BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

Appeal of Decision by DCRA to issue building permits to Father Flanagan's Boy's Home to construct single family dwellings at 1308, 1310, 1312, and 1314 Potomac Ave., SE (Square 1045, Lots 137, 136, 135, and 134)	)	BZA No. 16935

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SOUTHEAST CITIZENS FOR SMART DEVELOPMENT, INC.
(APPELLANT)
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Introduction

This Proposed Findings of Fact and Conclusion of Law is filed by Appellant, Southeast Citizens for Smart Development, Inc. ("SCSD"), in support of its appeal of the issuance on July 8, 2002 of four revised building permits numbered B446916, B446917, B446918, and B446919. ANC6B joined in this appeal by unanimous vote taken at its regularly scheduled meeting on September 12, 2002.

PRELIMINARY AND PROCEDURAL MATTERS

Motion to Dismiss. The Developer filed a Motion to Dismiss Appellants' case on the basis that the appeal was untimely. The Developer argued that the Appellants' appeal should have been filed no later than November 6, 2001, 60 days after the original permits were issued for the structures now at issue. As explained below, the structures at this site were the subject of an earlier appeal before this Board, pertaining to the proposed use as Youth Residential Care Homes.

The Board heard arguments and concluded that there was no basis to dismiss the appeal as to the side yard issue, and that the Board had jurisdiction to hear the case. The Board concluded that when the Developer first sought building permits, the applicable zoning regulations differed between what side yard requirements were for Youth Residential Care Homes ("YRCH") and for Single Family Detached or Semi-Detached Dwellings. Under the YRCH zoning regulations, no side yards were required. See 11 DCMR §775.5. Under the zoning requirements for residential uses, additional side yard regulations became effective, as explained more fully in the decision below. See 11 DCMR §§405.1 – 3.

The Board dismissed the Appellants' appeal with regard to parking issues raised. The Board determined that the zoning requirements for parking did not differ for either Youth Residential Care Homes or single family dwellings. Because the parking actually

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constructed did not differ between the original and revised permits, the Board deemed that portion of the appeal as untimely.

Appellant's Case. The Southeast Citizens for Smart Development, Inc. ("SCSD"), joined by Co-Appellant, ANC6B, present several arguments. First, they argue that while this is a C-2-B District, the three single-family semi-detached dwellings must comply with the requirements of an R-2 District. Second, they argue that the building permits for 1310, 1312 & 1314 Potomac Avenue conflict with the plain meaning of 11 DCMR §405.3, which provides that in the R-2, R-3, R-4, and R-5 Districts, when a one family dwelling is erected that does not share a common division wall with an existing building or a building being constructed with the new building, it must have a side yard on each freestanding side. Third, they argue that the Zoning Administrator's position that the lot line walls on each of the western sides of 1310, 1312 & 1314, do not constitute free standing walls, contradicts this Boards holding in the case of Pritchard, *infra*, and a plain reading of §405.3. The Appellants also argue that the Zoning Administrator required a property owner at 220 5th Street, SE, to obtain special exception approval from this Board where a free standing lot line wall did not provide the necessary eight foot side yard. Appellants argue, as well, that the architectural projection on the eastern side yard of 1314 Potomac Avenue cuts into the one side yard that does exists, rendering that dwelling non-compliant with side yard zoning regulations on either side. Appellants also argue that the purpose of the side yard zoning regulations is to regulate not only the space between the structures but also the *relationship* of adjoining structures. In this case, Appellant's argue, the close proximity of the structures limits light and air in a development for residential use.

Finally, the Appellants argued that the Board should narrowly apply the scope of this decision to the specific case at hand, i.e., semi-detached single family dwellings with freestanding lot line walls, since that is the type of structure under review in this case.

Mr. Lyle Schauer, Zoning Chairman of the Capitol Hill Restoration Society, testified as an expert witness on behalf of the Appellants' case. Mr. Schauer argued that when the Developer applied for permits as either detached or semi-detached single family dwellings, the side yard requirements of 11 DCMR §405 became applicable. He argued that the lot line walls of the semi-detached dwellings constitute free standing walls, and under §405.3 require an eight foot side yard on the side of the freestanding walls. He further argued that the Zoning Administrator's position that the lot line walls did not constitute freestanding walls, and thus not require side yards, contradicted the plain meaning of §405.3, as well as the Board's conclusions in the Pritchard case. Mr. Schauer also argued that the Zoning Administrator should have directed the Developer to seek a special exception before issuing the revised permits.

