GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16934 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA), in the issuance of building permit (No. B445856) issued on May 28, 2002, to JFC Builders, LLC, allowing construction of a foundation at 920 and 922 Constitution Avenue, N.E., Washington, D.C. (Square 939, Lot 27).

HEARING DATES: November 14, 2002; February 18, 2003; March 4, 2003; March 18, 2003

DECISION DATES: March 4, 2003; March 18, 2003

FINAL ORDER DISMISSING APPEAL

Advisory Neighborhood Commission ("ANC") 6A filed an appeal with the Board of Zoning Adjustment on July 24, 2002 challenging the decision of the Zoning Administrator to approve the issuance of a foundation permit at 920 and 922 Constitution Avenue, N.E. (Square 939, Lots 27 and 28) in an R-4 district as noncompliant with the side yard requirements in the Zoning Regulations. For the reasons stated below, the Board concludes that it has no jurisdiction over the decision complained of, and must therefore dismiss the appeal.

PRELIMINARY AND PROCEDURAL MATTERS

Notice of Filing and Notice of Hearing. By memoranda dated September 20, 2002, the Office of Zoning advised the Zoning Administrator, the Office of the Corporation Counsel, the property owner, Advisory Neighborhood Commission (ANC) 6A (the ANC for the area within which the property that is the subject of this appeal is located), the Ward 6 Councilmember, and the D.C. Office of Planning of the filing of the appeal.
The Board of Zoning Adjustment (the BZA) scheduled a public hearing on the appeal for November 19, 2002. Pursuant to 11 DCMR § 3113.14, on October 4, 2002 the Office of Zoning, mailed the ANC and the Zoning Administrator notice of the hearing. The property owner was copied on the ANC's notice. Notice of hearing was also published in the *D.C. Register.*

FINDINGS OF FACT

BZA
Case No. 16934
Exhibit No. 52

Board of Zoning Adjustment
District of Columbia
CASE NO.16934
EXHIBIT NO.52

1. On May 22, 2002, John Casey, agent for JFC Builders, LLC, applied to DCRA for a permit to construct the foundation for a single-family dwelling to be located at 920 & 922 Constitution Avenue, N.E., Washington, D.C. The permit application depicted the footprint of the foundation, but not its height.

2. DCRA approved the application and issued a permit to construct the foundation on May 28, 2002. The permit (Number B445856) allowed the construction of the "foundation only", "per HPRB (Historic Preservation Review Board) concept approval".

3. On July 11, 2002, at a regularly scheduled ANC meeting, ANC 6A met and voted 6-0 to initiate an appeal of the permit.

4. The following day, on July 12, 2002, DCRA issued a second permit (Number B447067) allowing construction of a new single-family dwelling at the subject property.

5. On July 24, 2002, Daniel Pernell, the ANC Vice-Chair, filed an appeal with the Office of Zoning challenging the issuance of permit Number B445856, the foundation permit. Mr. Pernell was assisted by Virginia Gaddis, a long-time ANC member, and Keith Jarrell, the ANC chair.

6. On or about July 25, 2002, the Director of the Office of Zoning, wrote to the ANC requesting additional information regarding the basis for its appeal. The ANC responded to this request with a submission dated September 4, 2003. The submission contained numerous references to the building at the site, but did not specifically challenge the second permit which allowed the construction.

7. The ANC met again on November 7, 2002, and resolved that ANC member Virginia Gaddis appear at the November 19, 2002 BZA hearing due to her familiarity with the property and the issues surrounding the appeal.

8. That same day, November 7, 2002, Ms. Gaddis filed an application with the BZA for "party status" in the appeal. In addition, Christopher's Row, LLC filed an application for "party status" on November 14, 2002, since it had acquired the subject property from JFC Builders, LLC after the appeal was filed.

9. On November 19, 2002, the ANC requested a postponement of the hearing due to an emergency in Ms. Gaddis's family. Benny Kass, Esq., of Kass, Mitek & Kass, appeared for Christopher's Row, LLC and consented to the postponement. At that time, the BZA re-set the hearing for February 18, 2003 and urged the ANC to include a challenge to the building permit in the appeal, indicating to the ANC representative that the "wrong" permit number (the foundation permit number,

instead of the building permit number) was listed on the appeal form. The BZA directed the ANC to file further submissions by January 21, 2003, and gave Christopher's Row, LLC until February 3, 2003 to respond.

