BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF	*	
	*	
2944 CHESAPEAKE STREET, NW	*	BZA Appeal No. 16764
WASHINGTON, DC	*	
	*	
DARREL GRINSTEAD, APPELLANT	*	

Appeal # 16764, 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, in the issuance of a building permit (#B430178) issued on October 13, 2000, to William Wahabi, permitting the construction of a new house allegedly not complying with height, lot occupancy, lot area, rear and side yard requirements in a R-1-A District at premises 2944 Chesapeake Street, N.W. (Square 2256, Lot 30).

Hearing Dates: October 16 and 23, 2001

DISTRICT OF COLUMBIA ZONING ADMINISTRATOR'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

PROCEDURAL HISTORY

On June 27, 2000, William Wahabi (hereinafter "Intervenor") submitted an application for a building permit to construct a new custom house at 2944 Chesapeake Street, NW. On October 7, 2000, Darrel J. Grinstead (hereinafter "appellant") wrote to the Department of Consumer and Regulatory Affairs (hereinafter "DCRA") with concerns about the size and height of the house to be constructed, claiming that the lot size was less than the minimum required in an R-1-A district, that the building plans indicated a structure consisting of four floors, and that the proposed building was destructive of the neighborhood's character and damaging to the adjacent landowners. The letter further raised concerns about the protection of trees, construction ingress and

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egress, effects on parking and noise. The letter requested a meeting to discuss these concerns. DCRA approved the building plans and issued a building permit B430178 on October 13, 2000.

On February 19, 2001, appellant wrote to DCRA to "renew the appeal" filed on October 7, 2000. That letter restated the concerns of the earlier letter and raised concerns about the rear and side yard setbacks. It further requested that a stop work order be issued while DCRA conducted a site inspection of the construction "to determine the lack of compliance with applicable building and zoning rules."

As set forth in a letter dated May 14, 2001, DCRA issued a Stop Work Order after an initial wall test report reflected one of the side yards to be less than the required minimum. The Stop Work Order was rescinded after a second wall test report adjusted the side yard to the required 8-foot minimum. The approved plans were reviewed again and DCRA concluded that no other issues of non-compliance existed. Appellant's concern as to the lot size had been addressed by the Zoning Administrator's flexibility authority under 11 DCMR § 407.1.

In addition to what appellant's letter described as an "appeal" dated October 7, 2000 followed by a "renewal" of the appeal on February 19, 2001, he filed the instant appeal on June 27, 2001, alleging that DCRA had issued the permit in error. A hearing was commenced on October 16, 2001 and concluded on October 23, 2001 with the parties required to submit proposed findings of fact and conclusions of law by November 27, 2001.

FINDINGS OF FACT:

1. The subject property is located on an irregularly shaped lot of 6,723 square feet at 2944 Chesapeake Street, NW in an R-1-A zoned district with a legal description of Lot 30 in Square 2256 (Application for Construction Permit dated June 27, 2000 ("Application"), Appellant's Statement filed in support of this appeal on September 18, 2001 at 7, and Transcript ("Tr.") at 5, 40, 233, and 237).[1]

2. Prior to its purchase by William Wahabi ("Intervenor"), the lot was determined to be buildable, in compliance with 11 DCMR § 401.2, by the Zoning Administrator in a letter from Wilkes, Artis, Hedrick and Lane to, and countersigned by, Michael Johnson dated March 14, 2000. (Ex. 34; Tr. at 82, 219 and 232-234).

3. In R-1-A zoning districts, in which buildings are limited to a height of 40 feet and 3 stories, the height of the building may be measured from the finished grade at the middle of the front of the building to the ceiling of the top story. The number of stories is counted at the point from which the building height is measured. A cellar is not counted as a story in an R-1-A zoning district. 11 DCMR § 199.1. 11 DCMR § 400.1. (Tr. at 41, 53, 79, 83 and 184; see generally Appellant's Statement, Application, and Building Permit No. B430178 dated 10/13/00 ("Permit")).

4. An application for a construction permit for a "new custom house" was filed with DCRA on or about June 27, 2000. A permit to construct a new custom house

[1] Contrary to Denzil Noble's letter to appellant dated May 14, 2001, this property does not lie in the TSP overlay district.

was issued by DCRA on October 13, 2000. (Appellant's Statement at 2, Tr. at 219-220).

