GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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Appeal No. 17034 of Advisory Neighborhood Commission 2E, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator in the issuance of a final and binding ruling letter dated July 12, 2001, to the law firm of Shaw, Pittman, confirming the ability to develop three lots on the east side of the 1500 block of 32nd Street, N.W. with three row dwellings. The R-3 zoned subject property is located in the 1500 block of 32nd Street, N.W. (east side) (Square 1270, Lots 19, 20 and 21).

HEARING DATE: November 18, 2003
DECISION DATES: November 25, 2003, December 2, 2003

ORDER

PRELIMINARY MATTERS

On May 9, 2003, appellant Advisory Neighborhood Commission ("ANC") 2E ("Appellant") filed this appeal with the Board of Zoning Adjustment ("Board"), alleging error in a July 12, 2001 letter decision of the then-Zoning Administrator, Michael Johnson ("ZA"). The appeal claimed that the ZA had erred in interpreting section § 401.2 of the Zoning Regulations, (Title 11 of the District of Columbia Municipal Regulations ("DCMR")), thereby erroneously concluding that construction could proceed as a matter of right on the three lots which comprise the property subject to this appeal. The subject property is in an R-3 zone.

Appellant alleged 6 grounds for its appeal, all of which stem from the ZA's interpretation of §401.2 of the Zoning Regulations. Section 401.2 carves out an exception to § 401.3's minimum allowable lot area and lot width, but in order to fall under the exception, a property must meet several conditions. The ZA determined that the 3 lots here met those conditions and the Appellant disagrees. Specifically, the Appellant claims: (1) the lots were not unimproved on November 1, 1957, (2) the lots were in the same ownership as of the date of the ZA's letter, (3) none of the lots have the minimum necessary lot width, (4) the ZA has no authority to use the 2% discretion he is given by § 407.1 on top of the exception carved out by § 401.2, (5) the ZA did not make the requisite finding that the 2% deviation allowed would not impair the purpose of the otherwise applicable Zoning Regulations, and finally, (6) the lots do not comply with the standards set out in § 401.3, contrary to the ZA's general finding in his letter.

The Board held a public hearing on the appeal on November 18, 2003 at which the Appellant presented its case and the owners of two of the lots, (19 and 20), represented by the law firm of Shaw Pittman, defended the decision of the ZA. Neither the ZA, nor any representative of the Department of Consumer and Regulatory Affairs ("DCRA"), of which the ZA is a part, appeared at the hearing. The owner of the third lot (21) did not appear, although all three property owners were automatically parties to the proceeding, pursuant to 11 DCMR § 3199.1.

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The Board held a public decision meeting on November 25, 2003. After lengthy deliberation, a Board member moved to grant the appeal, but the motion failed for lack of a majority, the vote being 2-2-1, with one member abstaining. As one of the members voting against granting the appeal had not been present and had voted by absentee, the Chairman decided to hold a second decision meeting on December 2, 2003. The previously absent member was present at the second meeting, and, after a second deliberation, the Board voted 5-0-0 to grant the appeal.

For the reasons stated below, the Board finds that the exception to the minimum lot width requirement does not apply to these lots. As a result, the proposed development of three row houses may not proceed as a matter of right. Since the resolution of this one issue disposes of the appeal, it is unnecessary for the Board to address the other forwarded grounds.

FINDINGS OF FACT

The Subject Property

1. The subject property is comprised of 3 adjacent lots, numbers 19, 20 and 21, fronting on 32nd Street, N.W. All 3 lots are within Square 1270 and are in an R-3 zone district.

2. Lot 19 is owned by Strategic Georgetown, LLC. Lot 20 is owned by Georgetown 32nd Street, LLC. Lot 21 is owned by Herbert S. and Patrice R. Miller, who previously owned all 3 lots, but sold lots 19 and 20 to their current owners on October 18, 2002.

3. The 3 lots are proposed to be developed with one single-family row dwelling per lot.

4. Section 401.3 of the Zoning Regulations establishes minimum lot dimensions within residence zones. Except as provided in §§ 401.1 and 401.2, all R-3 lots with row dwellings must contain at least 2,000 square feet of lot area.

