GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16020 of Raimonda and Tyrus D. Barre, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of Joseph Bottner, Zoning Administrator made on October 5, 1994, to the effect that the property owner may construct a pool house per plans filed with the Zoning Administrator in an R-1-A District at 4524 Garfield Street, N.W. (Square 1339, Lot 811).

HEARING DATE: February 8, 1995
DECISION DATE: April 5, 1995

ORDER

SUMMARY OF THE EVIDENCE:

BACKGROUND:

The subject appeal involves the appellants, Raimonda and Tyrus Barre, owners of 2811 Foxhall Road, N.W.; the respondent, the Zoning Administrator; and Mr. Ralph Davidson, owner of the subject property. Mr. Davidson was granted intervenor status by the Board. Due to the limited nature of Mrs. Barre's participation in the actual proceedings, for the purposes of this order, only Mr. Barre will be referred to as the appellant.

As a procedural matter, the property owner, Mr. Davidson, moved to exclude as irrelevant certain exhibits filed as part of the appellant's pre-hearing statement. The intervenor sought to exclude all those exhibits which do not relate to the plans approved by the Zoning Administrator in October of 1994. Inasmuch as the Board members had already received and reviewed the material, the Chairman ruled to admit those items to the record but to give them the weight that they deserve as related to pertinent issues.

The subject property is located at the southeast corner of the intersection of Garfield Street and Foxhall Road, N.W., on Lot 811 in Square 1339. The property is located in the R-1-A District.

The subject lot contains approximately 31,655 square feet of land area. It has a width of 168.73 feet along Garfield Street and a rear yard of 105 feet. The property is known as 4524 Garfield Street, N.W. It is improved with a single-family dwelling which contains approximately 6,056 square feet of floor area. There is a swimming pool located in the rear yard of the property. When the property was purchased in January 1990, there was also a 170-square foot pool house in the rear yard at the southeastern corner of the lot near the pool.

The appellant lives at 2811 Foxhall Road, N.W. His lot is located to the south of the subject property. The front yard of the appellant's property abuts the rear yard of the subject property. A fence separates the two adjoining properties.

Board of Zoning Adjustment
District of Columbia
CASE NO. 17040
EXHIBIT NO. 7A2

After assuming ownership of the subject property, the owner, Mr. Davidson, began construction, without a permit, of a large two-story pool house. The appellant, Mr. Barre, contacted the Department of Consumer and Regulatory Affairs (DCRA) to question the construction and review the plans. On August 20, 1990, after it was learned that no building permit had been applied for or issued to Mr. Davidson, a stop work order was issued for the construction then underway. Mr. Davidson filed plans for a building permit for the pool house. These plans showed the construction of a two-story, 23-foot high structure. On the first floor there was to be a living room with a large fireplace and a kitchen equipped with an electric range, a microwave oven, a dishwasher and an icemaker. The first floor also had a dining room and a bathroom. On the second level there were two rooms designated as bedroom/office space. Heating and air conditioning were also provided. The owner planned to use the structure as a pool house and possibly as "guest quarters." On September 4, 1990, the Zoning Division of DCRA approved a building permit for the structure.

Mr. Barre complained a second time about the structure and another stop work order was issued, this time requiring Mr. Davidson to modify the interior of the structure. Mr. Davidson was also informed that the structure could not be used for living quarters. On October 1, 1990, revised plans were submitted to DCRA.

After the third stop work order was issued, and in order to address the issues raised by DCRA, Mr. Davidson submitted to DCRA revised plans which lowered the ceiling of the second floor by one inch and changed the names of the space designations. Mr. Davidson converted the living room to a poolroom and changed the grade immediately around the structure by adding a two-foot retaining wall to deal with the fact that the height of the structure exceeded that permitted for an accessory building. A new building permit was issued to Mr. Davidson allowing for a "three-story" building, which was later revised to authorize a one-story pool house or the pool house which was constructed one inch shy of being two stories.

Mr. Barre again challenged the issuance of the permit and argued that Mr. Davidson's grading of the property was improper. The Zoning Administrator refused to stop work on the pool house and Mr. Barre filed an appeal with this Board challenging the decision to issue that permit and the determination that the pool house was a valid "accessory building." According to the appellant, a pool house as large as Mr. Davidson's is not customary for the District of Columbia.

By order dated June 28, 1991, the Board granted the appeal concluding that the pool house, as designed, was not an accessory building within the meaning of that term. The Board further concluded that "the design of the structure shall be altered and the scale reduced to bring the structure into compliance with the intended meaning of "accessory building" as that term is customarily used in the District of Columbia." (See BZA Appeal No. 15453). The Board reasoned that while Mr. Davidson revised the plans to eliminate many of the rooms and amenities within the pool house and bring the pool house into compliance with the Zoning Regulations as to height, number of stories and intended use, "no adjustments were made to the design and size of the structure to make them consistent with the" customary size of other pool house accessory structures.

Mr. Davidson appealed the Board's decision to the D.C. Court of Appeals. (*Ralph Davidson v. District of Columbia Board of Zoning Adjustment*, 617 A.2d 977 (D.C. App. 1992)). In that appeal, Mr. Davidson argued that that the Board had no discretion to order him to reduce the size of the structure, as long as the structure was being used for legitimate accessory purposes. The Court disagreed and affirmed the decision of the Board, holding that the Board's determination that the pool house did not meet the definition of "accessory building" was not arbitrary and capricious. Further the Court held that the Board's interpretation of the accessory building regulations to restrict the scale of activities that may be conducted in the intervenor's pool house was not plainly erroneous. The Court pointed out that it was proper for the Board to focus, not only on the size of the structure, but also on the design and contents of the building. The Court noted that the Zoning Regulations governing accessory buildings restrict *use* as well as the *physical aspects* of these structures. Meeting the physical requirements and limitations is not all that is required to come within the meaning of the Regulations. The Court determined that the nature and scale of permissible use is not unlimited. Mr. Davidson requested a rehearing by the Court but was denied in June 1993.

On October 6, 1993, Walter E. Lynch, agent and architect for Mr. Davidson, filed amended drawings with DCRA, showing removal of the storage lofts and the wall between the main room and the recreation room, elimination of the dishwasher and microwave and reduction of the wet bar to a minimum size.

On December 23, 1993, Joseph Bottner, Jr., the Zoning Administrator, sent a letter to Mr. Lynch indicating that the reduction in design and scale was insufficient. Mr. Lynch met with Mr. Bottner in January and February 1994 to determine what reduction would be acceptable, with Mr. Bottner unwilling to indicate what changes would be necessary.

On June 13, 1994, Mr. Lynch met with Mr. Hampton Cross, Director, DCRA, and Ms. Gladys Hicks, the Acting Zoning Administrator, in the absence of Mr. Bottner, to discuss revisions to the plans. At that meeting, Mr. Cross and Ms. Hicks agreed that reducing the height by four feet, lowering the chimney by four feet and reducing the wet bar to a minimum size would be sufficient to meet the Board's order of October 28, 1991.

On July 19, 1994, Mr. Bottner sent a letter to Mr. Davidson setting forth a list of conditions that the pool house would have to meet to comply with the Board's order. The text of that letter follows:

> Dear Mr. Davidson:
>
> This letter is being directed to you as a result of final decisions by the Board of Zoning Adjustment (BZA), Case Number 15453, and the D.C. Court of Appeals in Case Number 91-AA-847.
>
> Your architect, Walter E. Lynch, on October 6, 1993, filed plans for modification of your pool house; however, my letter to Mr. Lynch, dated December 23, 1993, advised him that the plans did not show that the building will be reduced in scale. Consequently,

I disapproved the application and requested that you take immediate steps to conform with Board of Zoning Adjustment conditions.