5. The drawings submitted to the DCRA with the application, which included a Front Elevation of the house showing recessed portions and a 2-car garage, were used by the Office of the Zoning Administrator to establish compliance with the District's zoning regulations, including the height of the building. (Tr. at 83-85).

6. The appellant Darrel J. Grinstead is the adjoining neighbor of the subject property, residing at 2964 Chesapeake Street, NW. (Tr. at 16, *see generally*, Appellant's Statement).

7. Appellant was provided with two complete sets of building plans in October 2000. (Tr. at 226).

8. The zoning regulations do not define "front." Words not specifically defined in the zoning regulations have the meanings given in Webster's Unabridged Dictionary. The Office of the Zoning Administrator which has a copy of Webster's Unabridged Dictionary interprets the dictionary definition of the word "front" as used in the context of a building to mean the portion of the building that faces the property line that abuts the street. 11 DCMR § 199.2(g). (Tr. at 188-189).

9. The District's zoning regulations do not require that the front of a building must be on a continuous plane, therefore, in determining what constitutes the front of the building, the fact that a portion may be recessed does not matter. (Tr. At 85, 190-193, 211, 239; *see generally* Intervenor's Request to Intervene and Opposition Statement of Property Owner ("Opposition")).

10. Although a building may have more than one front, 2944 Chesapeake Street, NW has only one front which spans the entire width of the building. (Tr. at 58, 83 and 176).

11. The "wing" as described by appellant's witness, is not a projection into the yard, but rather an essential part of the structure that provides shelter and it faces the property line that abuts the street, constituting part of the "front." (Tr. at 180, 189 and 211).

12. The garage as depicted in the Front Elevation drawing submitted to DCRA The garage, is below the finished grade. It was excavated in order to meet the District of Columbia's parking requirement of one space per newly constructed home and does not constitute a story. (Tr. at 85, 87, 113, 186 and 237-238).

13. In order to construct the driveway and garage, there was excavation into the existing topography, maintaining the existing topography on either side of the driveway. The finished grade at 2944 Chesapeake Street, NW reflects what is closest to what was the natural grade barring the excavation that was necessary to construct the required garage. (Tr. at 85, 237 and 253).

14. The review of the application, including plans for the proposed construction, was personally conducted by Mr. Olutoye Bello for compliance with the District's zoning regulations. This project was reviewed under very strict scrutiny because of the number of telephone complaints received at DCRA before the permit was issued. Other than the smaller-than-required minimum lot size, which was pre-approved by the Zoning Administrator, DCRA determined that there were no

other instances of non-compliance with the District's zoning regulations in the plans. (Tr. at 79, 82, 182, 95 and 217).

15. A Wall Test Report is typically part of the construction process, to verify that the building conforms with the plans as it relates to the placement of the building on the property. (Tr. at 240).

16. Based upon telephone complaints received subsequent to the issuance of the permit and a questionable Wall Test Report conducted on March 23, 2001, DCRA issued a Stop Work Order to allow the Zoning Administrator to re-review the approval of the plans and issuance of the permit. DCRA again concluded that the project plans complied with all aspects of the zoning regulations. (Tr. at 82-83 and 95).

17. Wall Test Report, which was adjusted as of April 6, 2001 and the subsequent Location Survey dated September 25, 2001 demonstrate that the side yards are in compliance with the zoning regulations. (Ex. 25 and 33).

18. Olutoye Bello and Richard Lessard, the District's and the Intervenor's witnesses, respectively, are both recognized as experts in the areas of zoning and interpretation of zoning regulations in the District of Columbia. Both experts recognized by the Board agree that the reasonable interpretation of the 11 DCMR § 199.1 definition of building height is that middle of the building is measured from the farthest left corner to the farthest right corner or, in other words, the entire width of the building. (Tr. at 213 and 239).

19. The height of this building, measuring from the finished grade to the peak of the roof, is less than 40 feet, and the lower floor, which includes the garage

constitutes a cellar, as defined in the zoning regulations, therefore the Application was approved and Permit No.B430178 was properly issued by the Zoning Administrator. (Tr. at 184).

CONCLUSIONS OF LAW AND OPINION:

The Board of Zoning Adjustment (hereinafter "the Board") has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code § 6-641.07(f) (2001 Ed). Appellant has the burden of proof pursuant to 11 DCMR § 3324.2. In order to reverse the Zoning Administrator's decision to approve the issuance of the building permit, appellant must demonstrate by a preponderance of the evidence that (1) the building permit violates the height restrictions and setback requirements of 11 DCMR § 400.1 and (2) that the number of stories exceeds the restriction under 11 DCMR § 400.1

The appellant did not file a timely appeal of the decision of the Zoning Administrator to approve the building permit no B430178 issued on October 13, 2000.