Zoning Administrator's Case. The Zoning Administrator argued that the lot line walls do not constitute freestanding walls, thereby negating the applicability of §405.3. The Zoning Administrator argued that the lot line walls at 1310, 1312 & 1314 Potomac Avenue each constitute a "face on line wall, which means a wall that's built to the property line that provides for future construction on the other side to come up to the

property line." Tr. at 117. The Zoning Administrator further argued that a face on line wall is not a freestanding wall. Finally, the Zoning Administrator argued, without providing any specific examples, that there are other permits that have been issued by his office with similar lot line walls and no sideyards being required under §405.3. Finally, the Zoning Administrator argued that §405.3 could not be reasonably applied as urged by Appellants because, for example, in the context of rowhouse construction, certain applications of the regulation would preclude otherwise matter-of-right construction.

Property Owner's Case. The property owner was represented by its attorney, Martin Sullivan. The property owner adopted the case of the Zoning Administrator. Mr. Sullivan also made a brief additional statement. Mr. Sullivan argued that the dwellings complied with all side yard zoning regulations for either detached or semi-detached structures. Mr. Sullivan also argued that, based on the Zoning Administrator's analysis of §405.3, that regulation did not apply.

ANC Report. In its Report dated December 31, 2002, ANC6B, states that at a duly noticed meeting held on September 12, 2002, with a quorum present, the ANC voted to support the appeal. At the hearing, the ANC representative testified, consistent with Co-Appellant, Southeast Citizens, that the side yard regulations were not properly applied by the Zoning Administrator for the three semi-detached structures at 1310, 1312 & 1314 Potomac Avenue. In all other respects, the ANC adopted the case of the Co-Appellant, Southeast Citizens.

Background

The events leading up to the issuance by DCRA of the four permits at issue here merit brief recount as the prior permits and appeal history help explain how the current appeal arose. The events also shed light on the siting and layout of the particular buildings on each lot, which has led to the unique factual circumstances regarding the construction of the semi-detached dwellings now under appeal.

On September 6, 2001 building permits were first issued for the construction of four community based residential facilities (CBRF), on the same lots now at issue (Building Permit Nos. B438336, B438335, B438337 & B438338), following an August 30, 2001 determination by the Zoning Administrator that each of the proposed CBRF's in Phase I were permitted as a matter of right within the C-2-B District.

The permits were issued to Father Flanagan's Boys Home, developer of the properties. The properties constitute Phase I of a two-phase development at the corners of Pennsylvania and Potomac Avenues, Southeast. The building plans for the original and revised permits indicate that the four structures are intended to constitute four group homes forming part of Girls and Boys Town, USA, owned and operated by the developer.

At its May 7, 2002 decision meeting, following several public hearings with argument, testimony and briefing by the parties, the Board ruled that "the Zoning Administrator erred in approving the four building permits as a matter of right, since the use of the property constitutes a single community-based residential facility, a youth residential care home for 24 children, that requires special exception review and approval." See Appeal of Southeast Citizens for Smart Development, Inc. and ANC6B, BZA No. 16791 (May 7, 2002), at Appellant's Exhibit No. 7.

On July 2, 2002, shortly before the first permits were due to be revoked on July, 8, 2002, the Developer filed with DCRA four new applications for permits which appeared to indicate only a change in use, not a change in the physical aspects of construction. The DCRA reviewing agencies, on July 2 and July 8, 2002, signed off on the eleven review approval requirements in the applications, including zoning review. See Appellant's Exhibit No. 2. The revised permits were issued on July 8, 2002, without the initial permits being revoked. The initial permits should have been revoked on July 5th.

On August 1, 2002, SCSD timely appealed the revised permits. ANC6B subsequently joined in the appeal, by vote taken on September 12, 2002, at its regularly scheduled meeting, with a quorum present. SCSD alleged that, based on both a reading of the Decision and Order in BZA No. 16791 and the applicable side yard and parking regulations, the revised permits were issued in error. At the time the appeal was filed, the Zoning Administrator had not issued a written decision explaining the regulatory basis for its zoning review approval made July 8, 2002. Subsequently, on October 17, 2002, by letter to ANC6B, and October 21, 2002, by letter to SCSD, the DCRA explained the regulatory basis for its determination that the revised permits complied with side yard and parking requirements. See Appellant's Exhibit Nos. 13 and 14.