I have not received plans relating to your pool house after my December 23, 1993 letter to Mr. Lynch. The Board of Zoning Adjustment and the Court of Appeals found your existing pool house to be a main building rather than an "accessory building". The Board has ordered that the design of the structure be altered and the scale reduced to bring the structure into compliance with the intended meaning of "accessory building", as that term is customarily used in the District of Columbia.

The Board found that the structure was large enough and fully equipped to accommodate activities such as "cooking, dining, studying, entertaining and other activities associated with daily life." The Board further determined that many of these uses exceeded what is customary for pool house uses in the District of Columbia and that they are not incidental to uses of the main building.

Because I am obligated to enforce the decision of the Board of Zoning Adjustment and the Court of Appeals, as it relates to your pool house, you must therefore reduce the size and height of your pool house and limit its contents. The pool house must be reduced by 350 square feet, resulting in the building having only 430 square feet of area. The contents of the pool house must be limited to a changing room, shower, a commode, a basin, a wet bar with a small area adjacent to the wet bar, and a mechanical equipment room, sufficient only for the pool. All other proposed contents of the pool house are prohibited.

The building must have only one story with no storage loft. Further, the building must be reduced by two feet in height. Also, the fireplace must be removed.

I will review all of your revised plans in order to assure compliance with the above conditions. Your revised plans must be approved by me and a building permit issued no later than August 5, 1994. Construction must be completed by no later than September 16, 1994. Your construction shall be inspected for zoning compliance no later than September 23, 1994. Failure to comply with these conditions will result in appropriate enforcement action. ... Sincerely, Joseph F. Bottner, Jr. Zoning Administrator... [copies to: Hampton Cross, Pat Montgomery and Ted Gordon]

This letter was sent without Mr. Bottner's knowledge of the June 13th meeting between Mr. Lynch, Mr. Cross and Ms. Hicks.

Mr. Bottner met with Mr. Lynch on September 21, 1994 and sent a subsequent letter, of the same date, to Mr. Davidson. That letter requested that Mr. Lynch submit plans by September 28, 1994.

Pursuant to the June 13th agreement and Mr. Bottner's September 21st letter, Mr. Lynch filed an application for a building permit on September 27, 1994, to make the changes in the existing building. The permit application describes the scope of work as follows:

- Remove existing hip roof down to eave.
- Remove existing chimney.
- Provide Leyland Cypress per neighbors' approval at property line.
- Remove wet bar cabinets, refrigerator, microwave, sink, power supply and plumbing.
- Remove wall between poolroom/recreation, storage room as indicated.
- Remove ceiling above dressing area.
- Remove platforms at loft areas (2).
- Remove framing, drywall from platforms/ceiling above dressing area and storage area.
- Remove framing, roofing, plywood decking of main hipped roof.
- Install new flat roof.

Mr. Barre was of the view that while this proposal would result in a small reduction in the height of the pool house, it would not reduce the scale, density or floor area of the pool house.

On October 5, 1994, DCRA issued permit No. B390383 for "alterations and repairs to an existing pool house (accessory to main house)." By letter dated October 13, 1994, Mr. Barre was notified of the issuance of the permit. The instant appeal was filed on October 25, 1994.

ISSUES PRESENTED:

The issue presented in this appeal is whether the Zoning Administrator erred in approving the issuance of a building permit for the pool house with the changes proposed in the plans? In deciding this issue, the Board must determine whether the alterations made to the plans sufficiently reduced the scale of the pool house to bring the structure into compliance with the mandate of the Board's order and into compliance with the intended meaning of the Section 204.1 which allows "other buildings or structures customarily incidental to the uses permitted in R-1 districts...".

ARGUMENTS:

At the public hearing of February 8, 1995, the appellant stated that when the Court of Appeals upheld the Board's earlier decision, he thought the matter was concluded, but after years have passed, the pool house still remains, the same size and in the same place as before – almost on top of his property line. The appellant maintained that from the point of view of enjoying his

property, the only change which Mr. Davidson has proposed is to alter the slope of the roof so that it is now slightly lower than before but inconsequentially. The appellant asked the Board to see that the Zoning Regulations are enforced and that the Board adheres to its original decision regarding this building.

Ellen McCarthy, an expert in planning and zoning testified on behalf of the appellant. According to Ms. McCarthy, the proposed pool house, with alteration, is not an accessory building since its size is not that of a customarily accessory pool house in the District of Columbia and approval of the building permit was inconsistent with the Comprehensive Plan, 10 DCMR 1103 & 1105.

In her testimony, Ms. McCarthy referred to the board's prior order which required that the "scale" be "reduced" and noted that Webster's New Collegiate Dictionary defines "scale" as:

> Relative dimensions, without difference in proportion of parts; esp. proportion in dimensions between a drawing, map, etc., and that represented; as, drawn to a scale of one inch to a mile.

According to Ms. McCarthy, the essential notion of reducing the scale of a building is one that requires a reduction in "proportion" – that is, if the building is slightly reduced at the roof, but none of the other dimensions have been altered proportionally, it has not been reduced in scale, but merely in height. In Ms. McCarthy's opinion, the proposed modification does not deal with the Board's initial concern that the overall scale of the building was too great to fit the classification of being customarily incidental. Merely changing the slope of the roof, which is all that is being proposed in terms of any reduction of the height of the facility, would have an inconsequential effect on the scale of the pool house.

Ms. McCarthy also stated that her opinion was supported by other provisions of the Zoning Regulations. The Zoning Regulations place some importance on separating the daily activities of living of one neighbor from those of another in R-1 zones, in that restrictions are placed on rear and side yards. If density of use were the sole justification for the zoning function, then the regulations would merely impose lot coverage and bulk/height restrictions on residences. The fact that the Zoning Regulations then allow accessory buildings, but not additions or extensions of the main house, to be located within the required 25 foot setback relates to the traditional function of accessory buildings – tool sheds, garden equipment sheds, and small storage areas. This is further borne out by two additional zoning restrictions placed on accessory uses: § 2500.3, which allows no more than 30 percent of the area of the rear yard to be occupied by an accessory building, and §§ 2500.5 and 2500.6, the restrictions on private garages - the one accessory use which is explicitly permitted to be larger, and to include sleeping quarters for domestic help.– these sections permit garages to have a second story used for sleeping quarters. The garage restrictions limit the height of the building, require a setback at least equal to the width of required side yards in the district in which it is located, and prohibit the building from being located within the required rear yard.

Ms. McCarthy testified that she surveyed four architects who have a considerable practice in residential architecture, to ascertain what is customary for the size if a pool house,

based on their experience. The four architects surveyed were Robert Bell, Heather Cass, Andre Houston, and Robert Schwartz. According to Ms. McCarthy, the customary size of the pool houses with which these architects were familiar was similar to the size originally specified by the Zoning Administrator in his letter to Mr. Davidson dated July 19, 1994. That is between 400 and 500 square feet, although one pool house was as small as nine square feet. Therefore, Ms. McCarthy concluded that the modification under consideration, while it reduces the pitch of the roof, and therefore reduces the height minimally, the scale of the building, as measured in square feet does not result in a pool house which is customarily incidental to the main house owned by Mr. Davidson.

Subsequent to the issuance of the permit and filing of the instant appeal, and prior to the hearing on the appeal, Mr. Bottner retired from the District of Columbia government. Ms. Gladys Hicks was the Acting Zoning Administrator for part of the time that revisions to the plans were under discussion, due to Mr. Bottner's absence on extended sick leave. Ms. Hicks was the Deputy Zoning Administrator at the time the permit was issued. At the time of this hearing, Ms. Hicks was the Acting Zoning Administrator and she appeared at the public hearing and testified as the respondent.

