Received 5/24/02

BEFORE THE BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF	)	
	)	
1018 CONSTITUTION AVE., N.E.	)	
WASHINGTON, D.C.	)	BZA APPEAL #16811
	)	
DAVID AND JANET PRITCARD,	)	
APPELLANTS.	)	

Appeal of David and Janet Pritchard, pursuant to 11 DCMR Sections 3100 and 3101, from the administrative decision of Michael D. Johnson, Zoning Administrator, for the issuance of Building Permit No. B431591 allowing the construction of an addition to a single-family dwelling allegedly not complying with the side yard requirements (section 405) in a R-4 District at premises 1018 Constitution Avenue, N.E. (Square 964, Lot 46).

Hearing Date: March 5, 2002

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER OF INTERVENORS PHILIP SEDLAK AND KATHLEEN PEOPLES OWNER OF THE SUBJECT PROPERTY AT 1018 CONSTITUTION AVE., N.E.

PROCEDURAL HISTORY

On May 21, 2001, Philip Sedlak (hereinafter "Intervenor") submitted an application for a building permit to construct a two story addition on the rear of the existing semi-detached structure at 1018 Constitution Avenue, N.E. On July 5, 2001, the Building Permit (#B431591) was issued by the D.C. Department of Consumer and Regulatory Affairs ("DCRA"). On August 7, 2001, the Appellants requested that the permit be suspended, and by letter dated August 20, 2001, the then Zoning Administrator issued a formal determination that there was no basis to issue a stop work order.

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"letter of determination" concluded that a row dwelling is a permitted use in the R-4 zoning district; that row dwellings may cover up to 60% of their lot area; that Section 405.3 is not intended to compromise a building owner's right to convert from one allowed matter of right use to another (from semi-detached to row-dwelling); and, that side yards are not required in the R-4 district, but, if provided, shall be no less than eight (8) feet.

This Appeal to the Board of Zoning Adjustment followed on October 31, 2001. Notice of hearings were mailed to the parties for the dates of January 8, 2002, however, the matter was ultimately heard and concluded March 5, 2002 (the "Hearing").

FINDING OF FACTS

1. The subject property is located at 1018 Constitution Avenue, N.E. in an R-4 zoning district with a legal description of Lot 46 in Square 964 (Application for Construction Permit dated May 21, 2001 ("Application"), Appellant's Statement filed in support of this appeal on February 26, 2002 at 1, and Transcript.
2. An application for a Building Permit was filed by Philip Sedlak to construct a two- (2) story addition on the rear of an existing home on May 21, 2001. The Surveyor's Plat was submitted along with the Application, showed the footprint of the anticipated construction, was stamped as being in compliance with the Zoning Regulations on June 19, 2001. The Permit was issued by the D.C. Department of Consumer and Regulatory Affairs on or about July 5, 2001. Application dated May 21, 2001, Appellant's Statement and Transcript.

3. The drawings and the Plat, submitted with the Application, were used by the Office of the Zoning Administrator ("Zoning Office") to establish compliance with the District's zoning regulations, including setbacks and sideyards.

4. Pursuant to inquiry made by the Appellants, Mr. Olutoye Bello of the Zoning Office personally reviewed the application and plans submitted by the Intervenor prior to the issuance of the Building Permit. Finding no reason to deny its issuance, the Building Permit was approved and granted.

PROPOSED CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment (the "Board") has jurisdiction to hear this appeal and render a decision and order pursuant to D.C. Code Section 6-641.07(f) (2001 Ed.). Appellant has the burden of proof pursuant to 11 DCMR Section 3324.2. In order to reverse the Zoning Administrator's decision to confirm approval of the issuance of a building permit, Appellant must demonstrate by a preponderance of the evidence that (1) the building permit violates the side yard requirements of Section 405 of the Zoning Regulations, and (2) that the Building Permit should not have been issued without the Intervenor first securing the approval of the Board.

The Zoning Administrator properly issued Building Permit #B431591 because there is no side yard requirement for a row dwelling in the R-4 district.

The Board placed the parties on Notice by letter dated February 19, 2002, that they must be prepared to address the substance of Zoning Commission Order No. 17 (the "Order"), (November 17, 1970) (now known as 11 DCMR Sub-Section 405.3) as it relates to side yards. The Intervenor accepts and adopts by reference herein, the statements and position of the Zoning Administrator in the review and approval of the Application; the Zoning Administrator's "letter of determination" dated August 20, 2001, in which he concluded that the Building Permit was properly issued by the D.C. DCRA; and, all statements made by the Zoning Administrator at the Public Hearing held March 5, 2002 along with his comments and statements with the BZA staff on April 2, as well as the post-hearing submissions as presented by the Corporation Counsel.