10. Thereafter, the law firm of Holland & Knight replaced Kass, Mitek & Kass as counsel for the property owner and filed a motion to dismiss the appeal dated February 3, 2003. In its motion the owner claimed that: (a) the BZA lacked jurisdiction over the appeal because the ANC was not properly authorized to prosecute the appeal at the time it was filed; (b) the redistricting of Ward 6 invalidated whatever authorization the ANC may have previously had; and, (c) the appeal was legally insufficient because the ANC appealed from the foundation permit instead of the building permit.

11. Due to inclement weather on February 18, 2003, and the closing of offices within The District of Columbia, the BZA hearing was postponed to March 4, 2003, and neither the motion to dismiss nor any other issues were addressed.

12. On March 4, 2003, the BZA heard arguments on the motion to dismiss. It Concluded that: (a) the ANC did have proper authorization to prosecute the appeal based upon the ANC's representation that the ANC Chair and Vice-Chair filed the appeal with Ms. Gaddis's assistance; and, (b) the appeal of the foundation permit was not legally insufficient on its face, and a hearing was required to determine whether the foundation permit violated the side yard requirements.

13. Since the motion to dismiss was denied, the hearing was scheduled for March 18, 2003, and the BZA directed the owner to provide documents that it submitted to DCRA to obtain the foundation permit. The BZA also directed the parties to focus on the height of the foundation, inasmuch as § 2503.2 of the Zoning Regulations prohibits any structure exceeding 4 feet in height in the side yards.

14. During the March 4, 2002 proceedings, the ANC did not seek to amend its appeal to include a challenge to the building permit as well as the foundation permit.

15. At the March 18 hearing, ANC Commissioner Cody Rice appeared for the ANC for the first time and framed the issue on appeal as whether the newly constructed row dwelling violates the side yard requirements. Mr. Rice maintained that the building permit is inextricably connected to the foundation permit because the foundation permit stated that the foundation was intended for a dwelling. The BZA treated these remarks as an oral motion to amend the appeal to include a challenge to the building permit. However, after deliberating, the BZA denied the motion to amend the appeal, finding that the property owner would be prejudiced by an amendment at such a late date.

16. The BZA then considered the property owner's motion to dismiss the appeal of The foundation permit. The owner claimed the appeal should be dismissed for two reasons:

(a) the side yard requirements in the Zoning Regulations are not triggered by a "foundation", but by a "building"; and, (b) even if the side yard requirements were triggered, structures such as a foundation less than 4 feet in height, are permitted in the side yard under § 2503.2 of the Zoning Regulations.

17. Documents provided by the owner were inconclusive as to the foundation height approved by DCRA. Because of this, the BZA considered continuing the case to give the ANC one last chance to prove that the foundation exceeded 4 feet in height and encroached on the side yards. Ultimately, the BZA found that the ANC had not established that the height of the approved foundation exceeded 4 feet, and had not met its burden of proof on this factual issue.

CONCLUSIONS OF LAW

The Board has before it a motion by the property owner to dismiss the appeal. The motion argues that dismissal is required because the ANC purportedly was not authorized to bring the appeal and because DCRA's decision to issue a foundation permit was not based upon any Zoning Regulation, and therefore not within this Board's jurisdiction to review. Although the Board finds the first argument unpersuasive, it agrees with the property owner as to the second and therefore dismisses this appeal.

Turning first to the authorization issue raised by the property owner, the Board concludes that ANC 6Awas properly authorized to prosecute the appeal. The property owner claimed that the ANC was not authorized to prosecute the appeal until November 7, 2002, long after the appeal was filed on July 24, 2002. The property owner is mistaken in this regard. Although Virginia Gaddis was not authorized to represent the ANC until November 7, the evidence of record shows that the ANC voted to initiate the appeal on July 11, 2002. And, the appeal itself was filed on July 24, 2002 – after the ANC vote – by the ANC Chair and Vice-Chair (with the assistance of Ms. Gaddis), both of who were authorized to act for the ANC.

As to the second ground for dismissal,. the Board first notes that its jurisdiction in an appeal pursuant to the Zoning Act is limited to whether an administrative official erred in the carrying out or enforcement of the Zoning Regulations. *See* D.C. Official Code § 6-641.07(g)(1) (2001). An appeal may only be brought by persons or entities aggrieved as a result of "any decision of ... granting ... a building permit ...based in whole or in part upon any zoning regulation". D.C. Official Code § 6-641.07(f). The Board agrees with

the property owner that the issuance of the foundation permit was not based upon any zoning regulation.