5. Each lot consists of approximately 1,573 square feet of lot area.

History of the Subject Property

6. Historically, the 3 lots, as well as the others in the Square, were part of the land associated with the Bowie-Sevier Mansion, which is located within Square 1270, just northeast of the subject property, at 3124 Q Street, N.W.

7. As a result of a lawsuit brought by one of the heirs to the Bowie-Sevier property, the land associated with the mansion was subdivided in May 1881. Many new lots were created within what is now Square 1270, including lots 19, 20 and 21. Exhibit No. 17.

8. A June 26, 1919 survey plat from the District of Columbia Surveyor shows that the first 30 feet of lots 19, 20, and 21 was subdivided for the purpose of constructing garages. Exhibit No. 18, Attachment F.

9. Upon her death in 1953, the descendant of the Sevier family left the mansion and its grounds, including lots 19, 20 and 21, to the Episcopal Church Home of the Diocese of Washington ("Home"). The Home restored and converted the mansion for use as a home for the elderly and razed buildings along 32nd Street in order to construct a nursing wing there.

10. On July 5, 1956, groundbreaking occurred for the about-to-be-built nursing wing. Exhibit No. 23, Attachments 2 and 5.

11. On September 26, 1956, a building permit was issued to the Home for an addition and alterations and repairs, presumably including the nursing wing. Exhibit No. 19, one of additional documents added after Attachment 10.

12. Construction of the nursing wing actually began in October 1956. *See,* Exhibit No. 23, Attachment 2. It was built partially on lots 19, 20 and 21 at issue here. *See,* Exhibit No. 19, Attachment 8.

13. In January 1957, a significant portion of the steel frame and brick façade of the nursing wing had been erected. Exhibit No. 23, Attachments 1 and 2.

14. The plat and wall check of the D.C. Surveyor's Office dated April 17, 1957, clearly shows a building, presumably the nursing wing, on parts of lots 19, 20 and 21. Exhibit No. 22.

15. On January 14, 1958, a Certificate of Occupancy was issued to the Home for a "Residence for the Aged with Convalescent Facilities" on lots, *inter alia,* 19, 20 and 21, in Square 1270. Exhibit No. 19, one of additional documents added after Attachment 10.

16. In July 1997, the Millers purchased the Bowie-Sevier mansion and its grounds, including lots 19, 20, and 21, with the nursing wing located on them, for reconversion to residential use. Exhibit No. 19, Attachment 10.

17. It appears from a letter sent by the Millers to their Georgetown neighbors that the nursing wing existed on parts of lots 19, 20 and 21 at least until February 1998. *Id.*

The ZA's Decision Letter

18. On July 12, 2001, the ZA, Michael Johnson, sent a letter to the Miller's attorney confirming that each of the lots could be developed as a matter of right, as conditioned in the letter. The "conditions" appear to be the requirements of § 401.2 of the Zoning Regulations. (The letter refers to an "Exhibit A" and an "Exhibit B," but neither is included in this record on appeal.) *See,* Exhibit No. 1, Attachment No. 1.

19. The ZA's letter interprets § 401.2 of the Zoning Regulations, which permits the erection of a structure on an undersized "unimproved lot in single ownership on November 1, 1957" if the lot "does not adjoin another unimproved lot in the same ownership" and if

the "lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3."

20. The ZA's letter concludes that the subject property satisfies the conditions of § 401.2, and therefore matter of right construction of rowhouses could proceed despite the deficient lot areas. With respect to compliance with the conditions of § 401.2, the letter specifically states: "[t]he lots **are** unimproved, and **were** in single ownership on November 1, 1957." (Emphasis added.)

21. The ZA decision makes no determination as to whether lots 19, 20, and 21 were unimproved on November 1, 1957.

22. The letter makes it clear that the ZA knew that as of July 12, 2001, the lots were under common ownership, but that at the time of development, it was anticipated that the lots would be owned by separate entities, to avoid the stricture in § 401.2 that two adjacent unimproved lots not be in the same ownership.