Ms. Hicks testified in support of the building permit issued to Mr. Davidson. She stated that Mr. Bottner had reviewed the plans for the proposed modifications to the pool house and concluded, after thorough discussion, that the plans met the requirements of the Zoning Regulations and that the scale had been reduced consistent with the order of the Board. Ms. Hicks stated that she was unaware of Mr. Bottner's July 19, 1994 letter to Mr. Davidson or the reasons why Mr. Bottner changed his position and authorized a permit to Mr. Davidson to alter the pool house without complying with the terms of the letter. Ms. Hicks believed that she had approved similar sized pool house s but could not recall any specific one. Ms. Hicks also stated that when presented with an application for a building permit for an accessory building, she does not determine whether the size of the building is customary for other similar accessory uses. Instead, Ms. Hicks merely determines whether it meets the maximum height and area requirements permitted by the Zoning Regulations. Finally, Ms. Hicks acknowledged that this approach had been rejected by the Board in its prior decision and she asked the Board to give her office some guidance if it should decide that the pool house is still too large to be an accessory building.

The intervenor, Mr. Davidson, presented the testimony of an expert in land planning and zoning in the District of Columbia. The expert testified that:

a. The permit application would result in significant reductions in the scale of the building by lowering the height by 4 feet (more than 25%) and the floor area by approximately 450 square feet (more than 35%).

b. The interior changes would reduce the scale of use of the building, by removing kitchen appliances, removing lofts and partitions which created areas that could have been used for sleeping and by rendering the building unsuitable as habitable space.

c. The building would meet all of the requirements of Section 2500 of the Zoning Regulations concerning accessory buildings, including the overall lot occupancy requirements and the limitation on occupancy of required yards.

d. The pool house is incidental in size and scale compared to the main dwelling. The lot occupancy of the pool house is approximately 2.58 % and the pool house would have approximately one-seventh of the floor area of the main house.

e. In R-1 Districts, the Zoning Regulations allow bigger buildings, including the main house and any accessory buildings, on bigger lots, because of the combined effect of lot occupancy and height limitations.

f. The subject pool house is comparable to other accessory buildings in the area. The area which was considered is zoned R-1, predominantly R-1-A, and includes both sides of Foxhall Road from W Street to Loughboro Road/Nebraska Avenue, north of Loughboro Road along Rockwood Parkway, Glenbrook Road, Indian Lane and Overlook Terrace and south of Loughboro Road along Maud, Macomb and Lowell Streets. This area has a variety of lot sizes and house sizes.

g. The subject building is a proportionally smaller building than the accessory building on the appellant's lot next door. Mr. Barre's accessory building is 576 square feet in area, which is a lot occupancy of approximately 5.27%, more than twice as much as the subject building.

h. There are other existing accessory buildings that have been approved by the District and are of similar size and scale as related to their lots. Those buildings include 4400 Edmunds Street (an approved 1963 plat and a photograph were submitted), 4521 Dexter Street (an approved 1971 plat and a photograph were submitted), 2817 Woodland Drive (an approved 1994 permit and plan were submitted) and 2900 Benton Place (an approved 1994 permit and plan were submitted). In addition, there are accessory buildings at 2810 44th Street, 4400 Dexter Street, 2930 44th Street, 5063 Overlook Terrace, 2923 45th Street, 2910 45th Street, 3000 45th Street, 4833 Rockwood Parkway and 4934 Indian Lane which are of similar size and scale to the subject building.

i. The Zoning Regulations set minimum area and bulk standards to prevent adverse impact. The R-1-A District is the most restrictive district in the Regulations. Neither the Zoning Administrator nor the Board of Zoning Adjustment in an appeal has the authority to amend the Regulations to add further standards or requirements.

j. The Zoning Administrator may legitimately inquire as to whether a building is an accessory building. Once a building has been determined to be accessory, the Zoning Administrator must then determine only whether the proposed construction meets the specific requirements of the Regulations. It would be an abuse of discretion for the Zoning Administrator to apply other limitations or requirements not specified in the Regulations, such as size, location or choice of materials.

k. The Zoning Regulations do not require the Zoning Administrator to consider the potential adverse impact of an accessory building on other properties.

Mr. Lynch, the intervenor's architect testified that the square footage of the pool house would be reduced from 1,275 square feet to 818 square feet, more than 400 square feet, and that this constituted a reduction in scale as ordered by the Board. On cross-examination, Mr. Lynch acknowledged that the pool house was 780 square feet, as found by the Board in its prior decision, and that the alterations to the loft space did not reduce the square footage of the pool house since that space was not, and is not, considered part of the structure's square footage. In fact, Mr. Lynch acknowledged that Mr. Davidson had challenged, and the Board had rejected, a similar assertion by the appellant in the prior matter. Thus, the only reduction in the size of the pool house proposed by Mr. Davidson was the height of the pool house as a result of the removal of the hip roof and its replacement with a flat roof.

Ms. McCarthy responded to the exhibits relied on by the intervenor showing other accessory buildings. Ms. McCarthy stated that it was not appropriate to use those buildings as a guide to determining what was customary for an accessory pool house because some of the buildings are garages which are treated differently by the Zoning Regulations and are customarily larger than pool houses. Further, only one of the exhibits was a pool house and it included an enclosed pool, not a customary accessory structure. She noted that many of the buildings were permitted because they may have been authorized under other Zoning Regulations and were not accessory buildings, such as one which was located on a separate lot or those which were attached to the main residence.

The appellant argued that the Court of Appeals rejected the intervenor's position that "the Zoning Administrator is limited to determining whether an application for a building permit complies with the specific requirements of the Zoning Regulations".

Advisory Neighborhood Commission 3D, by letter dated January 5, 1995, supported the appeal. The ANC stated that even with the alterations, the "pool house would still be much too large and far too intrusive to meet the zoning requirements and comply with the Board" prior decision." Furthermore, ANC 3D supported Mr. Bottner's opinion, expressed in his July 19, 1994 letter to Mr. Davidson, that the pool house should be reduced in size to 430 square feet.

The Wesley Heights Historical Society supported the appeal, by the testimony of George Watson, its president, and by copy of a letter to the Zoning Administrator dated January 24, 1995. The Society stated that the pool house would still be too large in overall bulk and floor area to qualify as an accessory building. Even with the removal of the hip roof, the height would still be too high and intrusive on the privacy of Mr. Barre's property. The Society also concurred with Mr. Bottner's opinion that the pool house should contain no more than 430 square feet.

FINDINGS OF FACT:
Based on the issues raised and the evidence of record, the Board finds as follows:

1. Pool houses should be compared to other pool houses to determine whether what is built is customary. The customary size for an accessory pool house building in the District of Columbia is 400 to 500 square feet.

2. The pool house constructed by Mr. Davidson will not be reduced in scale by altering the roof from a hip roof to a flat roof, since no other aspect of the size of the pool house is being proportionately reduced.

3. The pool house, as revised, does not reduce the scale or alter the design enough to meet the intent of the Board's decision in Appeal No. 15453.

4. The specifications in the July 19, 1994 letter from Joseph Bottner to Mr. Davidson were consistent with intentions of the Board's decision in Appeal No. 15453.

CONCLUSIONS OF LAW AND OPINION:

Based on the evidence of record, the Board concludes that the appellant is challenging the decision of the Zoning Administrator to issue a building permit for construction of a pool house structure at 4524 Garfield Street, N.W.

In its prior order related to the subject property, the Board directed the intervenor, Mr. Davidson to adjust the design and reduce the scale of the pool house to make it consistent with its use as an accessory building. The Board is of the opinion that the appellant has demonstrated that the subject structure has been designed to be in excess of what is customarily incidental to a pool in a residential property in the District of Columbia.

The Board concludes that on October 5, 1998, the Zoning Administrator erred in deciding to issue a building permit, under the accessory building provisions of the Zoning Regulations, for construction of the structure at the subject premises.