The four structures at issue sit on four separate lots of record. The structure at 1308 Potomac Ave. (Lot 137) is alleged by DCRA to meet the minimum eight (8ft.) foot side yard requirement on each side. DCRA states that the remaining three structures at 1310, 1312 & 1314 Potomac Avenue (Lots 136, 135 and 134) also met the side yard requirements of applicable zoning regulations. According to DCRA they are "allowable semi-detached single-family dwelling[s] having the required minimum side yard of eight feet. (As defined by 11 DCMR §199.1, a semi-detached single-family dwelling is "a one-family dwelling, the wall on one (1) side of which is either a party wall, or lot line wall, having one (1) side yard.") See Appellant's Exhibit No. 13.

The three semi-detached dwellings at 1310, 1312 and 1314 Potomac Ave., have each of their west side walls sitting directly on the lot line. None of these three semi-detached structures shares a common division wall with an adjacent building. The east side walls of the structures do not sit on the lot line, and are alleged by the Developer and DCRA to have an eight foot set back from the lot line.

The siting of the buildings on each lot, including setbacks from all lots lines, was established when application was made for the original permits, i.e. as Youth Residential

Care Homes. See BZA Exhibit No. 31 (Approved Plat). When permitted as a Youth Residential Care Home, none of the structures required any side yards. See 11 DCMR §§199.1 & 775.5. When the use changed in the revised permits to single-family dwellings, the applicable side yard regulations changed. See 11 DCMR §405. By the time the revised permits were issued, the buildings were under roof. By the time of the hearing on this appeal, the buildings had achieved substantial completion.

FINDINGS OF FACT

The Subject Lots and Dwellings

1. The properties that are the subject of this appeal are four contiguous lots, located at 1308, 1310, 1312, and 1314 Potomac Avenue, S.E. (Square 1045, Lots 137, 136, 135, and 134), in a C-2-B Zone District, in the Capitol Hill neighborhood.
2. As described in 11 DCMR §775, "Side yards shall be provided for structures in a Commercial District as specified in this section. . . . A one-family detached dwelling shall be subject to the side yard requirements of an R-1 district. . . . A one family semi-detached dwelling shall be subject to the side yard requirements of an R-2 district. . . . No side yard shall be required for any other building or structure; but if a side yard is provided, it shall be at least two inches (2 in.) wide for each foot of height of building, but not less than six feet (6 ft.)."
3. Matter-of-right uses include one-family detached dwellings and one family semi-detached dwellings.
4. The subject lot for 1308 Potomac Avenue (Lot 137) is irregular in shape, with an eleven foot (11 ft.) side yard between the dwelling and the closest point of the western lot line, and an eight foot (8 ft.) side yard on the east side between the dwelling wall and the lot line. See BZA Exhibit No. 31 (Plat approved by Zoning Administrator 7/5/01). The side stoop/mud room projecting into the side yard, on the approved plat, was apparently deleted during construction. See BZA Exhibit 31 (Approved plans).
5. The subject lots for 1310 and 1312 Potomac Avenue (Lots 136 and 135) are rectangular in shape, with a lot line wall on the western side of the dwellings and an eight foot (8 ft.) side yard on the east side of the dwellings. See BZA Exhibit No. 31 (Plat approved by Zoning Administrator 7/5/01). The side stoops/mud room which project into the side yards, on the approved plats, were apparently deleted during construction. See BZA Exhibit 31 (Approved plans).
6. The subject lot for 1314 Potomac Avenue (Lot 134) is rectangular in shape, with a lot line wall on the western side of the dwelling and a five foot architectural projection, identified as a porch, on the east side of the dwelling. The resulting open side yard between the projection and the lot line appears to be three feet (3 ft.) on the east side of the dwelling. See BZA Exhibit No. 31 (Plat approved by Zoning Administrator 7/5/01).
7. The subject dwellings are located on the north side of Potomac Avenue, and constitute four lots of a larger triangle-shaped tract of six lots owned by the same developer, on a corner parcel between a public alley to the west and Pennsylvania Avenue to the north.