23. The ZA's letter applied the § 401.2 80% exception to the required minimum lot area of 2,000 square feet and determined that each lot of the subject property would need to be 1600 square feet in area to be developable as a matter of right under § 401.2.

24. The ZA then applied a 2% deviation to the area requirements of § 401.3 pursuant to § 407.1 so that a lot with an area of 1,568 square feet would be developable as a matter of right under the conditions set forth in § 401.2.

25. The ZA therefore determined that each of the 3 lots was ostensibly developable as a matter of right under § 401.2 as each, at approximately 1,573 square feet, was larger than the 1,568 minimum required.

26. The ZA's decision letter is addressed to Mr. John T. Epting of the law firm of Shaw Pittman and there is no indication that it was sent to anyone else. It was not publicly disseminated.

27. Through an e-mail from an unidentified neighbor, the Appellant found out about the decision letter in April, 2003. *See,* Hearing Transcript at 377. The appeal was filed on May 9, 2003, within the 60-day window for filing appeals with the Board. *See,* 11 DCMR § 3112.2.

CONCLUSIONS OF LAW

Procedural Issues

Section 8(f) of the Zoning Act of 1938 provides that appeals to the Board may be taken by a person aggrieved or District agency affected by any decision of a District official in the administration and enforcement of the zoning regulations. D.C. Official Code § 6-641.07(f) (2001). The ZA's decision letter was a decision of a District official in the administration and enforcement of the zoning regulations. It explained the reasoning behind the ZA's decision and

expressed his final determination as to the issues discussed in the letter. In order to be certain that the issues were ripe for appeal, OZ requested that the Appellant obtain a letter from DCRA confirming that the letter represents the ZA's final and binding decision with respect to the issues presented. The Appellant filed such a letter with OZ on June 24, 2003. Exhibit No. 8. Therefore, the Board finds that the ZA's letter was a proper subject for appeal.

The Board also concludes that the appeal is timely. Pursuant to 11 DCMR § 3112.2(a), an appeal must be filed within 60 days from the date the appellant had notice or knowledge of, or should have had notice or knowledge of, the decision to be appealed. The ZA's decision letter is dated July 12, 2001. It is addressed to Mr. John Epting of the law firm of Shaw Pittman and there is no indication that it was sent to anyone else. Nor was it publicly disseminated.

In April, 2003, the Appellant found out about the decision letter through an e-mail from an unidentified neighbor. This was the earliest that the Appellant had, or should have had, notice or knowledge of the letter. The appeal was filed on May 9, 2003, within the 60-day window for filing appeals and is therefore timely.

Substantive Issues

The ZA's conclusion that the subject property could be developed as a matter of right is premised on the property being eligible for the exception to minimum lot area permitted by § 401.2 of the zoning regulations. This subsection states:

> Except as provided in § 401.3, in the case of an unimproved lot in single ownership on November 1, 1957, that has a lot area or width of lot less than that specified in § 401.3 for the district in which it is located and that does not adjoin another unimproved lot in the same ownership, a structure may be erected on the lot if both the lot area and width of lot are at least eighty percent (80%) of the lot area and width of lot specified under § 401.3; provided, that the structure shall comply with all other provisions of this title.

11 DCMR § 401.2. Under the § 401.2 exception, if a lot, which was both unimproved and in single ownership on November 1, 1957, and which today does not adjoin another unimproved lot in the same ownership, has a lot width or lot area which is at least 80% of the required minimum, it may be built on as a matter of right. All of the criteria of § 401.2 must be met in order for the exception to apply.

The ZA, in his decision letter, concluded that the § 401.2 exception applies to the subject property because "[t]he lots are unimproved, and were in single ownership on November 1, 1957." The Board, however, does not read the regulation to require that the lots be unimproved now, while requiring that they be in single ownership as of November 1, 1957. That is not what the regulation says. The Board concludes, as a simple matter of reading the language of § 401.2, that the subject property must have been both unimproved and in single ownership on November 1, 1957, in order to get the benefit of the exception. Reading § 401.2 as the ZA did would permit

a lot owner with a too-small lot, whose lot was in single ownership on November 1, 1957, to demolish a structure on his lot, rendering it unimproved, and thereby eligible for the § 401.2 exception.