The Board concludes that the Zoning Administrator has the discretion to determine whether a proposed building constitutes an accessory structure under the Zoning Regulations, aside from its strict compliance with the technical requirements of those Regulations. In exercising that discretion, the Zoning Administrator may consider such factors as what use is being made of the structure and the appropriate size and scale for the accessory structure, as compared to the sizes and scales of similar accessory structures in the District of Columbia. The Board credits the testimony of the appellant's expert that pool houses in the District of Columbia are customarily between 400 to 500 square feet. In doing so, the Board rejects the intervenor's argument that the size of non-pool house accessory buildings can be a guide to what is customary for a pool house. To conclude otherwise would permit a property owner to construct in a rear yard a variety of accessory buildings, such as tool sheds, a garage a pool house and other buildings of equal size without regard to their customary use and impact on a residential neighborhood, if they meet other area requirements of the Zoning Regulations. Such a result would be unreasonable. The Board is of the view that the Zoning Commission clearly intended

to treat each accessory building differently depending on its customary size and use. This is demonstrated by the promulgation of regulations governing accessory buildings used as garages.

The Board further concludes that, in exercising discretion to determine whether a proposed structure is an accessory structure, the Zoning Administrator may take into consideration the proximity of the structure to the lot lines of abutting properties.

The Board acknowledges that the Zoning Administrator made an effort to bring the pool house structure into compliance with the Board's decision in Appeal No. 15453. In his letter of July 19, 1994, the Zoning Administrator required that the property be changed in very specific ways. Not only did he require that the structure be reduced by 350 square feet, he also discussed limiting it to one story without a storage loft, reducing the height by two feet and changing the interior layout or design of the structure to limit the uses to pool house-type uses. However, the building permit was issued without requiring that these changes be made. Therefore, the building permit that was issued to Mr. Davidson, which requires a minimal reduction in the height of the structure and alterations to the interior of the pool house, does not address the Board's direction that the scale of the building be reduced. The Board notes that the pool house remains almost twice as large as the size of other pool houses that have been constructed as customarily incidental uses to single-family residences. Furthermore, the proximity of the pool house to the appellant's property line makes the structure appear that much more out of scale.

The Board is of the opinion that if the delineated changes had been made, the pool house would be consistent with the Board's prior order and with the intended meaning of the term "accessory building" in the Zoning Regulations. Therefore, the Board concludes that the Zoning Administrator erred in authorizing the issuance of the building permit without requiring that these changes be made.

In light of the foregoing, it is hereby **ORDERED** that the **APPEAL** is **GRANTED** and the **DECISION** of the Zoning Administrator is **REVERSED.**

VOTE: 3 – 1 (Susan Morgan Hinton, Maybelle Taylor Bennett and Laura M. Richards to grant and reverse; Craig Ellis opposed to the motion; Angel F. Clarens not voting, not having heard the case).

THE EXCEPTIONS PROCESS:

This order was issued as a proposed order pursuant to the provisions of D.C. Code Section 1-1509(d). The proposed order was sent to all parties on November 12, 1998. The filing deadline for exceptions and arguments was Friday, December 4, 1998. The deadline for responses was Monday, December 14, 1998. No party to this appeal filed exceptions or arguments relating to the proposed order, therefore, the Board of Zoning Adjustment adopts and issues this order as its final order in this case.

BY ORDER OF THE BOARD OF ZONING ADJUSTMENT – SHEILA CROSS REID, BETTY KING AND JERRY H. GILREATH.

ATTESTED BY: Sheri M. Pruitt-Williams
SHERI M. PRUITT-WILLIAMS
Interim Director

Final Date of Order: DEC 21 1998

UNDER 11 DCMR § 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT.

ORD16020/TWR

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

29 August 2000

Mr. Michael D. Johnson
Zoning Administrator
Building and Land Regulation Administration
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Johnson:

Reference my July 25th letter, a copy of which is enclosed.

Since it has been well over a month since our meeting, when may I expect a detailed reply to my talking points paper and specific questions I raised about projects at 4417 Garfield Street and 2708 – 44th Street?

Hoping for a prompt answer, I am

Sincerely yours,

William E. Timmons

Enclosure

RECEIVED
D.C. OFFICE OF ZONING
2003 MAY 19 PM 4: 54

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

7 September 2000

Theresa D. Lewis
Deputy Director for Operations
Department of Consumer and Regulatory Affairs
Suite 9500
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Theresa:

May I ask your good offices once again to try to get a substantive response to inquiries I have made to the Zoning Office?

You may recall that JoAnn Spencer set up a meeting for June 26th but called that morning to report that Mr. Lourenco was not in the office and the meeting would have to be rescheduled. It next was planned for July 14th in your office, but for some reason it was not on your calendar or any of the other officials. Nevertheless, you called around and Mr. Noble came. You said that if I would leave my summary notes you would organize another meeting in ten days with all the parties, and they would have written responses to my questions with citations of appropriate regulations. The third session was scheduled for July 25th.

Mr. Noble, Mr. Johnson, and Mr. Bello were present on the assigned day, as was the President of the Wesley Heights Historical Society, Mr. George Watson. Unfortunately, the Zoning officials did not have my written questions and had never seen them. Nevertheless, I felt the meeting was productive. Mr. Johnson promised to look into a number of issues and give me a prompt response. Additionally, I requested a written memo summarizing the issues we did focus on. That was 44 days ago and no written reply has been received although I have written several follow-up letters to Mr. Johnson.

Copies of recent communications are attached for your information.

Thanks for anything you can do to assist.

Sincerely,

William E. Timmons

RECEIVED
D.C. OFFICE OF ZONING
2003 MAY 19 PM 4: 54

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

22 September 2000

Mr. Michael D. Johnson
Zoning Administrator
Building and Land Regulation Administration
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Johnson:

Reference my letters of July 25th and August 29th. Why do I get the feeling I am being "slow walked" by your office?

It now has been **58 days** since you promised a written report on the items we discussed in Theresa Lewis' office on July 25th. You may recall it took **141 days** of repeated letters before that meeting was scheduled and then only when a Member of Congress intervened.

I gave you a written series of zoning concerns of Wesley Heights residents, the Historical Society, and the local ANC. I hope a substantive response will be forthcoming soon.

Sincerely,

William E. Timmons

Copy for Ms. Lewis —
Hope you can help again.

RECEIVED
D.C. OFFICE OF ZONING
2003 MAY 19 PM 4: 54

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Administrator

February 5, 2001

Mr. William E. Timmons
4426 Garfield Street, N.W.
Washington, D,C. 20007-1142

Dear Mr. Timmons:

Thank you for your letters of May 8th and July 25, 2000. I appreciate your taking the time to meet with Building and Land Regulation Administration (BLRA) staff to discuss issues of concern to you which impact your community directly. I apologize for the delay in responding.

We all came out of the meeting with a consensus on the building height issue. We are all in agreement that the broad definition of building height, as defined in the Zoning Regulations, is distinctly a separate issue from the mode of measurement. The mode of measurement may vary depending on the zoning district in which a subject premises is located. I have enclosed a highlighted copy of the relevant sections of the regulation for your convenience.

The language of the regulation is clear. For those districts in which the height of building is limited to forty feet (40ft), the Zoning Administration is allowed the discretionary authority to take that measurement from the middle of the front wall at finished grade. The mandatory language "shall" which has been the subject of your focus in understanding the height issue, serves only to set the maximum height attainable in any district subject to the allowable mode of measurement.

We were all in agreement about the "structure" issue; that is, that the general definition of what constitutes a structure has limited bearing on what counts toward lot occupancy percentage calculations. The more appropriate section of the regulation is that which defines "Building Area."

With regard to the garage issue, we discussed the relevant section, which addresses a garage as an accessory structure, the prescribed locations and limited height.

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Section 2300.2(a) of the Zoning Regulations allows a private garage that is an accessory building in a residence district to be located within a rear yard or beside the main building under specific provisions. Section 2500.3 limits to thirty percent (30%), the occupancy of such rear yard by an accessory building. Section 2500.4, DCMR Title 11, the Zoning Regulations, limits the height of an accessory building to no more than fifteen feet (15) and one (1) story.

You stated that you were specifically concerned with the height of the "garage" at 4417 Garfield Street. A reduced sized copy such as the one attached to your letter may not provide an accurate scale for measurement. An on site measurement of the height in real terms through site inspection by a zoning inspector will provide the true measurement. These measurements will determine the habitability of the subject space.

Section 2300.2(a) of the Zoning Regulations allows a private garage that is an accessory building in a residence district to be located within a rear yard or beside the main building under specific provisions. Section 2500.3 limits to thirty percent (30%), the occupancy of such a rear yard by an accessory building to no more than fifteen (15ft) one story.

Thank you for your commitment to our city. I applaud your keen sense of civic responsibility. I encourage you to continue to assist us by communicating your concerns.

Sincerely,

Denzil L. Noble.
Deputy Administrator

Enclosure

cc: Carlynn M. Fuller, Interim Director
Theresa Lewis, Acting Administrator, BLRA
Michael D. Johnson, Zoning Administrator

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

15 February 2001

Mr. Denzil L. Noble
Deputy Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Noble:

I very much appreciate your letter dated February 5th that I received on the 14th. I recognize I have been a pain in the neck to the Zoning Office, but that discomfort doesn't approach the frustrations the citizens of Wesley Heights have experienced trying to get rational answers from the DC Government. Unfortunately, your letter has a number of errors, misstatements, and omissions that I feel compelled to call to your attention.

You cite my letters of May 8th and July 25th last year but do not reference mine of February 7th, April 24th, May 22nd, June 6th, June 12th, August 29th, September 7th, November 1st, November 30th, and December 4th – all in 2000- and January 25th 2001. I trust you have them all in your file.

At our meeting last July 25th I was encouraged because although your colleagues did not have answers to all the questions you heard firsthand our community's concerns and promised to give me a written report on all issues with referenced provisions of the Code within 10 days.

Your letter states incorrectly that we all came out of the meeting in July with a consensus on building height and had an agreement on the "structure" issue. You wrote that you were enclosing a highlighted copy of relevant sections of the regulation for my convenience, but there were no enclosures with your letter.

On page two, paragraphs one and three are virtually identical that can only lead to the conclusion the letter was not read before signature. However, there may have been a reason for the repetition but, if so, it escapes me.

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Building Height. At our July meeting I pointed out that the Code states that in our neighborhood the height **shall not** exceed 40 feet measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. However, in those districts in which the height of the building is limited to 40 feet the height of the building **may** be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story. Therefore, the principal regulation uses "shall" which is mandatory and takes precedence; the secondary requirement has "may" which is permissive and requires a deliberate decision by the Zoning Office not to use the more restrictive rule and should be based on some special circumstance. One such situation is a building on a rise or hill where it would be impractical and unfair to measure height from the curb. The lot at 4417 Garfield Street is flat, and the "shall" rule should apply.

It was pointed out during our meeting that permit approvals and compliance inspectors for over 20 years have measured from the "may" grade level to the ceiling of the top story and have never used the "shall" rule. It was pointed out that to change the system now would be difficult to implement and unfair in the future to builders who could not take advantage of the extra height. I stated I understood the reasons, but I did not agree that the law should not be fully enforced. Certainly, there was no consensus although I agree that mode of measurement is in the discretion of the government. One would hope there would be a uniform rationale for using the "may" provision since I suspect the drafters of the regulation had a good purpose in choosing "shall."

Structure. This is defined as, "anything constructed, including a building, the use of which requires permanent location in the ground, or anything attached to something having a permanent location on the ground and including, among other things,..." Some of the illustrations cited in the Code are platforms, retaining walls, gas holders, and bridges. I fail to see why swimming pools, brick pillars, and patios are not considered structures since they clearly have permanent locations in the ground.

The Wesley Heights Overlay District provides that structures may not occupy more than 30% of the lot. 4417 does not meet this test.

The Zoning Office seems to mix up environmental requirements in Section 2503 with structures used to calculate lot occupancy in Section 403.2. Regarding required open spaces, a structure, not including a building, no part of which is more than four feet above the grade at any point may occupy any *yard* required under the provisions of this title. This environmental provision is for light and air and does not waive the

lot occupancy limitations. (If structures under 4 feet don't count then the whole yard could be paved over!)

Greenery. I understand from our meeting that the Zoning Office has never enforced the section of permit applications where the architect must certify the percentages of the lot devoted to building, paved area, and greenery. What value is the requirement to identify percentages if it is meaningless?

Garage. I agree that the Code allows a private garage to be located within the rear yard without conforming to the normal setback rule. However, the garage at 4417 Garfield Street includes an expansion with living space that I believe forfeits the garage exclusion from the required rear yard setback of 25 feet. If developers can add living space to garages and thereby avoid the setback restrictions then the purpose of the regulation is defeated.

The architect's plans, drawn to scale, shows the garage is 17 feet tall which is 2 feet above the height limit. You contend that this may not provide an accurate scale and that an on site measurement in real terms through site inspection *will provide* the true measurement. I agree and infer from this that your inspectors will, in fact, measure the height of the garage at 4417 Garfield Street.

I am puzzled, however, by your statement that these measurements will determine the "habitability of the subject space." I don't see what the height has to do with a garage being used as habitable space.

Cellar. Your letter is silent on one of the major issues with which the community has concern and that I have raised repeatedly. Section 199.1 clearly states that cellars may not have habitable rooms. A basement, on the other hand, is habitable, counts as a floor, and is calculated in the gross floor area. The Garfield house has a cellar with a large recreation room with fireplace, two maids' bedrooms, bath, etc. It has no outside exit door and appears to have only two very small windows. Surely the regulation was drawn with fire emergencies in mind since in subject house there is no escape other than up the interior stairway.

It seems common practice for developers to build a cellar with considerable living spaces, thereby effectively adding GFA and an additional floor in contravention to the Code. 4417 has a cellar that is habitable and, therefore, in violation of the zoning regulations.

4 Permit #B427286 6/6/00

Swimming Pool and Retaining Wall. I pointed out that the original plans and permit for 4417 Garfield do not contain a swimming pool and large, extensive retaining wall. These have been built virtually against the rear lot line. Was a permit issued? Do they encroach on the required rear setback? Do they count as structures for lot occupancy purposes? (I should point out again that the definition of "structure" specifically includes retaining walls.)

Occupancy Permit. I had requested that the government not grant an occupancy permit for the Garfield address until various complaints were settled. I gather this was not honored since a family moved into the house before it was even completed (and still is not finished).

2708 – 44th Street, N.W. After months of complaints by the Wesley Heights neighborhood the government finally in February 1999 found subject property in violation of a number of zoning requirements. However, repeated efforts by the ANC, Wesley Heights Historical Society, and individual neighbors to have the building brought into compliance have been unsuccessful. For two years we have been unable even get a status report on the government's compliance order. I raised this again during our July meeting.

Mr. Noble, I have focused primarily on the project at 4417 Garfield Street, but this is only one example of what is going on throughout Wesley Heights and Spring Valley where there are another half dozen similar situations. Developers know they can build almost anything without fear of the government enforcing zoning regulations, and those of us wishing to maintain the character of the neighborhood are losing the battle.

I remain hopeful that we can reach closure on the disputed property by receiving meaningful explanations of each issue outlined above. Thanks for reading through this letter.

Sincerely,

William E. Timmons

cc: Carlynn M. Fuller, Interim Director
Theresa Lewis, Acting Administrator, BLRA
Michael D. Johnson, Zoning Administrator

Original Mailed 7/18/

3668

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Zoning Administrator

May 18, 2001

William E. Timmons
4426 Garfield Street, NW.
Washington, DC 20007-1142

Dear Mr. Timmons:

Please accept my apology for all errors, misstatements, and omissions evident in my letter of February 5th. Those errors were typographical not intended to mislead or misinform.

For purposes of clarity, let me attempt in this letter to respond to you in a similar format in which your letter was sent, and to reiterate the position of this office on each subject heading.

Building Height:

Section 400.1 of Title 11, the Zoning Regulations, sets the maximum height attainable by buildings or structures in respective zones. Not withstanding, where otherwise specified in this same document, such height may be measured in accordance with specified modes of measurement. Pursuant to Section 199.1 of the Regulations, it is otherwise specified that for districts in which buildings are limited to forty feet (40ft), such height may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story. The subject premises is located in the R-1 district, which limits buildings to 40 feet of height. The mode of measurement of building height, which is provided for as an exception in Section 199.1, does not necessitate such discretionary application of mode of height measurement of buildings or structures as you allude to in your letter. This mode of measurement is uniformly applied as a matter of rule.

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The word "shall" mandates the maximum height attainable in respective zone districts; the word "may" is instructive on how to effect the measurement. Your interpretation merges the generic definition of "Building Height" where the word "curb" is used as a reference point only and the schedule of height limit where the word "shall" is used as a mandatory adverb. Therefore, I believe this office has properly applied the height limit as set forth in the Zoning Regulations with regard to 4417 Garfield Street, NW. Hence no violation on height exists with respect to the principal building.

Structure:

Based on our interpretation of what counts in the percentage of lot occupancy, which is based on the definition of "Building Area" in Section 199.1 of the Zoning Regulations, it is the position of this office that 4417 Garfield Street complies with the limitations of Section 1543.2 of Title 11. Clearly the definition excludes "any projections into open spaces authorized elsewhere in this title" as fences, retaining walls, and structures, which do not exceed four feet (4ft) above grade pursuant to Section 2503.2 are. For similar logical reasons, swimming pools, brick pillars and patios are not computed in percentage of lot occupancy calculations, though I agree with you that they qualify as structures as defined in this Title.

I agree that Section 2503.2, which permits structures no higher than four feet from grade at any point, to occupy any yard, seemingly implies possibility of 100% lot coverage. However, this argument is refuted by the limitation placed on such encroachments by the definition of "Yard" provided for in Section 199.1 of the same title. Such encroachment is limited to fifty percent (50%). The definition of "Yard" as provided for in the aforementioned section is as follows:

> Yard – An exterior space, other than a court, on the same lot with a building or other structure.
> A yard required by the provisions of this Title shall be open to the sky from the ground up, and shall not be occupied by any building or structure, except as Specifically provided in this title. No building or

structure shall occupy in excess of fifty percent (50%) of a yard required by this title.

Greenery:

Please refer to Section 2503.1, which provides that required yards be unobstructed and open to the sky from ground up, unless otherwise specified. Certainly, patios and in ground swimming pools cannot be deemed obstructions above grade, or that where provided, constitute an impediment to the openness of the sky. The value of the greenery percentage request in the building permit application informs the Environmental Department about the soil and erosion control measures that may be necessary as a function of the size of lot upon which a proposal is requested. It should be noted in the Wesley Heights Overlay zone, there are no applicable mandatory requirements for greenery. It is instructive that in the University Terrace/Chain Bridge Overlay district, the Regulations impose an impervious surface to lot ratio limit (Refer to Section 1567.2).

Garage:

A private accessory garage conforms to setback rules that apply when placed within a required rear yard, provided it is in strict adherence to the provisions of Section 2300.2(a) and (b) of the Zoning Regulations.

2300.2(a) and (b) allows a private accessory garage to locate within a rear yard or a side yard and to be set back a distance 12 feet measured from the centerline of an alley it abuts, if any. Section 2500.2 mandates all other accessory structures to be located within a rear yard. An accessory building can be so designed as to serve multiple functions, so long as those functions constitute uses that are customarily incidental to the principal residential use. A pool house, such as proposed at 4417 Garfield even when designed as an extension of a proposed private garage structure, is a use that is recognized as being customarily incidental to the principal use. Field verification of the height of the accessory structure indeed confirms your position that the structure exceeds the fifteen feet (15ft) maximum allowed an accessory structure.

This office will embark on an abatement solution and inform you of such at the commensurate time of final abatement action.

Cellar:

The term "Habitable Room" as defined in the Zoning Regulations only deals with such rooms in an enclosed space as would be devoted to bedrooms for sleeping or living purposes.. Your interpretation would virtually render "corridors, hallways, laundries and bathrooms" on floors at or above the main level "inhabitable rooms" because this definition excludes these spaces. Clearly, that is not the intent of the definition. Cellars, which conform to the minimum requirements for light, ventilation and headroom height stipulated in the building codes (Refer to 1996 BOCA, Chapter 12) could be habitable and occupiable space. Please refer to Sections 1202.1, 1204.1 and 1205 of the 1996 BOCA Codes. The BOCA codes, in section 502.0, define a basement as "that portion of a building which is partly or completely below grade". Clearly this definition includes a cellar which in the Zoning Regulations is defined as "that portion of a story, the ceiling of which is less than four feet (4ft) above the adjacent finished grade" This definition does not reflect upon the habitability or occupiability of such space other than what is stipulated in the Building Codes.

Your interpretation is faulty on context because it merges the definition of "Habitable Room" and "Cellar" without reference to the Building Codes' position on the habitability or occupiability of space.

Swimming Pool and Retaining Wall:

This work was granted under Permit # B427286 issued June 6, 2000.

Occupancy Permit:

Pursuant to Section 3203.1, a certificate of occupancy is not required for use of a building as a single-family dwelling.

I applaud your tenacity and perseverance in pursuit of your civic duty and apologize because I recognize our office's responsiveness may not always have been timely and adequate.

The Department has erred in issuing a permit to 4417 Garfield Street, NW only with regard to the height of the accessory structure. Pursuant to Section 3100.2 of the Zoning Regulations, this decision can be challenged through an appeal to the Board of Zoning Adjustments.

With respect to 2708 – 44th Street, NW, I am sure you can appreciate that the wheel of due process is often slow, but rest assured that I would inform you in the event of substantive movement in our Compliance Enforcement Division, where abatement remedy is still being pursued.

Respectfully,

Toye Bello, Chief
Zoning Review Branch

TB/er
4417garfieldstnw

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

Office of the Director

COPY

December 21, 2001

The Honorable Kathy Patterson
D.C. Councilmember, Ward 3
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: William Timmons
2708 44th Street, N.W
4417 Garfield Street, N.W.

Dear Councilmember Patterson:

I am informed that the Zoning Division has constructively engaged Mr William Timmons over the two referenced properties and has provided written interpretations of the Zoning Regulations as they apply to numerous elements of the construction of two new single family dwellings at each site respectively.

The Zoning Office contends that it has fully provided Mr. Timmons with an explanation of the applicability of the zoning regulations to all his questions regarding construction at the referenced sites, but concedes two outstanding issues, one at each respective property.

Although Mr. Timmons disagrees with the interpretations provided by the zoning office in all respects, following are what I understand to be the outstanding issues at each subject premises:

1. 2708 44th Street, N.W.

   Subsequent to the issuance of a revised building permit, the attic space of a new single family dwelling under construction was converted for purposes of human habitation, thereby constituting a fourth story, in violation of the three (3) story limitation of the Zoning Regulations. For a combination of reasons, this permit was inadvertently issued to the builder/developer, who then, on good-faith reliance on said permit, built out the attic space. This property was subsequently sold to the current occupants of the property.

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941 North Capitol Street. N.E., Suite 9500. Washington. D.C. 20002
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Copies — sent copy to Timmons

2. 4417 Garfield Street, N.W.

An accessory structure was constructed to a height of seventeen (17) feet in excess of the height limitation of fifteen (15) feet, as prescribed by the Zoning Regulations. This permit was also inadvertently issued to the builder/developer who has since sold the property to the current occupant.

My understanding is that both of these issues present a quandary of retroactive enforcement. I also understand that case law may not be kind to the ability of the Department to force enforcement action upon a construction carried to completion on a construction permit duly issued by the government, even if issued in error, provided such permit was not obtained on false information.

I am having the Zoning Administrator, in conjunction with our General Counsel evaluate this very issue and provide a determination in no later than two-weeks from the date of this letter. I will instruct Toye Bello to inform Mr. Timmons of the decision of the general counsel as soon as it is available.

I assure you that the Department will continue to strive towards an error-free environment and vigorously enforce the Zoning Regulations to the maximum permitted by law.

Respectfully,

David A. Clark
Director

Cc: Theresa Lewis
J. Gregory Love
Denzil Noble
Toye Bello
William Timmons

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Building and Land Regulation Administration
Office of the Administrator

February 26, 2002

Mr. William E. Timmons
4426 Garfield Street NW
Washington, D.C. 20007

Dear Mr. Timmons:

This letter is in response to your inquiry regarding Wesley Heights community to have the government enforce the zoning regulations on two subject properties, 2708-44th Street, N.W. and 4417 Garfield Street, N.W. I am informed that the Zoning Division has constructively engaged you over the two reference properties and has provided written interpretations of the Zoning Regulations as they apply to numerous elements of the construction of two single family dwellings at each site respectively.

My understanding is that both of these properties present a quandry of retroactive enforcement. I also understand that case law may not be kind to the ability of the Department to force enforcement action upon a construction carried to completion on a construction permit duly issued by the government, even if issued in error, provided such permit was not obtained on false information.

The Zoning Office provided you with an explanation of the applicabillity of the zoning regulations to all your questions regarding construction at the reference sites. Although you disagreed with the interpretations provided by the zoning office, the Department will continue to strive towards an error-free environment and vigorously enforce the Zoning Regulations.

Thank you for your time and patience concerning this issue. If you have any further questions, please contact Robert Henry, Special Assistant, Building and Land Regulation Administration, at (202) 442-4677.

Sincerely,

J. Gregory Love
Administrator, BLRA

cc: Robert Henry
#113340

941 North Capitol Street, N.E., Suite 2000, Washington, D.C. 20002
Phone: (202) 442-4455 Fax: (202) 442-4863

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William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

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2003 MAY 19 PM 4:54

1 March 2002

Mr. J. Gregory Love
Administrator, BLRA
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Love:

Thank you for your letter dated February 26th about failure of the District of Columbia government to enforce the zoning regulations.

Because of identical language, it appears your letter was drafted by the same zoning staff that prepared DCRA Director Clark's response to Councilmember Kathy Patterson on 21 December 2001. I wrote Mr. Clark on 2 January 2002 (copy enclosed) with important background on the two properties in question. I have not received a reply or even an acknowledgement even though on 15 February Councilmember Patterson wrote Mr. Clark requesting he respond and take appropriate action.

I need to point out that the Zoning Division has not, as you allege, "constructively engaged," "provided written interpretations of the Zoning Regulations," or "provided you with an explanation of the applicability of the zoning regulations to all your questions." I requested information from Mr. Toye Bello on 30 May 2001 (copy enclosed) and despite repeated follow-ups have received no reply.

The purpose of my January letter to Mr. Clark was to make him aware that the government was alerted to zoning violations at 2708-44th Street and 4417 Garfield Street during the initial stages of construction so there was ample opportunities to bring the buildings into compliance. In the case of the 44th Street property the developer also was given notice by the ANC and Historical Society that he had to comply with the appropriate regulations.

You point out legal difficulties in enforcing the law retroactively unless the building permit was obtained on false information. I call your attention to Mr. Armando Lourenco's 18 June 1999 letter to the developer of the 44th Street site that the permit contained inconsistencies that contributed to the government's approval and stated that the submitted plans were inaccurate. Mr. Lourenco wrote that if rebuttal or

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

6 March 2001

Mr. Denzil L. Noble
Deputy Administrator
Building and Land Regulation Administration
Department of Consumer and Regulatory Affairs
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Noble:

I would be grateful if you could respond to my reply of February 15th to yours dated February 5th. A copy of my letter is enclosed in case you misplaced the original.

I am anxious to have answers to the several questions I raised. As you know, efforts to receive plausible explanations for what appears to be gross violations of the zoning regulations have gone on for many months.

Thank you.

Sincerely,

William E. Timmons

cc: Carlynn M. Fuller, Interim Director
Theresa Lewis, Acting Administrator, BLRA
Michael D. Johnson, Zoning Administrator

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

21 March 2002

Mr. David A. Clark
Director
Department of Consumer and Regulatory Affairs
Suite 9500
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Clark:

Reference my letters of 2 January and 15 February regarding violations at 2708-44th Street, N.W. and 4417 Garfield Street, N.W. I will be grateful if you could respond to the issues raised in those communications.

There is another matter I bring to your attention about the property at 4417 Garfield Street in addition to the illegal structure with which you already are familiar.

According to the tax records of the District of Columbia this property has a land area of 9,000 square feet and building area of 6,995 square feet. Provisions of the Wesley Heights Overlay District limit livable floor space in a residence to the sum of 2,000 square feet plus 40 percent of the area of the lot. The first 600 square feet of a garage is not counted in the calculation. Therefore, 40% of 9,000 = 3,600 square feet plus the base 2,000 and 600 for the garage result in a total permitted usage of 6,200 square feet. So, this site is almost **13** percent (**795** square feet) over the amount allowable under the Wesley Heights Overlay.

I trust you will instruct the Zoning Office to enforce the law by bringing this project into compliance.

Sincerely,

William E. Timmons

William E. Timmons

cc: Honorable Kathy Patterson
Chair, ANC 3-D
President, Wesley Heights Historical Society

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

15 February 2002

Mr. David A. Clark
Director
Department of Consumer and Regulatory Affairs
Suite 9500
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Mr. Clark:

Six weeks ago, on January 2nd, I wrote you a 15-page letter detailing efforts by the Wesley Heights community to have the government enforce the zoning regulations on two properties that after years of effort finally were admitted to be in violation by the DCRA.

In that letter responding to yours of December 21st I pointed out that you were misinformed about Mr. Bello's having "fully provided Mr. Timmons with an explanation of the applicability of the zoning regulations to all his questions." Mr. Bello still has not answered mine of May 30th although I have written him many times. I provided you with a copy of his May 18th letter as well as my request for information.

I pointed out in my January letter that the DC government was alerted by the ANC and Historical Society that the properties were in non-compliance before construction was well underway, so there was ample time to correct the projects. In one case the developer was notified early about violations of zoning regulations.

I remain hopeful that you will provide a detailed response to my January letter and that Mr. Bello will reply to mine of 30 May 2001.

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Sincerely,

William E. Timmons

cc: Honorable Kathy Patterson
Eleanor Roberts Lewis, Chair ANC 3-D
George E. Watson, Wesley Heights Historical Society

Doris

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

29 August 2002

DCRA
OFFICE OF THE
GENERAL COUNSEL
2002 AUG 35 A 10:42
DOC. NO.
ENTERED

Doris Parker-Woolridge, Esquire
Office of the General Counsel
DCRA
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Ms. Parker-Woolridge:

I hope by the time you receive this you will have fully recovered from the automobile accident and in good health and spirits. I can't tell you how happy I (and our ANC and Historical Society) am that a responsible and dedicated attorney is showing sincere interest in resolving outstanding issues in the Wesley Heights area. It has been a long and frustrating journey trying to deal with the Zoning Office, and it now looks like there is light at the end of the tunnel. Hooray for the good guys!

2708 – 44th Street, N.W.

I believe this property violates several zoning regulations of the Wesley Heights Overlay, not just the finished attic. However, I suspect it serves little purpose to raise these issues again. Mr. Bello was involved in the initial approval of this project.

Your inspector reports that the attic is not used as livable space and therefore doesn't count as a story, is not included in building height, and the space not calculated as gross floor area. This analysis seems strange to me. What is to prevent some future owner from easily converting the attic to livable space?