8. The dwelling at 1308 Potomac Avenue (Lot 137) was classified for zoning purposes as a "one family detached dwelling"; that is, "a one-family dwelling, completely separated from all other buildings and having two (2) side yards. See 11 DCMR §199.1.
9. The dwelling at 1308 Potomac Avenue has no lot line walls or companion walls with any adjacent dwellings.
10. The dwellings at 1310, 1312, and 1314 Potomac Avenue (Lots 136, 135, and 134) were classified for zoning purposes as "one-family semi-detached dwellings"; that is, "a one-family dwelling, the wall on one (1) side of which is either a party wall or a lot line wall, having one side yard." See 11 DCMR §199.1.
11. The dwellings at 1310, 1312, and 1314 Potomac Avenue each have lot line walls on the west side of the dwellings.
12. The dwellings at 1310, 1312, and 1314 Potomac Avenue do not share any companion walls with the dwellings on the adjacent lots.
13. The lot line walls on the west side of 1310, 1312, and 1314 Potomac Avenue are free-standing walls.
14. Given the configuration of the abutting properties, the dwellings at 1310, 1312, and 1314 Potomac Avenue, could have been designed to share a common division wall with adjacent dwellings.
15. Each dwelling contains a minimum lot width of 76 feet. See BZA Exhibit No. 31 (Permit Applications).
16. Given the configuration, lot width, and size of the abutting properties, the dwellings at 1310, 1312, and 1314 could have been designed to have two side yards.
17. By the date of the hearing on this appeal, the construction of the four dwellings reached substantial completion.
18. **Original and Revised Permits**:
19. On December 19, 2000, the Developer filed four virtually identical applications with the Department of Consumer and Regulatory Affairs (DCRA) to construct four two-story residences. The applications described the proposed use of the structures as youth residential care homes, housing 6 youths and 2 adults. See BZA Exhibit 31 (Original applications and permits).
20. The Zoning Administrator reviewed the applications simultaneously and concluded that the construction was a matter-of-right use. See Appellant's Exhibit No. 7.
21. As Youth Residential Care Homes, which are a subset of the zoning classification Community Based Residential Facility, the dwellings required no side yards. See 11 DCMR §§199.1 & 775.5.
22. DCRA issued the Developer Building Permit Nos. B438335, B438338, B438337, and B438336 ("original building permits") on September 6, 2001, for the construction of the four structures. See Appellant's Exhibit No. 7.
23. On September 12, 2001, Appellants filed a timely appeal of the issued applications with the Board, i.e., BZA Appeal No. 16791. After several hearings on the merits, the Board issued a written Decision and Order, dated June 21, 2002, granting the appeal, and reversing the prior decision of the Zoning Administrator to approve the original building permits.

24. In BZA No. 16791, the Board concluded that the Zoning Administrator erred in approving the four original building permits as a matter of right, since the use of the facility consisted of a single community-based residential facility, a youth residential care home for 24 children, that requires special exception review and approval. See Appellant's Exhibit No. 7, (BZA No. 16791, at 2).
25. The Board also concluded in BZA No. 16971 that "[t]he four buildings shown on the site plans . . . do not have the characteristics of single-family dwellings. For example, three of the buildings are to be constructed with a lot line wall on the side lot line. A one-family detached dwelling in the C-2 District, however, must have two side yards; and the lot line wall of a one-family semi-detached dwelling must consist of a common division wall. See 11 DCMR §§405.1, 405.2, 405.2, 405.9, 775.2, 775.3."
26. On July 2, 2002, the developer filed four virtually identical applications with DCRA to construct four two story and cellar residences. The applications describe the proposed use of the properties as "one-family dwelling[s]". None of the dwellings was described as semi-detached dwellings in the applications or accompanying plans. See Appellants Exhibit No. 2.
27. As single-family detached or semi-detached dwellings, the applicable side yard regulations differ from the side yard regulations applicable to Youth Residential Care Homes. Tr. at 91 (April 1, 2002).
28. For a single family detached dwelling, the side yard regulations for an R-1 District apply and require two side yards, with an eight foot (8 ft.) minimum width. See 11 DCMR §§405.1 & .9, §775.2.
29. For a single-family semi-detached dwelling, the side yard regulations for an R-2 District apply. See 11 DCMR §775.3. The regulations require one side yard; but where the dwelling does not share a common division wall and has a freestanding wall, then there must be an eight foot (8ft.) side yard on the resulting free standing side. See 11 DCMR §§405.2 & .3.
30. DCRA issued the developer Building Permit Nos. B446917, B446919, B446918, and B446916 on July 8, 2002, for the construction of four two story and cellar residences. See Appellant's Exhibit No. 2.
31. Prior to learning of the permit issuance, by letter dated July 8, 2002, Appellants asked DCRA to review the applications consistent with the Decision and Order issued in BZA No. 16971 on June 21, 2002. See Appellant's Exhibit No. 7A (BZA Exhibit No. 33).
32. By letter dated July 15, 2002, Denzil Noble, the Acting Zoning Administrator, advised Appellants that the permits had been issued on July 8th and that "they satisfied all construction code and zoning requirements for single family dwellings." The letter did not mention side yard zoning compliance. See Appellant's Exhibit No. 7B (BZA Exhibit No. 33).
33. By letters dated August 5 & 26, 2002, Appellants requested DCRA to revoke the permits and issue stop work orders, alleging that the structures did not comply with the applicable zoning requirements for side yards or parking, including among others 11 DCMR §405.9 and §775.2, and §2117.4 and §2116.1. See Appellant's Exhibit Nos. 7C & 9.

