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Of Counsel
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November 27, 2001

HAND DELIVERED

Jerrily R. Kress
Director
Office of Zoning
Room 210
441 Fourth Street NW
Washington, D.C. 20004

Re: BZA Appeal No. 16764

Dear Ms. Kress:

Enclosed for filing in the above case are ten copies of Appellant's Proposed Findings of Fact and Conclusions of Law. Also enclosed is a disk containing that document.

Please return a date-stamped copy to us with our messenger.

Thank you for your assistance.

Sincerely,

James T. Draude

BZA
Case No. 16764
Exhibit No. 46

Board of Zoning Adjustment
District of Columbia
CASE NO.16764
EXHIBIT NO.46

CERTIFICATE OF SERVICE

I hereby certify that copies of the enclosed Appellant's Proposed Findings of Fact and Conclusions of Law were mailed, postage prepaid, on November 27, 2001 to:

John Patrick Brown, Jr.
Greenstein Delorme & Luchs
Suite 900
1620 L Street NW
Washington, DC 20036

Marie Claire Brown
Office of Corporation Counsel
Room 450N
441 Fourth Street NW
Washington, DC 20001

James T. Draude

JAMES T. DRAUDE

APPELLANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Appeal No. 16764 of Darrel J. Grinstead, pursuant to 11 DCMR 3100 and 3101, from the administrative decision of Denzil L. Noble, Deputy Administrator, Department of Consumer and Regulatory Affairs, on May 14, 2001, confirming compliance with all zoning regulations of a new single family house under construction by William Wahabi pursuant to permits previously issued allegedly not complying with zoning restrictions on number of stories, height, minimum lot size, lot occupancy, rear and side yard setbacks in an R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30).

HEARING DATES: September 25, October 16, and October 23, 2001

DECISION DATE: December 4, 2001

DECISION AND ORDER

Darrel J. Grinstead filed an appeal with the Board of Zoning Adjustment on June 28, 2001 challenging on various grounds the decision of the Department of Consumer and Regulatory Affairs ("DCRA") confirming issuance of building permits to William Wahabi allowing construction of a new single family house in an R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30) ("Subject Property"). After public hearings, the Board granted the appeal and reversed the decision of DCRA.

Preliminary and Procedural Matters

Parties. The appellant in this case, Darrel J. Grinstead, is represented by James T. Draude, Esquire of Driscoll & Draude. Mr. Grinstead owns property adjoining the Subject Property (10/16 Tr. 17-18; Ex. 21, p. 1)[1]. The appellee, the DCRA, is represented by the Civil Division of the Office of the Corporation Counsel. The owners of the Subject Property, William Wahabi and Mouzella Ademilluyi, are represented by John Patrick Brown, Jr., Esquire of Greenstein, Delorme & Luchs. Advisory Neighborhood Commission 3F ("ANC 3F"), a party to this case pursuant to 11 DCMR 3399.1, appeared at the public hearing through its Secretary, Robert V. Maudlin.

Notice of Appeal and Notice of Public Hearing. By memoranda dated July 5, 2001, the Office of Zoning advised the Office of Corporation Counsel, the Councilmember for Ward 3, the ANC

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[1] "Ex. ___" refers to the exhibits marked and filed in the record in this case. "Ex. 21-A" refers to the document marked Exhibit A and attached to Ex. 21. "10/16 Tr. ___" refers to the transcript of the hearing in this case on October 16, 2001. "10/23 Tr. ___" refers to the transcript of the hearing in this case on October 23, 2001.

representative for the single member district in which the Subject Property is located, ANC 3F, the Office of Planning, the Zoning Administrator, and William Wahabi of the filing of this appeal (Ex. 8-14).

The Board scheduled a public hearing on this appeal for September 25, 2001. Pursuant to 11 DCMR 3315.11, the Office of Zoning, on August 16, 2001, mailed notice of the hearing to the Appellant, William Wahabi, ANC 3F, and the Zoning Administrator (Ex. 15, 17-18). Notice of the hearing also was published in the D.C. Register on August 16, 2001 at ___ DCR ____.