There was no dispute that lots 19, 20, and 21 were in single ownership on November 1, 1957. The Board concludes further that lots 19, 20, and 21 were not unimproved on November 1, 1957. There is ample evidence in the record showing that the nursing wing of the Episcopal Church Home of the Diocese of Washington existed on these lots on November 1, 1957. Construction of the nursing wing began in October 1956. A photograph from January 1957 shows that a significant portion of the steel frame and brick façade of the nursing wing had been erected. The April 1957 plat and wall check from the D.C. Surveyor clearly depicts a building straddling lots 19, 20, and 21. A Certificate of Occupancy for the nursing wing was issued on January 14, 1958.

Although there is no picture in the record depicting precisely how much of the nursing wing had been constructed by November 1, 1957, the Board concludes that even the amount of construction which existed on the subject property in January, 1957 suffices to make it "not unimproved." "Unimproved" is not defined in the zoning regulations, so the Board turns to Webster's Dictionary, as directed by § 199.2(g). Webster's defines "unimproved" with respect to land as follows: "not tilled, built upon, or otherwise improved for use: retained in the wild or natural state." *Webster's Third New International Dictionary of the English Language (Unabridged),* 1961. On November 1, 1957, the subject property was "built upon" and was not "in the wild or natural state."

The Board disagrees with the property owners' argument that land is unimproved until a Certificate of Occupancy is issued for a structure on that land. Buildings, such as single-family dwellings, and structures, such as walls and fences, do not require a Certificate of Occupancy, and yet are improvements to land. The property owners' expert witness stated that the issuance of a Certificate of Occupancy "sanctions completion of the improvements on the lot." Exhibit No. 20, at 2. Clearly, the improvements existed on the lot before they were "completed." A partially constructed building, even one that would eventually require a Certificate of Occupancy, is an "improvement" to the land on which it is being constructed.

Section 401.2 is a grandfathering provision that afforded protection against the application of what were then new lot dimension rules in circumstances when no other protection was available. Under other provisions of the Zoning Regulations, the owner of an undersized lot was protected against the application of the rules with respect to any structure for which a building permit had been issued even if construction had not yet begun. But without § 401.2, the lot owner would not have been protected if his lot was vacant and no building permit had issued. Once the building permit was issued to the Home on September 26, 1956, whether or not a certificate of occupancy was issued before November 1, 1957 was irrelevant to the legitimacy of the building on these three lots. Thus, there is no reason to hinge the application of this rule on whether or not a C of O had been issued.

Because lots 19, 20, and 21 do not meet the minimum lot area requirement of 2000 square feet set forth in § 401.3, they can only be built on as a matter of right if they fall within the § 401.2

exception. The subject property, however, was not unimproved on November 1, 1957, and therefore is not eligible for the § 401.2 exception. The Board therefore concludes that the ZA erred in determining that the subject property could be built on as a matter of right, pursuant to the exception set forth in § 401.2.

Appellant's other claims of error arise out of the ZA's interpretation and application of § 401.2. The Board has determined as a threshold issue that because the subject property was not unimproved on November 1, 1957, § 401.2 does not apply to it. Therefore, the Board does not need to reach these other claims of error.

For the reasons stated above, the Board concludes that the Appellant has met its burden of demonstrating that the ZA erred in determining that the subject property fell within the § 401.2 exception and was therefore developable as a matter of right. It is hereby **ORDERED** that this appeal is **GRANTED.**

VOTE: **5-0-0** (Ruthanne G. Miller, Curtis L. Etherly, Geoffrey H. Griffis, David A. Zaidain, and Anthony J. Hood, to grant appeal.)

BY THE ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.

Each concurring member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAY 12 2004

PURSUANT TO 11 DCMR § 3125.6, THIS 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. LM/rsn

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BZA APPEAL NO. 17034

As Director of the Office of Zoning, I hereby certify and attest that on MAY 12 2004 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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