34. By letter dated September 4, 2002, Appellant ANC6B requested DCRA to revoke immediately the four revised building permits and issue an immediate stop work order on the basis that applicable side yard and parking zoning regulations were not met. See Appellant's Exhibit No. 10.
35. Appellants' letters to DCRA specifically referred to the Decision and Order in BZA No. 16791, at 24 – 25, and the Board's conclusions regarding the structures' characteristics which did not conform to single-family dwellings in a C-2 zone.
36. By letters dated October 17, and 21, 2002, the DCRA, through the Administrator of the Building and Land Regulation Administration, and later, by the Director of DCRA, issued formal determinations to Appellants, ANC6B, and Southeast Citizens for Smart Development, Inc. ("SCSD"), that the permits were correctly issued. The letters stated the reasons for the Zoning Administrator's determination, and indicated that they were final decisions, appealable to the Board of Zoning Adjustment.
37. Ms. Ellen Opper-Weiner testified that the October 17 & 21, 2003 letters from DCRA were the Appellant's first notice that DCRA classified the four structures as either detached or semi-detached single family dwellings for zoning review. Tr. at (April 15, 2003).
38. Ms. Opper-Weiner testified that various requests for information, including Freedom of Information Act requests, and file reviews at DCRA disclosed no information that DCRA determined the dwellings to be detached or semi-detached for zoning review, prior to October 17, 2002.
39. Appellant, Southeast Citizens, timely filed its appeal on August 8, 2002.
40. Appellant, ANC6B, voted to join in the appeal on September 12, 2002, at its regularly scheduled meeting with a quorum present.
41. **Side Yards**
42. Mr. Schauer was accepted as and testified as an expert witness for the Appellants on the applicable side yard zoning regulations.
43. Mr. Schauer testified that the structures at 1310, 1312 & 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. Tr. at 91, 92, 102 (April 1, 2003).
44. Mr. Schauer testified that the lot line walls here constitute freestanding walls, thus activating the side yard requirement of 11 DCMR §405.3. Tr. at 92, 104 (April 1, 2003).
45. 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. Tr. at 92 – 4, 102 (April 1, 2003).
46. The projection into the east side yard of 1314 Potomac Avenue reduced that side yard to less than eight (8ft.) feet. Tr. at 101 - 2 (April 1, 2003).
47. The dwelling at 1314 Potomac Avenue fails to comply with side yard zoning requirements on either side. Tr. at 94 (April 1, 2003).
48. Mr. Schauer stated in his report that 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.
49. Mr. Schauer also stated in his report that the dwellings at 1310, 1312, and 1314 adversely affect the light and air between the structures.

50. **Miscellaneous Findings**:
51. The Developer's representative stated that its motivation for seeking the revised permits was only as device to complete construction of its project which was facing an imminent stop work order due to the Decision and Order in BZA No. 16971. Tr. at 157 (April 1, 2003).
52. The purpose of Sec. 405.3, as expressly stated in Z.C. Order No. 17, published at 17 DCR 305 (1970), is "to ensure the provision of adequate side yards for all residential buildings regardless of the zoning district in which they lie."
53. The Board has previously interpreted §405.3 in Appeal of David and Janet Pritchard, BZA No. 16811. There, the Board reversed a decision by the Zoning Administrator to allow the construction of an addition to a semi-detached dwelling where the eight (8ft.) foot side yard requirement of 11 DCMR §405.3 was not met. The Board determined that the lot line wall constituted a freestanding wall, requiring an eight (8 ft.) foot side-yard, pursuant to 11 DCMR §405.3.
54. The Pritchard decision was made public on the record at the Board's decision meeting on June 4, 2002, more than one month before DCRA issued the revised permits for this site. As a party to that appeal, the Zoning Administrator was on notice, through the public decision meeting 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 and application of 11 DCMR §405.3
55. Prior to the Pritchard case, the Zoning Administrator required the property owners of a semi-detached dwelling at 220 5th Street, S.E., to seek special exception approval to construct an addition on its lot, where the resulting structure lacked an eight foot (8 ft.) side yard.
56. The Board can limit the scope of its interpretation and application of 11 DCMR §405.3 in this Decision and Order to semi-detached dwellings built with lot line walls sharing no companion walls with adjoining structures.
57. The Board's interpretation and application of 11 DCMR §405.3 in this Decision and Order does not involve an interpretation of the regulation to row house construction, as that type of construction is not at issue in this case.

