued erroneously because of improper access to the Intervenor's off-street parking space located in the garage. Order No. 16405 references both § 2117.8 and § 2117.4. (*See,* Order No. 16405, Findings of Fact Nos. 13 and 14.) The fact that the access to Intervenor's garage is substandard invalidates the ability to have a garage and with no garage, the Intervenor cannot meet the off-street parking requirement of § 2101.1. All issues related to improper access and off-street parking restrictions are subsumed within the Board's conclusion that the garage permits were issued erroneously and the Intervenor may not contest them now. Therefore Appellant's Motion for Summary Granting is granted as to Issue No. 6.

In conclusion, after giving great weight to ANC 3D's unanimous support for Appeal No. 16679, the Board hereby **DISMISSES ON ITS OWN MOTION ISSUE NO 1, AS SET FORTH ABOVE, GRANTS THE INTERVENOR'S MOTION TO DISMISS AS TO ISSUES NOS. 2, 3, AND 4, AS SET FORTH ABOVE, AND GRANTS APPELLANT'S MOTION FOR SUMMARY GRANTING AS TO ISSUES 5 AND 6, AS SET FORTH ABOVE.**

VOTE ON ISSUE NO. 1:	**4-0-1**	(Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain, Carol J. Mitten, to dismiss, Ruthanne G. Miller, abstaining.)
VOTE ON ISSUE NO. 2:		**BY CONSENSUS OF BOARD.**
VOTE ON ISSUE NO. 3:	**3-2-0**	(Carol J. Mitten, Curtis L. Etherly, Jr., David A. Zaidain to dismiss, Geoffrey H. Griffis and Ruthanne G. Miller, opposed.)

VOTE ON ISSUE NO. 4:	**4-0-1**	(Carol J. Mitten, Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain, to dismiss, Ruthanne G. Miller, abstaining.)
VOTE ON ISSUES NOS. 5 AND 6: (TAKEN TOGETHER)	**5-0-0**	(Carol J. Mitten, Geoffrey H. Griffis, Curtis L. Etherly, Jr., David A. Zaidain, and Ruthanne G. Miller, to summarily grant.)

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

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

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

FINAL DATE OF ORDER: JUN 10 2005

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT." LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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BZA APPEAL NO. 16679-A

As Director of the Office of Zoning, I hereby certify and attest that on JUN 10 2005 a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY:

JERRILY R. KRESS, FAIA
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