At the public hearing on September 25, 2001, the Board granted the request of William Wahabi for a postponement of the hearing on the grounds that Mr. Wahabi had not received the Appellant's Statement (Ex. 21) until the day prior to the hearing. The hearing was re-scheduled for October 16, 2001. The Board also requested Appellant to submit additional plans for the house on the Subject Property and photographs of the Subject Property by October 2, 2001, which Appellant did (Ex. 23).

Public hearings on this appeal were held on October 16, 2001 and October 23, 2001.

Motions. At the hearing on October 16, 2001, the Board granted the unopposed motion of William Wahabi and Mouzella Ademilluyi, owners of the Subject Property, to intervene as parties to the appeal ("Intervenor").

On October 10, 2001, Intervenor also filed a motion to dismiss the appeal on the grounds that the appeal is untimely and is barred by the doctrines of estoppel and laches. At the hearing on October 16, 2001, the Board postponed consideration of this motion. At the hearing on October 23, 2001, the Board denied Intervenor's motion to dismiss the appeal as untimely on the grounds that there was no unreasonable delay in filing the appeal (10/23 Tr. 164-171).

Appellant's Case. Appellant presented testimony by Mr. Grinstead ("Grinstead") and Stephen W. Gresham, a qualified architect. Appellant contends that the house under construction on the Subject Property violates limitations on height (forty feet) and number of stories (three) because it is four stories and forty-three feet eight inches high. That position is based on Appellant's contention that the "front" of the house for purposes of calculating height and number of stories is the thirty-five foot wide facade that contains the main entrance to the subject house. If the "front" is so defined, then the subject house violates limitations on both height and number of stories. Appellant also contends that the subject house violates the minimum permissible lot occupancy. Appellant further contends that the Subject Property violates the applicable

minimum lot dimensions (minimum lot size and minimum lot width). Finally, Appellant contends that a bay on the rear of the subject house impermissibly encroaches on the required rear yard.

ANC 3F's Case. ANC 3F appeared through its Secretary, Robert V. Maudlin. ANC 3F introduced two resolutions supporting the appeal (Ex. 20, 27). The Board waived its rules to allow late filing of the second ANC resolution, the first having been timely filed (10/23 Tr. 199). ANC 3F endorsed the positions taken by Appellant with respect to height and number of stories (Ex. 27). ANC 3F also requested that the Board direct DCRA to obtain an independent survey of the Subject Property and subject building to determine whether they comply with all zoning requirements (Ex. 20). While the Board did not grant this request, the Board did require Intervenor to submit a survey by a licensed surveyor showing all relevant dimensions of the site and house, which Intervenor did on November 13, 2001.

Zoning Administrator's Case. DCRA presented testimony by the Zoning Administrator, Michael Johnson, and by Toye Bello of the Office of the Zoning Administrator. Those witnesses testified that the Subject Property and subject house meet all applicable zoning requirements as set forth in DCRA's letter of May 14, 2001. They asserted that the "front" of the subject house is forty-six feet wide because the "front" includes a north facing facade located at the rear of the house. Based on that definition of "front", they testified that the subject house is three stories and less than forty feet high. They also contended that the Subject Property is entitled to a reduction of the required minimum lot dimensions as allowed in 11 DCMR 401.2. Finally, they asserted that the bay on the rear of the house does not exceed the Zoning Administrator's flexibility to permit such encroachments on a rear yard.

Intervenor/Property Owner's Case. Intervenor presented testimony by William Wahabi ("Wahabi") and Richard C. Lessard, a qualified architect. Intervenor supported the positions of DCRA and the Office of Zoning Administrator.

Closing of the Record. The record closed at the conclusion of the hearing on October 23, 2001, with the exception of specific materials requested by the Board and the parties' proposed findings of fact and conclusions of law.