CONCLUSIONS OF LAW AND OPINION

The Board is authorized under §8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat.797, 799; D.C. Code §6-641.07(f) and (g)(1) (2001), to hear and decide appeals where it is alleged by appellant that there is an error in any decision by an administrative officer in the carrying out or enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §§3100.2, 3101.5, and 3200.0. The notice requirements of §3112 for the public hearing on the appeal have been met.

The Board is required to give "great weight" to the issues and concerns raised in the affected ANC's written report, as required by D.C. Code, 2001 Ed. Sec. 1-309.10(d) (formerly codified at D.C. Code Sec. 1-261 (1994 Repl. & 1999 Supp.)). See 11 DCMR §3115.3. ANC6B joined in this appeal by unanimous vote taken at its regularly scheduled meeting on September 12, 2002, with a quorum present. ANC6B duly

submitted a Report to this Board on January 14, 2003. See 11 DCMR §3115.1. ANC6B's representative testified at the hearing on April 1, 2003, regarding the basis of its position as outlined in its Report to the Board. ANC6B's testimony noted that its position on the merits of the appeal is consistent with that of Co-Appellant, Southeast Citizens. See Appellant's Exhibit No. 16.

The issue in this case is whether the revised permits for the alleged two story and cellar residences with driveways, determined by DCRA to be either detached or semi-detached single family dwellings, at 1308, 1310, 1312, and 1314 Potomac Avenue, SE (Square 1045, Lots 137, 136, 135 and 134) comply with applicable side yard zoning regulations where the three semi-detached dwellings, built with a lot line wall, will not share a common division wall with an adjacent building. As explained below, the Board concludes that while a semi-detached dwelling is a matter-of-right use in a C-2-B District, the side yard Zoning Regulations require, under the specific circumstances presented here, two side yards when a semi-detached dwelling does not share a common division wall with an adjacent building.

Applicable Side Yard Regulations

The structures are located in a C-2-B zone. Side yard regulations for a commercial zone are set forth at 11 DCMR §775. Pursuant to 11 DCMR §§775.2 and .3 a one-family detached dwelling shall be subject to the side yard requirements of an R-1 District, and a one-family semi-detached dwelling shall be subject to the side yard requirements of an R-2 District. Also, as noted above, 11 DCMR §405.3 states that "in R-2, R-3, R-4, and R-5 Districts, when a one-family dwelling, flat, or multiple 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."

Further, pursuant to 11 DCMR 405.9, structures in an R-1 or R-2 district must have a minimum side yard of 8 feet. The structures at issue in this appeal must therefore be analyzed under the regulations applicable for either R-1 (1308 Potomac Ave. detached dwelling), or R-2 (1310 – 1314 Potomac Ave. semi-detached dwellings). In every case, the side yard regulations require a minimum of eight feet.

For the detached dwelling at 1308 Potomac Avenue, it appears that the structure may conform to the applicable zoning regulations at 11 DCMR §405. The approved plat shows two side yards, eleven feet on the west side, and eight feet on the east side. See BZA Exhibit No. 31 (Approved Plat).

The remaining three buildings are single-family semi-detached dwellings with lot line wall on each of their western sides. None of these structures shares a "common division wall with an existing building or a building being constructed together with the new building." The Board concludes, therefore, that under 11 DCMR §405.3, the dwellings must provide a side yard on the west side, the resulting free-standing side. In the present case, the lot line wall, which is the free-standing wall, does not have an eight

(8 ft.) foot side yard because the eight (8 ft.) foot spacing that exists is used by the adjoining structure to the west as satisfying its eight (8 ft.) foot side yard requirement. 11 DCMR §199.1.

The Board rejects the arguments of the Zoning Administrator that 11 DCMR §405.3 does not apply because the lot line walls for the semi-detached dwellings at 1310, 1312 & 1314 do not constitute freestanding walls. Instead of applying 11 DCMR 405.3 as interpreted by this Board, the Zoning Administrator testified to an interpretation and application that was consistent only with the interpretation urged by then Acting Zoning Administrator, Toye Bello, in his testimony in the Pritchard case, *infra*. But that interpretation and application was flatly rejected by this Board and should not have been applied to this case.