Section 405.3 of the Zoning Regulations provides that a "dwelling", "flat" or "multiple dwelling" erected in an R-4 zone shall have a side yard. However, a "foundation" is not a "dwelling", "flat" or "multiple dwelling". (A "dwelling" is defined under § 199 of the Regulations as a "building designed for human habitation".) Because a foundation is neither a "building"[1] nor designed for human habitation, the side yard provisions of the Zoning Regulations are not triggered. But, even were the side yard provisions triggered by a "foundation", as argued by the ANC, § 2503.2 of the Zoning Regulations[2] permits structures (such as foundations) in the side yard, so long as they do not exceed 4 feet in height. Since the ANC failed to establish that the foundation approved by DCRA was more than 4 feet above grade, it did not prove that the foundation violated the side yard requirements of the Zoning Regulations.

To the extent that the ANC sought, on March 4, 2003, to amend the appeal to include the building permit that actually authorized the erection of a structure on the subject property, that motion is denied. As detailed above, the ANC had several opportunities to amend its appeal to include a challenge to the building permit. It chose not to do so. When the appeal was initially filed on July 24, 2002, both the foundation permit and building permit had already been issued. The ANC appealed only the foundation permit. The ANC could have sought to amend the appeal on November 19, 2002 when it requested a postponement of the case, and when the BZA Chair expressly urged the ANC to include a challenge to the building permit in its appeal.

Finally, the ANC had additional opportunities to seek amendment after it was served with the property owner's February 3, 2003 motion to dismiss, and, again at the March 4, 2003hearing before the BZA. It was not until March 18, 2003 that Commissioner Rice urged the BZA to include the building permit as part of the appeal – nearly 8 months after the initial appeal had been filed and after the construction of the dwelling had been completed. Because of the lengthy and inexplicable delay of the ANC, and the prejudice to the owner which would have resulted by an amendment at this late date, the motion to amend the appeal is denied.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected

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[1] A "building" is defined as a "structure having a roof supported by column or walls for the shelter, support or enclosure of persons, animals or chattel." 11 DCMR § 199.

[2] "[A] structure, not including a building no part of which is more than four feet (4 ft.) above the grade at any point, may occupy any yard required under the provisions of this title." 11 DCMR § 2503.2

ANC's recommendations. To give great weight, the Board must articulate with particularity and precision the reasons why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this appeal, the ANC has not offered advice, but sought to appeal a decision that falls outside the Board's jurisdiction.

Therefore. for the reasons stated above, it is hereby **ORDERED** that that the motion of the property owner to Dismiss the Appeal on the ground that the appeal was not properly authorized is **DENIED,** the motion of the Appellant to amend the appeal, is **DENIED,** and the motion of the property owner to dismiss the appeal because the issuance of the foundation permit did not trigger or violate any provision of the Zoning Regulations is **GRANTED** and the appeal is **DISMISSED.**

Vote taken on March 5, 2003, on the motion to deny the property owner's motion to dismiss the appeal based upon the ANC's lack of proper authorization.

VOTE: 3-1-1 (Geoffrey H. Griffis, Anne M. Renshaw and David A. Zaidain, in favor of the motion; Curtis L. Etherly, Jr., opposed; and Carol J. Mitten being necessarily absent and having submitted a neutral proxy vote)

Vote taken on March 18, 2003, on the motion to deny the ANC's motion to amend the appeal to include a challenge to the building permit.

VOTE: 5-0-0 (Geoffrey H. Griffis, Anne M. Renshaw, David A. Zaidain, Curtis L. Etherly, Jr., and Carol J. Mitten in agreement to deny the motion)

Vote taken on March 18, 2003, on the motion to grant the property owner's motion to dismiss the appeal challenging the foundation permit.

VOTE: 4-1-0 (Geoffrey H. Griffis, David A. Zaidain, Curtis L. Etherly, Jr., and Carol J. Mitten in agreement to grant the motion, Anne M. Renshaw was opposed)

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 Kress
JERRILY R. KRESS. FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUL 10 2003

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. rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

BZA APPLICATION NO. 16934

As Director of the Office of Zoning, I hereby certify and attest that on JUL 10 2003 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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rsn

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning