BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Southeast Citizens for Smart Development, Inc., ANC6B, Appellants

Appeal No. 16935

Appellant's Closing Argument

Southeast Citizens for Smart Development, Inc., joined by co-appellant, ANC6B, have met their burden and the appeal should be granted. The testimony and evidence supporting this appeal demonstrate that the zoning regulations applicable to semi-detached dwellings were not met, such that the building permits for 1310, 1312 & 1314 Potomac Avenue, Southeast, were re-issued in error and should be revoked.

Before getting into the specifics of the testimony and evidence presented, we need to discuss scope. During the hearing, the Board asked a number of hypothetical questions involving the potential application of the side yard regulation at issue here, i.e. 11 DCMR 405.3. Most of those questions centered on the construction of row house dwellings, and how the side yard regulations would apply if only one of a series of row houses were built, or if a middle one of a series were missing and sought to be built. The apparent concern of the Board would be that it could be flooded with these cases involving the relevant regulation if it grants this appeal. For several reasons, we do not believe that this would result.

First, the reality of current development in the City, is that when row houses are built, it is generally that an entire row built at the same time, thus not involving 405.3. Next, and more importantly, we believe that the Board can decide this case without making a sweeping decision. Clearly, this is not a case involving row houses; and row houses do not need to be brought into this decision. The Board's analysis here should be limited to the application of the side yard regulations to semi-detached structures, as that is the structure at issue here. In fact, the only time that the question now before the Board arises in the context of semi-detached structures is when they are built with no common division wall. When a common division wall is built, then the regulation is not applicable.

Indeed, when questioned about this type of construction, the Zoning Administrator testified that hundreds of these structures were permitted for construction in the City without side yards required by 405.3. On cross-examination, however, the Zoning Administrator was unable to cite even one example out of the hundreds claimed in his testimony. We believe, in fact, that few, if any, semi-detached single-family dwellings similar to the unique structures at Potomac Avenue have been permitted for construction. By definition, a semi-detached dwelling generally envisions construction in pairs with a common division wall. The semi-detached structures at issue here, however, are not common as they have been constructed as separate units. For this reason, we believe it is appropriate for the Board to confine its decision only to semi-detached

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dwellings, with no common division wall, which are specifically at issue here. A decision, which is limited in scope to such semi-detached dwellings, will rectify the errors made by the Zoning Administrator in this case while also addressing this Board's concerns about creating a potentially large number of cases by this decision.

We further believe that it is the Zoning Commission that needs to look over these regulations and straighten them out once and for all in instances where their application may, under certain circumstances such as when dealing with row houses, be unclear. As the Board knows, the zoning regulations have evolved over time, so that certain unanticipated situations arise as further regulations are added. The Board's hypothetical questions about 405.3 in the context of row houses are a good example of this issue. For this reason, the Zoning Commission needs to pick this issue up through a general review and then define specifically their application to row houses, for example, as opposed to semi-detached structures.

With this in mind, we ask the Board to consider the specific merits of this case. At the hearing, Mr. Lyle Schauer testified as an expert witness on the applicable side yard zoning regulations. Mr. Schauer testified that the structures at 1310 – 1314 did not meet the side yard requirements pursuant to 11 DCMR 405.3 because they lacked an eight foot side yard on the side with the lot-line wall. He testified that the lot line walls here constitute free-standing walls, thus activating the side yard requirement of 405.3. Mr. Schauer testified that the Zoning Administrator's determination that only one side yard was necessary, on the east side of the structures, did not comply with the zoning requirements for semi-detached dwellings.

Mr. Schauer also noted in his testimony that the projection into the east side yard of 1314 Potomac Avenue reduced that side yard to two feet, which fails to comply with zoning regulations. Even under the Zoning Administrator's flawed theory of side yard zoning compliance, this structure does not comply. When asked about this projection during cross-examination, the Zoning Administrator stated that he thought it was a front door. Review of the plans belies this interpretation and shows that 1314 Potomac Avenue fails to comply with side yard zoning requirements on either side.

Mr. Schauer further testified on the application of the side yard zoning regulations as interpreted and applied by this Board in the recent case of Appeal of David and Janet Pritchard, BZA No. 16811. In that case, this Board determined that the lot line wall constituted a free-standing wall, requiring an 8 foot side-yard, pursuant to 11 DCMR 405.3. Mr. Schauer also testified that since the Potomac Avenue properties did not provide the eight foot side yards required by the zoning regulations, DCRA should have advised the Developer to seek zoning relief through the special exception process, before re-issuing the building permits on July 8, 2002. DCRA failed to do this.