Decision Meeting. At its decision meeting on December 4, 2001, the Board, voting _____, granted the appeal because the house on the Subject Property violates the Zoning Regulations' limitations on number of stories, height, minimum lot dimensions, and rear yard setback. The Board reversed DCRA's decision approving issuance of the building permits.

FINDINGS OF FACT

1. The Subject Property is located at 2944 Chesapeake Street NW (Square 2256, Lot 30) in an R-1-A zoning district.

2. The R-1-A zoning district limits buildings to three stories and forty feet in height with specified minimum lot size and width and required rear yard and side yard setbacks (11 DCMR 400.1, 401.3, 404.1, and 405.9).

3. On June 27, 2000, Wahabi filed an application for a permit to construct a "new custom house" as a single family dwelling on the Subject Property (Ex. 21-A). The application described the number of stories as three plus cellar (Ex. 21-A).

4. In late September, 2000, Grinstead learned from his representative on ANC 3F that a permit application was pending for the property adjacent to Grinstead's (10/16 Tr. 18).

5. After reviewing plans for the house on file with DCRA, Grinstead contacted Wahabi to express his concerns regarding the size of the proposed house (10/16 Tr. 18-20). Wahabi met with Grinstead at Grinstead's residence near the end of September, 2000 (Id.). Grinstead reviewed the plans with Wahabi and told Wahabi that the house was too large for the lot and too high, that the lot might not be a buildable lot at all, that Grinstead thought that the proposed house would violate the Zoning Regulations, and that Grinstead intended to oppose construction of the house (10/16 Tr. 19-20). Wahabi refused to make any concessions regarding the size and height of the house (Id.).

6. On October 5, 2000, Wahabi filed an application for a permit for grading, excavation, footing and foundation walls on the Subject Property (Ex. 21-B).[2] The application described the number of stories as three plus cellar (Ex. 21-B). DCRA issued the permit on Friday, October 6, 2000 (Ex. 21-D).[3] Grinstead did not learn of issuance of this permit until after the fact (10/16 Tr. 19, 73-74).

7. On October 7, 2000 (Saturday), Grinstead wrote a letter to DCRA on behalf of himself and adjoining neighbors requesting DCRA to deny the pending permit application (Ex. 21-C). Grinstead hand delivered that letter to DCRA on October 10, 2000

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[2] DCRA erroneously marked this application as being in an R-1-B zoning district (Ex. 21-B).

[3] This permit erroneously stated that the Subject Property is zoned R-1-B (Ex. 21-D).

(Tuesday)[4] (with a copy mailed to Wahabi) (10/16 Tr. 18-19). Grinstead's letter noted that the proposed house was four stories, that the height exceeded permissible limits, and that the lot did not meet the required minimum lot size. It also stated that the neighbors did not possess sufficient information to determine if the proposed house met rear yard, side yard, and other requirements of the Zoning Regulations.

8. On October 13, 2000 (Friday), DCRA issued a permit to Wahabi to construct a new custom house on the Subject Property (Ex. 21-E). This permit described the house as three stories (Ex. 21-E). Grinstead also did not learn of the issuance of this permit until after the fact (10/16 Tr. 19, 73-74).

9. Wahabi began excavation in late October, 2000 (10/23 Tr. 219).

10. On the weekend in October when heavy equipment was being placed on the Subject Property, Grinstead thought that a permit had not been issued and confronted the equipment operator, who withdrew the equipment from the Subject Property (10/16 Tr. 19).

11. On the following weekend heavy equipment again arrived on the Subject Property (10/16 Tr. 19-21). Wahabi was present and had a permit for excavation (Id.). Grinstead and some neighbors again confronted Wahabi with their objections that the proposed house violates the Zoning Regulations (Id.). Grinstead told Wahabi that "we intended to do everything we could to stop the property from being built as it was planned" (10/16 Tr. 21).

12. DCRA did not respond to Grinstead's letter of October 7, 2000 opposing issuance of the permits (10/16 Tr. 21). After repeated and unavailing telephone calls to DCRA seeking a response (10/16 Tr. 21-22), Grinstead mailed a letter dated February 19, 2001 to DCRA (with a copy mailed to Wahabi) repeating his objections to the proposed house (Ex. 21-F). He cited a prior case in which the Board had found that DCRA had approved construction of an illegal four story house in a zone with a three story limit (Ex. 21-F, p. 2). Both the Mayor's office and DCRA promptly acknowledged receipt of Grinstead's letter (10/16 Tr. 21-22, 74-76; Ex. 28). Shortly thereafter, the Zoning Administrator called Grinstead and said that he had not been aware of Grinstead's prior letter and that he would have someone look into it promptly (10/16 Tr. 22).

13. In March, the Zoning Administrator issued a stop work order while surveying was performed on the Subject Property (10/16 Tr. 22-23). The survey was completed on March 30, 2001

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[4] November 9, 2000 was the Columbus Day holiday.

(10/16 Tr. 23; Ex. 25). This indicated to Grinstead that the matter was under active review at DCRA (10/16 Tr. 23).

14. Having received no response to his letter by the end of March, 2001, Grinstead again began calling DCRA but received no response to his calls (10/16 Tr. 23-24).

15. On May 14, 2001, DCRA sent a letter to Grinstead responding to his letters of October 7, 2000 and February 19, 2001 (Ex. 21-G). DCRA stated that after review it found that the project was in compliance with all Zoning Regulations (Id.). DCRA noted that Grinstead had a right to appeal its decision to the Board (Id.).

16. This appeal was filed on June 28, 2001 (Ex. 1).

17. Wahabi testified that he did not become aware of the height issue until September 10, 2001 (10/23 Tr. 225). The Board does not credit this testimony since Wahabi had received Grinstead's letters of October 7, 2000 and February 19, 2001, both of which raise the height issue. When Ms. Renshaw observed that Wahabi "knew back in October that Grinstead had a problem with the height, as expressed in this letter of October 7", Wahabi did not disagree (10/23 Tr. 253-254).

18. The subject building is an L-shaped configuration (Ex. 23A, Sht. CS). The facade that includes the main entrance to the house is thirty-five feet wide (Ex. 23A, Sht. CS and A-1.1). At the rear of the house is a wing that extends to the west ("Rear Wing") (Id.). The northern facade of the Rear Wing is eleven feet wide (Ex. 23A, Sht. CS) and is twenty-six feet behind the main entrance to the house (Ex. 23A, Sht. A-1.1).

19. The permissible height and permissible number of stories are measured "from the finished grade level at the middle of the front of the building to the ceiling of the top story" (11 DCMR 199.1, "Building, height of" and "Story").

20. The front of the subject building is the facade that is shown on the drawings as 35 feet wide (10/16 Tr. 43-46; Ex. 23A, Shts, CS, A-1.1, and A-3). The middle of that facade is in front of the garage, and the finished grade at that location is the driveway (Id.). The height of the building from that point to the ceiling of the top story is forty-three feet eight inches and the number of stories is four (10/16 Tr.43; Ex. 23A, Sht. A-3). Mr. Gresham testified that the height from the finished grade in front of the garage doors to the peak of the roof is forty-six feet eight inches (10/23 Tr. 270). Mr. Lessard testified that the ceiling of the top story is three feet below the peak of the roof (10/23 Tr. 258-259). Mr. Bello admitted that the garage is a "basement", not a "cellar", and that a basement counts as a story (10/16 Tr. 126-129).

21. The Zoning Administrator's decision (and Intervenor's position) on height and number of stories depends on including the north facade of the Rear Wing as part of the front of the subject building, producing a front that is 46 feet wide (10/16 Tr. 85-90; Int. Sub., pp. 2-3)[5].