The Intervenor has argued that the appeal is not timely and is barred by the doctrine of laches. The Intervenor further argues that he has been prejudiced by appellant's failure to file a timely appeal because the building construction was complete except for trim, painting, and other decorative treatments by the time the matter was brought before the Board. He maintains that pursuant to *Waste Management, Inc. v. Board of Zoning Adjustment*, 775 A.2d 1117 (DC 2001), appellant's 8-month delay in taking this appeal after learning of the Zoning Administrator's decision in October 2000 is fatal.

> In the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal -circumstances outside the party's control- we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness. *Id.* at 1122.

Here, as in *Waste Management*, from October 2000 onward, DCRA consistently maintained that the building permit was properly issued. Because of the numerous complaints received about the issuance of this permit, the application was scrutinized far beyond ordinary review.

The fact that there was no formal extension of a suggestion to appellant to appeal the Zoning Administrator's decision[2] did not preclude appellant from taking a prompt appeal. The Court of Appeals has held that a delay of one year, under circumstances quite similar to these, was not reasonable and it has also implied that a delay of four months would not be reasonable. *Id.*

While the Board has decided that the less than 2-month period from the time DCRA formally responded to appellant to the filing of the instant appeal *may* satisfy *Waste Management,* the question of whether the Board has jurisdiction to hear the merits of this appeal remains undecided. The Intervenor has argued that in addition to the untimely filing by appellant, the appeal is barred by the doctrine of laches.

Appellant has failed to adequately demonstrate the exceptional circumstances that substantially impaired his ability to file the appeal within two months after the decision to approve the issuance of the permit. Appellant has failed to demonstrate that his appeal is not barred by the doctrine of laches.

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[2] It is clear that DCRA is not required under any law to notify an aggrieved citizen or complainant that he or she has the right to appeal.

The Zoning Administrator properly issued building permit no. B430178 because the building plans submitted for review do not exceed the height or number of story restrictions.

Buildings in an R-1-A zoning district are limited to three stories with a height limitation of 40 feet. For purposes of determining the height of the building, the number of stories must be determined, as well as the finished grade.

11 DCMR § 199.1 defines the height of the building and states that in an R-1-A district, the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story. This definition refers only to the front, and not to the "front façade" or some portion of the building closest to the street.

The testimony is uncontroverted that the finished grade of the property is consistent with the natural grade, except as to the garage, which was constructed in order to comply with the District's off-street parking requirement of one space per new home. In order to facilitate the construction of the garage, there was excavation of the earth to allow access to the street. The finished grade at the garage is, therefore, an artificial lower grade to accommodate the garage. It is agreed by all parties that all of the lower level, with the exception of the garage, is a cellar according to the definition in 11 DCMR § 199.1.

The centralmost issue in this appeal is at exactly what point the middle of the building lies. It is undisputed that the front elevation submitted to DCRA with the permit application depicts what DCRA has historically used to determine the front of the building. It is uncontroverted that while a building may have more than one front, there is only one front at the subject property –on Chesapeake Street. It is further

uncontroverted that the portion of the house described as the "wing" faces or fronts Chesapeake Street.

11 DCMR § 3307.2 provides that "great weight" shall be given to the written report of the ANC. While that report generally supports the appeal, the ANC testimony conceded that the "wing" (which appellant argued should be excluded from the front of the building for purposes of determining the middle) is forward facing, *i.e.*, faces the property line that abuts the street, consistent with the positions of the Zoning Administrator and the Intervenor.

Based upon the analysis of the experts; the underlying reason for a lower finished grade level only to accommodate the garage; the regulations and their reasonable interpretations; the building plans submitted to DCRA with the application; and all of the testimony and documentary evidence taken together, the point of measurement of the height of this building must be the middle point of the entire width of the building, consistent with the decision of the Zoning Administrator. In accordance with the zoning regulations and definitions, the point from which stories are counted lies at that point as well. The height measures from that point to the peak of the roof is less than forty feet. The number of stories is three.

The Zoning Administrator properly issued building permit no. B430178 because the lot was predetermined to be buildable and building plans submitted for review do not violate the rear and side yard setback requirements.