Mr. Schauer also testified that the Pritchard decision was issued in the Board's public hearing on June 4, 2002, more than one month before DCRA re-issued the permits for this site. As a party to that appeal, the Zoning Administrator was on notice, through the public hearing deliberation and vote of the BZA members on June 4, 2002, that this

Board rejected the Zoning Administrator's prior, incorrect interpretation of a free-standing wall. Therefore, on June 4th, DCRA was fully aware that its previous interpretation and application of the side yard requirement set forth in 11 DCMR 405.3 was inconsistent with the Board's interpretation, and should not be applied to future cases, such as for the Potomac Avenue permits here. Because it is the duty of this Board – and not the Zoning Administrator - to interpret the zoning regulations, the Zoning Administrator was obligated to apply those regulations, not ignore them as he did here. Moreover, when applying those regulations, the Zoning Administrator must do so consistent with their plain meaning and consistent with the interpretation and decisional guidance provided by this Board.

In contrast to Mr. Schauer's testimony, the Zoning Administrator testified that 11 DCMR 405.3 did not apply here. Instead of applying 11 DCMR 405.3 as interpreted by this Board, the Zoning Administrator testified that the lot line walls here did not constitute freestanding walls, and thus the regulation did not apply. Curiously, this application of the regulation by the Zoning Administrator was consistent only with the interpretation urged by then Acting Zoning Administrator, Toye Bello, in his testimony in the Pritchard case. But that interpretation and application was flatly rejected by this Board and should not have been applied to this case.

In an effort to justify his incorrect interpretation and application of 11 DCMR 405.3, the Zoning Administrator further testified that his office has approved hundreds of permits for comparable structures with lot line walls, without the requirement for eight an foot side yard set forth in 405.3. Although he claimed that hundreds of semi-detached dwellings have been approved for construction and exist in the city with such lot line walls and no side yards, he was unable during cross-examination to identify a single example. Instead, he relied upon the vague assertion that "hundreds exist throughout the City". Because this assertion lacks any foundation other than his unsupported statement, and expressly contradicts the plain meaning of the regulation, his claim must be discounted by this Board and not given any weight.

This Board must also consider the statement presented by the co-appellant, ANC6B. According to zoning regulations, the statements of the ANC must be given great weight by this Board when considering the merits of the case. In the present case, the ANC, after due consideration and deliberation of the facts and issues presented in executive session and at its subsequent regular meeting open to the public, the ANC voted to join the appeal. Like the Southeast Citizens, ANC6B believes that the DCRA re-issued the permits without correctly applying the relevant side yard zoning requirements.

In addition to the merits of the side yard regulation appeal that Mr. Schauer explained during the hearing, the testimony of Ms. Ellen Opper-Weiner showed that the appeal was timely. She testified that Southeast Citizens attempted repeatedly, to little avail, to obtain the basis of the Zoning Administrator's decision as to the zoning compliance of the four structures at issue, in view of the Board's written decision in BZA No. 16791, issued only weeks earlier. Only after filing a timely appeal to this Board,

within 60 days of the re-issued permits, did Southeast Citizens and ANC6B receive a written rationale from DCRA as to the alleged zoning compliance. According to Ms. Opper-Weiner, the decisions dated October 17 & 21, 2002, constituted the first time that DCRA provided a rationale for the zoning compliance based upon the structures constituting "semi-detached dwellings". Ms. Opper-Weiner further testified that all prior FOIA requests and verbal requests to DCRA officials, as well as reviews of the plans, applications and permits, revealed no prior indication of a September 6, 2001 determination that these constituted semi-detached dwellings, as alleged by the Zoning Administrator.

The Zoning Administrator, by contrast, testified that the semi-detached dwelling determination was made at the time of the first permit issuance, September 6, 2001. Notably, the Zoning Administrator's assertion was unsupported by any documentation from DCRA records, or direct knowledge, as the testifying Zoning Administrator was not even employed by the DCRA at the time of the alleged "determination." His testimony was based solely on hearsay evidence and lacked any credibility. The Zoning Administrator brought no files, evidence, or anything tangible to support his testimony. His lack of factual knowledge involving the September 6, 2001 decision and the July 8, 2002 decision, was evident due to his lack of specific information and, therefore, should not be given any weight.

Accordingly, we ask that the Board of Zoning Adjustment to grant the appeal, deem the re-issued building permits as issued in error, and grant such other and further relief as the Board deems appropriate. Thank you.

Respectfully Submitted,

Mary F. Withum
Counsel for Appellant

April 15, 2003

Southeast Citizens for Smart Development, Inc.