22. The Zoning Regulations use the word "front" in contexts that indicate that the word refers to that part of a building that abuts the street (see 11 DCMR 199.1, "Building, height of" and "Street frontage"). Mr. Bello testified, based on a dictionary definition of "front", that "the front is that portion of the building that faces the property line that abuts the street" (10/23 Tr. 187, 189). The north facade of the Rear Wing faces the western property line that abuts Mr. Grinstead's property (10/16 Tr. 63-64; 10/23 Tr. 279-280). The Board finds that the "front" of the subject building does not include the north facade of the Rear Wing.

23. Mr. Bello testified that the Rear Wing is part of the front of the building because it can be seen from the street at any point of the front of the lot (10/16 Tr. 114). As the photos introduced by all parties illustrate, what can be seen from the street depends on where one stands (Affidavit of Stephen W. Gresham; Int. Ex. B, C, and D; Z.A. Ex. B, C, and D)[6]. The Zoning Administrator (Mr. Johnson) testified that the "front" of the building is that part of the building that one can see from the middle of the front property line (10/16 Tr. 111-113). One cannot see the Rear Wing from the middle of the front property line. The Board rejects the position of the Zoning Administrator that determination of the "front" of the building is based on what an observer can see from a particular point, since that is entirely relative depending on the location of the observer.

24. The Zoning Regulations refer to "Webster's Unabridged Dictionary" for definitions of terms not defined in the Zoning Regulations (11 DCMR 199.2(g)). The Zoning Regulations use the term "front" in contexts that indicate the front of the subject building does not include the north facade of the Rear Wing. Thus, resort to the dictionary is unnecessary.

25. The Subject Property does not comply with the requirements for minimum lot size and minimum lot width in the R-

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[5] "Int. Sub. ___" refers to "Intervenor's Post-Hearing Submission", filed in this case on November 13, 2001. "Int. Ex. ___" refers to the exhibits attached to that submission.

[6] "Z.A. Ex. ___" refers to the exhibits attached to the "Post-Hearing Submissions of the Zoning Administrator", filed herein on November 13, 2001.

1-A zone. The required minimum lot size is 7,500 square feet, and the required minimum lot width is 75 feet (11 DCMR 401.3). The actual lot size is 6,723 square feet (Ex. 23A, Sht. CS), and the actual lot width is 67.80 feet (10/23 Tr. 257-258).

26. The Zoning Administrator's decision (10/16 Tr. 84) relies on a reduction of the minimum lot dimensions allowed by 11 DCMR 401.2 as follows:

> [I]n the case of an unimproved lot in single ownership on November 1, 1957, which has an area or width of lot less than that specified in [11 DCMR 401.3] for the district in which it is located and which does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the area and width of the lot are at least eighty percent (80%) of the area and width of lot specified under [11 DCMR 401.3]; Provided that the structure shall comply with all other provisions of this title. (Emphasis added).

27. As found above, the subject house violates the limits on height and number of stories. It also exceeds the maximum permissible lot occupancy for this site.

28. The site is in a Tree and Slope Protection overlay district (Ex. 2), and the maximum allowable lot occupancy is thirty percent (30%) (11 DCMR 1513.1). In its letter to Grinstead addressing the subject building, DCRA exercised its permitted two percent flexibility (11 DCMR 407.1) to allow a lot occupancy of 30.4% for the subject building (Ex. 2). Intervenor's architect testified that the actual lot occupancy is 32.1% (10/23 Tr. 237), and the Location Survey submitted by Intervenor (Int. Ex. A) confirms that the actual lot occupancy is at least 32.1%.

29. Since the subject building violates the requirements regarding height, number of stories, and lot occupancy, the subject building is not entitled to the reduction of minimum lot dimensions relied upon by the Zoning Administrator and Intervenor (11 DCMR 401.2).

30. Intervenor admits that the bay on the rear of the house impermissibly encroaches on the required rear yard space (Int. Sub., p. 3). The Board so finds.