The Board further rejects the Zoning Administrator's justification of his incorrect interpretation and application of 11 DCMR §405.3, on the basis that his office has approved hundreds of permits for comparable structures with lot line walls, without the requirement for an eight (8 ft.) 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 these lot line walls and no side yards, the Zoning Administrator 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.

At the hearing, Mr. Lyle Schauer testified on behalf of the appellants as an expert witness on the applicable side yard zoning regulations. We concur with Mr. Schauer's testimony and analysis that the structures at 1310, 1312 & 1314 do not meet the side yard requirements pursuant to 11 DCMR §405.3 because they lack an eight foot side yard on the side of each dwelling with the lot-line wall. We agree with his conclusion that the lot line walls here constitute free-standing walls, thus activating the side yard requirement of §405.3. We also concur with his expert opinion that the Zoning Administrator's determination, i.e. 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. Nor did the Zoning Administrator's determination comply with Pritchard, *infra*.

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. We concur with Mr. Schauer's conclusions and reject the Zoning Administrator's testimony inferring that the noted projection on the east side of 1314 Potomac Avenue did not negate the zoning compliance of that structure. Upon review of the plans and plat submitted, the Board concludes that 1314 Potomac Avenue fails to comply with side yard zoning requirements on either side.

The Board concludes that the Zoning Administrator erred in considering the three semi-detached dwellings to be permitted as a matter of right because the single eight foot

side yard per lot at 1310, 1312 & 1314 Potomac Avenue is insufficient to meet the zoning requirements discussed above. When the same regulations are applied to the detached dwelling at 1308 Potomac Avenue, the Zoning Administrator was correct in his determination that it be permitted as a matter of right since that structure contains two side yards of at least eight feet each.

The Board's conclusion in this appeal is consistent with its recent prior Decision and Order on the same regulation in the Appeal of David and Janet Pritchard, BZA No. 16811. The Board announced its decision in Pritchard on June 4, 2002, at its public meeting, and published the final order on October 15, 2002, only days before DCRA issued its written decision to Appellants, ANC6B and Southeast Citizens, in this appeal. See Appellant's Exhibit Nos. 13 & 14.

Prior Board Review of Side Yard Regulations

In the Pritchard case, this Board considered the applicability of 11 DCMR §405.3 where a homeowner sought to construct a rear addition to a semi-detached single family dwelling which did not share a common division wall with any adjacent buildings. The applicable regulation, which the Board discussed at length, states:

> In R-2, R-3, and R-5 Districts, when a one-family dwelling, flat or multiple 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.

As noted in Pritchard, the provision was added by the Zoning Commission in 1970 through Z.C. Order No. 17. The Board interpreted this provision of the side-yard zoning requirements and determined that:

> . . . [T]he last clause of the sentence, in requiring 'a side yard on each resulting free-standing side,' refers to each one of potentially two free-standing sides. Moreover, the use of the word 'resulting' indicates that the free-standing side results from the absence of a common division wall with an adjacent building, such that a side yard must be provided on each side of the dwelling that does not share a common division wall with an adjacent building.

Pritchard, at 8. See Appellant's Exhibit No. 6.

The October 17 and 21, 2002 determinations by DCRA which set forth the legal basis for DCRA's determination to issue revised permits, neither addressed the side yard zoning requirements of 11 DCMR §405.3, nor explained why the holdings established by the Board in Pritchard, i.e. requiring an eight (8 ft.) foot side yard setback on each of the free-standing sides, did not apply. See Appellant's Exhibit Nos. 13 & 14.

Purposes of the Side Yard Requirements

As noted above, side yard zoning requirements, and particularly 11 DCMR §405.3, were addressed at length in the Pritchard case. In reaching that decision, the Board looked at §405.3 and interpreted it in light of section 405 as a whole. For example, the Board noted that "the side yard regulations as a whole are designed to ensure the provision of an adequate amount of separation between structures." Pritchard, at 9. The Board also noted with approval that the appellant's position in the Pritchard case was supported by generally accepted policies and principles in zoning law.

> Restrictions on land development controlling building setback lines and requiring minimum front, side, or rear yard areas that must be kept free from structural development have long been recognized by courts as being reasonably related to promotion of public welfare. Front yards, rear yards, and side yards provide light, air, and privacy. They afford room for lawns and trees, keep residences away from street traffic, noise, dust, and neighbors, provide space for recreation and relaxation, and add to the attractiveness and comfort of a residential district. They provide access for firefighting equipment to the rear of buildings, and space for accessory buildings and uses. . . . More generally, police power restrictions relating to yards, courts, and other open spaces promote the overall community interest by fixing a spatial land use pattern and thereby promoting the orderly physical development of a community.