Additionally, the Intervenor submits that the only credible, expert testimony on the relevant issues presented at the Hearing, came from Mr. Bello (Acting Zoning Administrator) and Mr. Levine (the Architect). The Appellant did not meet her burden of proof necessary to overturn the Zoning Administrator's reasonable, expert interpretation of the Regulations.

As noted above, the parties were directed to focus on the specific language of Sub-Section 405.3 of the Zoning Regulations and explain if and how it is relevant to this

appeal. The Intervenor submits that this particular provision of the Zoning Regulations is completely inapplicable for several reasons.

First, the meaning, intent and applicability of Sub-Section 405.3 is clear and unequivocal on its face: where a one-family dwelling "does not share a common division with an existing building or a building being constructed together with a new building then it shall have a side yard on the resulting free standing side". The Appellant admits that there is a common division wall in existence to the west of the subject property, because those two share a party wall. However, when the subject property was constructed some +/-100 years ago, it was constructed several feet off the property lot line on the east that abuts the rear property line of the Appellant's property. The rear of Appellant's improvements sit well away from that property line, so it is therefore impossible for these two neighboring properties to also share a party wall, as would be the normal row house scenario with two adjacent improvements. As such, the Appellant would have the Board interpret this subsection to mean that the only option for the owner of this lot would be to create (or, maintain) a side yard that is otherwise not required in the R-4 zone. That interpretation fails to recognize that since row houses are a permitted use in the R-4 zone, the "non-party" end wall could be built face-on line and also serve as a division wall between the properties, without any side-yard. That was the basis of the Zoning Administrator's testimony, which supported his reasonable, consistent and expert interpretation of the Regulations. The architect/builder for the owner also came to the same reasonable conclusion in providing his advice to the owners on this matter. Additionally, it is well documented that such an interpretation has the weight of the prior

custom and practice of the Zoning Office, evidenced in the post hearing report of the BZA staff. It was made known to them that the Zoning Administrator's reading was consistent with prior interpretations of both the Zoning Office and the Corporation Counsel's office, that the sharing of a common-wall on only one-side was sufficient to negate the necessity for a side yard on any other side. (See also Statement of Appellant's witness Lyle R. Schauer, page 2, as to the custom and practice of the Zoning Office).

Second, the Intervenor submits that Sub-Section 405.3 applies only to new dwelling construction in the R-2 through R-5 zone Districts where the owner does not extend the construction to the full width of the lot, thus creating either a semi-detached or detached dwelling. The plain language of this section reads "[w]hen a one-family dwelling . . . is **erected** . . . that does not share a common division wall with an existing building or a building being constructed together with **the new** building, then it shall have a side yard on each resulting free standing side". (Emphasis supplied). This provision requires either one single, common division wall separating the two structures, or, if the newly erected structure does not share any single common division wall, then it must be situated on the lot as a detached dwelling, providing side yards on both sides. Clearly the Zoning Commission did not intend, as the Appellant would have the Board believe, for this section to apply to situations where (1) the owners sought to construct a row dwelling (because by its very definition, a row dwelling has no side yards because it is constructed to the full width of the lot); or, (2) where the owners sought to convert their property from semi-detached to row (which, as explored below, is never prohibited by the Zoning Regulations in the R-4 zone). Again, the interpretation as testified to by the

Zoning Administrator and later highlighted by the BZA staff's post-hearing report, is more reasonable than that set forth by the Appellant. The Commission's intent in 1970 was to eliminate the then recurring problem created by the construction of only one-half of a pair of semi-detached structures, when the other half was not constructed to the same property lot line simultaneously, or even worse, never constructed at all. The Commission sought to curb that practice by requiring that any such semi-detached structures be built together or, in the alternative, permit only one structure to be built and provide a side-yard on any side of the house that was not attached. That is a practical solution to an inherent problem with constructing semi-detached structures at different times. If, however, the intent of the 1970 Commission was for the Order to apply to the construction of row dwellings, then the Order would have the effect of superceding the various uses historically permitted within the R Districts, by requiring that they all provide a side yard, thus eliminating the row structure use altogether. Clearly that was not the intent of the Order, nor has that ever been the interpretation of the Zoning Office. The subject property herein does share a common division wall with an existing structure, and does not therefore need to have any side yards. The fact that a side yard was previously provided (when, in fact, none was required) does not forever bar a use conversion. In essence, the Appellant would have the Board determine by Rule of Law that a prior use as a semi-detached single family house would forever bar a conversion to an otherwise lawful use; or, that one permitted use bars a lawful conversion to another, in perpetuity. Nothing in the Regulations or the testimony presented at the hearing supports that conclusion, and the Board would be setting a new precedent that it should not set.