CONCLUSIONS OF LAW AND OPINION

The "front" of the subject house, for purposes of determining height and number of stories, is the thirty-five foot wide facade that contains the main entrance to the house. The middle of that facade is in front of the garage, and the finished grade at that point is the driveway. The height of the house from that point to the ceiling of the top story is forty-three feet eight inches and the number of stories is four. The subject house violates the limits on height (forty feet) and number of stories (three).

The maximum permissible lot occupancy is thirty percent. The actual lot occupancy of the subject house is at least 32.1%, a violation of the zoning requirements.

The Subject Property unquestionably violates the required minimum lot dimensions (minimum lot size and minimum lot width). Since the subject building violates the requirements regarding height, number of stories, and lot occupancy, the Subject Property is not entitled to the reduction of minimum lot dimensions relied upon by the Zoning Administrator and Intervenor (11 DCMR 401.2).

Intervenor admits that the bay on the rear of the house impermissibly encroaches on the required rear yard space. Intervenor asserts that he will cure this violation by altering the existing construction of the bay. The Board's order in this case requires that Intervenor abate all of the zoning violations found by the Board.

The Board denied Intervenor's motion to dismiss this appeal as untimely (10/23 Tr. 160-171). Intervenor also moved to dismiss this appeal as barred by laches and estoppel (Ex. 24). To establish defenses of timeliness, laches, and estoppel, Intervenor must show <u>both</u> an unreasonable delay by Grinstead in filing this appeal and prejudice to Intervenor caused by such delay. In this case, there was no unreasonable delay and any prejudice to Intervenor was self-inflicted by his decision to start and continue construction while Grinstead's objections were unresolved.

The decision that is the subject of this appeal is DCRA's letter of May 14, 2001 (Ex. 1). There was no unreasonable delay in the filing of this appeal after issuance of that decision.

Intervenor's defenses of timeliness, laches, and estoppel are based on Intervenor's contentions that Grinstead should have appealed from the issuance of the building permit in October, 2000 and that Intervenor had no knowledge of Grinstead's objections when he began construction (Owner Mem. 4-8; 10/23 Tr.

161-162).[7]

DCRA issued the building permit to Wahabi three days after DCRA received Grinstead's letter of October 7, 2000. Any reasonably prudent owner would have checked with DCRA to confirm that issuance of the permit meant that DCRA had rejected Grinstead's objections. Grinstead had no reason to think that issuance of the permit (of which he learned after the fact) constituted DCRA's decision on the objections raised in his letter of October 7, 2000.

The Board's experience is that issuance of a building permit is not necessarily DCRA's last word on a project (10/23 Tr. 169-170). DCRA did not so regard it since DCRA issued a separate decision on May 14, 2001 responding to both of Grinstead's letters (Ex. 21-G). That decision expressly notes that Grinstead has the right to appeal (Id.).

An owner who proceeds with construction in the face of unresolved issues raised by neighbors proceeds at his own risk.

The Board has given "great weight" to the positions expressed by ANC 3F.

ORDER

For the reasons stated above, the Board concludes that the Appellant has met its burden of proving by a preponderance of the evidence that DCRA erred in confirming issuance of the building permits because the house on the Subject Property violates the Zoning Regulations' limitations on number of stories, height, minimum lot dimensions, and rear yard setback. It is hereby **ORDERED** that the appeal is **GRANTED.** Pursuant to D.C. Code 5-424(g)(4), DCRA's decision is **REVERSED**, and DCRA is **ORDERED** to require Intervenor to promptly abate the zoning violations found by the Board.

VOTE:

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[7] "Owner Mem. ___" refers to the "Request to Intervene and Opposition Statement of Property Owner, William Wahabi and Mouzella Ademilluyi", filed in this case on October 1, 2001 (Ex. 24).

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

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

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

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR 3331.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR 3103.1, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.