July 12, 2002

SENT BY FAX ONLY 442-9445

Department of Consumer & Regulatory Affairs
941 North Capitol Street, NE – 9th Floor
Washington, DC 20002

Attention: Gina Douglas

Dear Gina:

As you requested, I am writing to make a request under the DC Freedom of Information Act, for access to and copies of the following documents:

1. Copies of the permits recently issued in July 2002 to Father Flanagan's Boys Town of Omaha, Nebraska.
2. Copies of all correspondence since December 2000 to the present date received by DCRA from Father Flanagan's Boys Town of Omaha, Nebraska, or from any of its agents including but not limited to Boys Town's attorneys and public relations representatives, architects, contractors.
3. Copies of all correspondence since December 2000 to the present date sent by any employees of DCRA to Father Flanagan's Boys Town of Omaha, Nebraska, and/or to any of its agents including but not limited to Boys Town's attorneys, public relations representatives, architects, contractors, etc.
4. Copies of all interagency communications between DCRA and each and every DC agency with regard to each and every application for all permits submitted by Father Flanagan's Boys Town of Omaha, Nebraska, or any of Boys Town's agents from December 2000 to the present date.

Please feel free to contact me at 547-7131 should you need any additional information. We look forward to your timely response to this request.

Sincerely,

Ellen Opper Weiner
Vice Chair

Will Hill, Chair
701 14th St., SE
Washington, DC 20003
*202 544-3785 * (Email) willonthehill@starpower.net*

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Consumer and Regulatory Affairs

Office of the Director



August 21, 2002

Ms. Ellen Opper-Weiner
Southeast Citizens for Smart Development, Inc
C/O Mr. Will Hill
701-14th Street, SE
Washington, DC 20003

Dear Ms. Opper-Weiner:

This is in response to your letter dated July 12, 2002, requesting certain documents under the Freedom of Information Act, D.C. Code section 2-531(2001), *et seq*. You requested the following information pertaining to Father Flanagan's Boys Town of Omaha, Nebraska:

- Permits recently issued in July 2002.
- All correspondence since December 2000 to the present date received by DCRA.
- All correspondence since December 2002 to the present date sent from DCRA.
- All interagency communications between DCRA and "each and every DC agency" from December 2002 to the present date.

In response to your request, we are enclosing all documents as located by searching those files where such records could reasonably be expected to be found. We have not included copies of the site plan that you viewed during a previous visit to DCRA. These documents are still available and can be provided to you for photocopying during normal business hours.

As provided under FOIA, DCRA is imposing a $10 search fee and $.025 for each of the 164 pages included in this response. Therefore, your total due to the District government is $51.00. Please make your check payable to the DC Treasurer and mail to my attention at the address listed below.

Sincerely,

Robert Henry
Freedom of Information Officer

enclosures

Exhibit 1

ORIGINAL

Form 150
(Revised 04/29/02)

BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

MOTION

Notice: See other side of motion form for instructions.

Applicant, Appellant, Appellee, Party, Intervener	vs.	Applicant, Appellant, Appellee, Party, Intervener
Southeast Citizens for Smart Development		Dept. of Consumer & Regulatory Affairs

Motion of:
(state what you want the Board to do)

See attached Motion

Points and Authorities:
(state the each and every reason why the Board should grant your motion, including relevant references to the Zoning Regulations or Map)

See attached

CERTIFICATE OF SERVICE

I hereby certify that on this (date) 15 day of (month) January (year) 2003 I served a copy of the forgoing Motion on each entity that has requested party status; or entities that have be granted party status – on the above referenced BZA case via

☐ First-class mail ☒ Hand delivery ☐ Other (specify) _____

(ATTACH A LIST OF PARTIES SERVED)

Signature:	Phil Feola Applicant* /by MB		
Print Name:	Phil Feola	Firm/Organization	Shaw Pittman LLP
Address:	2300 N Street, N.W. Washington. D.C. 20037		

* *In the event an authorized agent files a motion on the behalf of the maker of the motion, a letter signed by the maker of the motion authorizing the agent to act on his/her behalf shall accompany the notice of application.*

To be notified of hearing and decision:
(Maker of Motion or Authorized Agent)*

Name:	Phil Feola, on behalf of Father Flanagan's Boys Home				
Address:	2300 N Street, N.W. Washington, D.C. 20037				
Phone No.:	202-663-8789	Fax No.:	202-663-8007	E-Mail:	phil.feola@shawpittman.com

ANY APPLICATION THAT IS NOT COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS ON THE BACK OF THIS FORM WILL NOT BE ACCEPTED.