Lot Size

The zoning regulations require a minimum lot size of 7,500 square feet in order to construct a residence in an R-1-A zoning district. There is, however, an exception to this requirement. This unimproved lot (856) and an improved adjoining lot (859, with a

house constructed in 1937 known as 2934 Chesapeake Street, N.W.) were in single ownership as of November 1, 1957. All other adjoining lots were in different ownership. It was concluded by the Zoning Administrator that lot 856 could, therefore, be converted into a record lot complying with the requirements of the zoning regulations and that a detached single family dwelling could be constructed on lot 856 as a matter of right, provided that the house complied with all other provisions of the zoning regulations. In this case, the lot size is 6,723 square feet, almost 90% of the 7,500 square foot requirement. Pursuant to 11 DCMR § 401.2, having met all the listed criteria this lot was deemed suitable for construction prior to being purchased by the Intervenor.

Side and Rear Yard Requirements

In addition to the authority granted in 11 DCMR § 401.2, the Zoning Administrator is granted flexibility pursuant to 11 DCMR § 407.1 which permits a deviation of up to two percent (2%) of the area requirements of minimum lot dimensions and percentage of lot occupancy and a deviation of up to ten percent (10%) of the linear requirements of rear and side yards. This flexibility permits a building to deviate from no more than two of the identified sections without any impairment to otherwise applicable regulations.

Here, it has been demonstrated with uncontroverted evidence that the building plans reviewed and approved by the Zoning Administrator comply with the rear and side yard requirement. It is undisputed that the building plans submitted to DCRA provide fully compliant side yards, *i.e.*, at least 8 feet. The chimneys on either side of the building are projections permitted into the side yards for up to two feet pursuant to 11 DCMR § 2502.8. The testimony and documentary evidence, the Wall Test Report dated

March 23, 2001 and the subsequent Location Survey dated September 25, 2001, have clearly established that the side yards are all compliant with the zoning regulations.

As to compliance with the rear yard requirements, the testimony is uncontroverted that based upon the building plans submitted to DCRA, the rear bay window as shown on the floor plans projected into the rear yard. According to the plans as scaled by Mr. Bello, the bay window projected 2.5 feet into the rear yard. This projection was approved pursuant to the authority of the Zoning Administrator under 11 DCMR § 407.1 to deviate up to 10% of the linear requirement.[3]

As indicated in the testimony, the deck, which was permissible in the rear yard pursuant to 11 DCMR § 2503.2, is no longer being constructed and therefore not at issue in this appeal.

CONCLUSION

Building Permit No. B430178 issued by DCRA on October 13, 2000 was properly issued. While the building constructed at 2944 Chesapeake Street, NW may differ in character and size from the existing homes in the immediate neighborhood, it clearly complies with the District of Columbia's zoning laws. In determining the middle of the building from which point the height and number of stories are measured, the entire width of the building that faces forward, and abutting the street, must be taken into account. As such, the measurement from the middle of the front of the house at the finished grade level is less than forty feet and the number of stories counted from that

[3] The Intervenor's Post-Hearing Submission states that the current Location Survey completed after the construction was completed indicated that the bay window, in fact, projects almost 2.8 feet into the rear yard which exceeds the 2.5 of flexibility that was exercised by the Zoning Administrator. According to that document, a permit is being applied for to correct the 3.6-inch excess projecting into the rear yard.

point is three. The deviations from the zoning requirements with respect to lot size and the projection into the rear yard were properly approved by the Zoning Administrator.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing District of Columbia's Findings of Fact, Conclusions of Law and Proposed Decision and Order were faxed and mailed postage prepaid this 27th day of November, 2001 to James T. Draude, Esq., Driscoll & Draude, 1230 31st Street NW, 2nd Floor, Washington, DC 20007, Fax No.202-298-6699 and John Patrick Brown, Jr., Esq., Greenstein DeLorme & Luchs, P.C., 1620 L Street, NW, Suite 900, Washington, DC 20036-5605, Fax No. 202-451-1410.

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FOR THE DISTRICT OF COLUMBIA

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DARREL GRINSTEAD, APPELLANT	*	

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Hearing Dates: October 16 and 23, 2000

ORDER

Upon consideration of the evidence presented, the Board of Zoning Adjustment hereby finds that appellant Darrel J. Grinstead has failed to meet his burden of proof that the Zoning Administrator's decision of October 13, 2000 to issue building permit number B430178 to William Wahabi should be reversed and, therefore, Appeal #16764 is hereby DENIED.

ATTESTED TO: _____

FINAL DATE OF ORDER: _____

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