The Order was not intended to apply to row houses, and row structures should not be held to the same standards as semi-detached structures.

Third, if the Board were not inclined to accept that Sub-Section 405.3 applies only to newly constructed non-row dwellings then, again, it must be read to minimally allow the owner the option of providing a side yard or not in the R-4. It was the uncontroverted testimony of the Zoning Administrator that the Regulations generally, and this sub-section specifically, do not mean to limit or remove the owner's option of not providing a side yard, when building to the fullest extent of the lot-lines. More importantly, the Zoning Office has never so interpreted the Regulations. As stated, the intent of the 1970 Order was to preserve side yards in all zoning districts, but is not intended to preserve side yards for all "uses" permitted in each of the zoning districts. That is a very important distinction that the Appellant refuses to acknowledge. The Commission's desire to preserve side-yards does not negate an owner's right to construct a row-dwelling or convert to a row-dwelling, where permitted. The Appellant would have the Board rule that the reading of this sub-section necessarily requires a side yard whenever any structure is constructed, even a row dwelling. That is illogical and could not be the interpretation of the Board.

Finally, once Sub-Section 405.3 is eliminated from the debate as inapplicable, the controlling provision is Sub-Section 405.6, which reads that no side yard is required in the R-4 district but if one were to be provided, then it must be at least eight (8) feet wide. Here, no side yard is being provided and none is otherwise required. It was undisputed

that the existing side yard conversion to an open-court is acceptable, permitted and in full compliance with the Regulations.

The Building Permit was properly issued without the Intervenor first being required to secure the approval of the Board.

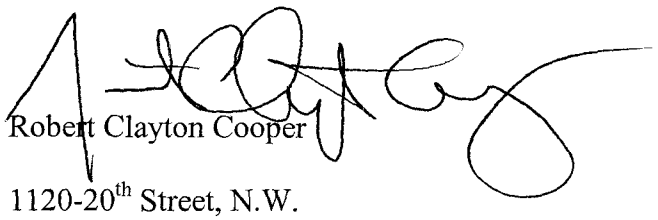
The Appellant argues that the Zoning Administrator failed to correctly and/or consistently apply his interpretation of the Regulations. She bases her argument on the Zoning Administrator's referral of the property owner at 220-5th Street to the BZA for approval of the construction of an addition. That case can be differentiated from the subject case, in part, by noting that the separation between the properties is substantially different. The structure on 5th Street shared a small common-division wall on the north property lot line, but was set back from the south property lot line by 8'-5". The owners there sought approval to build an addition up to property's southern lot line. However, the adjacent structure to the south was also set back from the lot line, but by only 3'-7". There, the addition would be very close to, but not adjoining, the neighboring structure. The then Zoning Administrator made a "judgment call" and referred the matter to the BZA for approval (which was later granted). The testimony of Mr. Bello was that the matter should not have been referred to the BZA; that it was an aberration that it was in fact referred; that it should have been approved by the Zoning Administrator without referral; and, that the case presented the exact set of facts and scenario that the 1970 Order sought discourage.

The Zoning Administrator testified that the rationale to refer the matter to the BZA by his predecessor might have been that the resulting wall was only three (3) feet away from the neighboring structure. Nevertheless, the application should not have been before the Board because nothing should or would have precluded the owners from exercising their right to build a face-on-line wall.

CONCLUSION

Building Permit No. B431591 dated July 5, 2001 was properly approved by the Zoning Administrator and properly issued by the DCRA. Nothing contained in the Zoning Regulations prohibit an owner from converting a structure from one permissible use to another permissible use in the R-4 District. The fact that a side yard had previously been provided, when none was otherwise required, does not bar its later elimination if the structure is converted to an otherwise permissible use. The Commission's 1970 Order was not intended to impede the construction of row dwellings or the conversion of structures by requiring side-yards where none is otherwise required. The only expert testimony presented at the Hearing was that of the Acting Zoning Administrator, Mr. Bello, whose reasonable interpretation of the Zoning Regulations and the subject amendment, was consistent with the practice and custom of that office, and should not be overturned.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Intervenor's Proposed Findings of Fact and Conclusions of Law were mailed, first class, postage prepaid this 24th day of May, 2002, to:

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