See Pritchard, at 10, citing 3 Rathkopf's The Law of Zoning and Planning, Sec. 34B.02[1] at 34B-2 to 34B-5 (2001).

The Board noted that when adopting 405.3 in Z.C. Order No. 17, "the Zoning Commission expressly stated that its purpose is 'to ensure the provision of adequate side yards for all residential buildings regardless of the zoning district in which they lie.'" Pritchard, at 10. The same public policy considerations apply here because the Board concludes that the zoning laws not only regulate the construction of buildings, but also the *relationship* of one building to another. That relationship concept between buildings is precisely what the side yard regulations, particularly §405.3, were intended to address. The Pritchard decision recognized this important zoning principle and applied it consistent with the guidance provided by Z.C. Order No. 17.

The Board concludes that the zoning regulations and decisional guidance cannot be reasonably interpreted to permit the kind of spacing between residential buildings that was done here. Mr. Schauer testified that the dwellings at 1310, 1312 & 1314 adversely affect the light and air between the structures. We agree and conclude that the DCRA should have advised the Developer to seek zoning relief through the special exception process, before issuing the revised building permits on July 8, 2002. DCRA failed to do this.

The Board notes, as well, that DCRA and the Zoning Administrator were on notice of the Pritchard analysis of side yards and "free-standing" walls as early as June 4,

2002, when it was decided by the Board, fully 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 decision meeting and vote on June 4, 2002, that this Board rejected the Zoning Administrator's prior, incorrect interpretation of a freestanding 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 at issue here.

It is the duty of this Board – and not the Zoning Administrator - to interpret the zoning regulations. The Zoning Administrator is 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 and the Zoning Commission when it enacted them.

Scope of Decision Limited to Semi-Detached Single Family Dwellings

The Decision and Order issued in this case is limited to the instances involving the application of the side yard regulations to semi-detached structures, as that is the type of 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.

The Board rejects the Zoning Administrator's argument that the dwellings at issue in this appeal were properly approved for permitting by DCRA because hundreds of these structures have been permitted for construction in the past throughout the City without the side yards required by §405.3. There is no evidence that any other semi-detached single-family dwellings similar to the unique structures at Potomac Avenue have been permitted for construction by DCRA. 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 typical as they have been constructed as separate, detached units. For this reason, we believe it is appropriate for the Board to confine its decision only to semi-detached dwellings, with no common division wall, which are specifically at issue here.

Furthermore, the Board believes that it is appropriate to confine this decision very narrowly because of the Developer's stated motive for seeking the revised permits. As noted at the hearing, the Developer sought the permits as single-family dwellings only as a way to continue and complete the construction process that was supposed to have been stopped due to the Board's earlier Decision and Order in BZA No. 16971. The purpose of the Developer in seeking these revised permits was not a serious effort to build single-family dwellings as a private developer for sale to the general public, as previously mentioned in BZA No. 16971. See Appellant's Exhibit No. 7, at 24. Instead, the Developer's stated motivation was to use the single-family dwelling zoning regulations

as a *device* to finish its prior construction process and *avoid* pursuing the zoning Special Exception review process before this Board.

The Board further believes that, to the extent that any changes to the side yard regulations may be warranted due to a perceived lack of clarity by the Zoning Administrator's office, it is within the purview of the Zoning Commission, and not this Board, to perform that review.

For the reasons stated above, the Board should ORDER that the appeal is GRANTED and that the decision of the Zoning Administrator to approve Building Permit Nos. 446916, 446918, and 446919 should be REVERSED.

Respectfully Submitted,

Mary F. Withum
Counsel, Southeast Citizens for Smart Development, Inc.
701 14th St., SE
Washington, DC 20003
(202) 544-3785

May 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2003, I served via facsimile a copy of Appellant's Proposed Findings of Facts and Conclusions of Law, on the following:

Martin P. Sullivan, Esq.
Shaw Pittman LLC
2300 N Street, NW
Washington, DC 20037-1128

Arthur Parker, Esq.
Office of the Corporation Counsel
441 Fourth Street, NW – Rm. 600 S
Washington, DC 20001

Julie Olson, Chair ANC6B
921 Pennsylvania Ave., SE
Washington, DC 20003

Mary F. Withum