The original computation shows gross floor area of 5,744 square feet, but you will see from the enclosed advertisement that it was sold as containing over 7,000 square feel including 5-7 bedrooms.

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Time and time again I have called the Zoning Office's attention to a mysterious incident regarding this property. On 11 June 1999 I went to the Office of Records Management in an effort to purchase copies of the revised architectural drawings for this construction. They were not there, and I was referred to the Central File Office. People there were not

able to locate the file on the office's computer. However, a courteous and helpful employee went through a series of loose-leaf books and did find a reference to it. The plans were not available because they were signed out by a Mr. Wayne Bowie and not returned. Who is Wayne Bowie I asked? Nobody seemed to know. Would he have been an employee of the DC government? Probably, I was told because nobody else can remove master file documents, only copies. Were they going to try to get them back I inquired? Since they didn't know Wayne Bowie they said it would be impossible to get them back. The staff brought in the supervisor who said all this was very unusual. I did some sleuthing and found that Mr. Bowie was employed by the developer of the subject property! Now the question arises why did the Central file Office allow a private citizen to remove the only copy of the plans? Why did the developer want the permanent office file when he and the architect surely had dozens of extra copies? No government official has ever expressed the slightest concern over this incident.

4417 Garfield Street, N.W.

I am pleased that at long last the government is going to enforce the height limit on the garage at this site. This violation was pointed out in writing and in a personal meeting with Mr. Johnson, Mr. Noble, and Mr. Bello before construction was finished when there was time to correct the situation. Mr. Bello, particularly, was adamant the garage was in compliance.

Doris, it would be extremely helpful to the ANC, Wesley Heights Historical Society, and individual neighbors if your office would take a hard look at the language of the regulations – independent of the Zoning staff – about four issues that we have been unable to receive clear answers.

Question: Are cellars, as opposed to basements, habitable spaces? NO If the answer is yes, do they count as a story and in the gross floor area?

Regulation: Section 199.1 states that a cellar is "that portion of a story, the ceiling of which is less than four feet (4 ft) above the adjacent finished grade." A basement is "that portion of a story partly below grade, the ceiling of which is four feet (4 ft) or more above the adjacent finished grade." A habitable room is "an undivided enclosed space used for living, sleeping, or kitchen facilities. The term habitable room shall not include attics, cellars, corridors, hallways, laundries, serving or storage pantries, bathrooms, or similar space..." The regulation also states that, "For the purpose of determining maximum number of permitted stories, the term 'story' shall not include cellars, stair or elevator penthouses, or other roof structures..."

In addition to the Zoning Regulations, Title 14, Section 404.1 of the Housing Regulations states that, "Any room with more than fifty percent (50%) of any exterior wall area from floor to ceiling below ground level (using average level along each exterior wall) shall not be used as habitable room..."

Question: Can accessory building garages located within a rear yard setback contain habitable space? If the answer is yes, what is the restriction on the amount of livable space permitted?

Regulation: Section 204.1 – The following buildings shall be permitted as accessory building in R-1 districts incidental to the uses permitted in this chapter: (a) Private garage, subject to the special provisions of chapter 23;..." Section 2300.2 – "A private garage that is an accessory building in a Residence district shall be subject to the following special regulations in regard to its location: (a) It may be located either within a rear yard or beside the main building; Provided, that if the garage is located beside the main building, it shall be removed from the side lot line a distance equal to the required side yard and from all building lines a distance of not less than ten feet (10 ft). Section 2300.3 has a special provision – with limitations – to permit an artist studio in a private garage that is an accessory building. Also, Section 2500.5 provides, "In an R-1-A or R-1-B district, an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building." There are restrictions for this use; for example in 2500.6 it "shall not be located within the required rear yard."

Note: To allow habitable space in garages in rear yard setbacks makes a mockery of the regulation that does not permit it.

Question: Must the Zoning Office have legitimate reason to measure the height of a residence building from grade to the ceiling of the top story rather than the curb to the highest point of the roof?

Regulation: In Section 400.1 of Title 11 it is mandated a residence building **shall not** exceed 40 feet in height and 3 stories tall in districts R-1 through R-5-A. Section 199.1 provides that the vertical distance be "measured from the level of the curb opposite the middle of the front of the building to the highest point of the roof of parapet." In those districts in which the height of a building is limited to forty feet there is an exception that provides the measurement **may** be from the finished grade level at the middle of the front of the building to the ceiling of the top story.

It is instructive that in Section 199.1 regarding building height there are five explanatory paragraphs for different circumstances: one uses "may," three use " shall," and another uses both "may" and "shall".

Note: The differences between shall and may are obvious and intentional by the drafters of the regulations. Therefore, it appears the Zoning Office is required to make a case-by-case determination to use the "may" provision depending on circumstances.

Question: Are swimming pools, patios, and retaining walls considered "structures" and therefore counted in lot occupancy?

Regulation: A Structure is defined as "**anything** constructed, including a building, the use of which requires permanent location in the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands, platforms, flag poles, tanks, bins, gas holders, chimneys, bridges, and retaining walls." The Wesley Heights Overlay District, Section 1543.2, provides "**No structure**, including accessory buildings, shall occupy an area in excess of thirty percent (30%) of the lot..." but there are exceptions for lots smaller than 6,667 square feet.

Note: The Zoning Office relies on Section 2503.2 regarding projections into open spaces that do not exceed four feet above grade as not constituting "structures." However, this is an environmental section for open spaces to allow light, air, and water and has nothing to do with lot occupancy. If the regulation drafters meant to exclude structures under four feet they would have written it into the principal section of "**anything** constructed." Theoretically, I suppose an owner could cement over his entire yard under the Zoning Office's position.

Thanks again for your continuing interest in these important issues to the District of Columbia.

Sincerely,

Bill

William E. Timmons

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

23 October 2002

Doris Parker-Woolridge, Esquire
Office of the General Counsel
DCRA
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Ms. Parker-Woolridge:

It has been three weeks since I last wrote you requesting replies to my letters of 29 August, 9 September, and 24 September about failure to enforce illegal construction at 2708 – 44th Street, N.W. and 4417 Garfield Street, N.W. In my letter of 2 October I enclosed copies of previous correspondence for your information.

I remain interested in receiving substantive replies. Thank you.

Sincerely,

William E. Timmons

William E. Timmons

cc: David A. Clark, Director, DCRA
John Finney, Chairman ANC3-D
George Watson, President, Wesley Heights Historical Society

Mr. Clark, appreciate any help with this.

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GENERAL COUNSEL

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William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

23 October 2002

Doris Parker-Woolridge, Esquire
Office of the General Counsel
DCRA
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

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Sincerely,

William E. Timmons

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cc: David A. Clark, Director, DCRA
John Finney, Chairman ANC3-D
George Watson, President, Wesley Heights Historical Society

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

Office of the General Counsel

November 7, 2002

Mr. William E. Timmons
4426 Garfield Street, N.W.
Washington, D.C. 20007-1142

Re: 2708 44th Street, N.W. and 4417 Garfield Street, N.W.

Dear Mr. Timmons:

This is in response to your letter dated October 23, 2002, addressed to the Office of the General Counsel, requesting a response to your earlier letters regarding zoning violations at the above-referenced properties. As you are aware, the Department of Consumer and Regulatory Affairs had conducted several inspections of these properties to ascertain compliance with applicable zoning regulations. The most recent inspection was completed on November 3, 2002.

The Building and Land Regulation Administration is currently reviewing the report of this last inspection and we should have a recommendation for proposed action within the next few days. If you would please bear with us for a few more days, we will give you a detailed response by the end of next week.

Sincerely,

Grant G. Moy, Jr.
Deputy General Counsel

cc: Ms. Doris Parker-Woolridge

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941 North Capitol Street, N.E., Room 9400, Washington, D.C. 20002
Phone: (202) 442-8475 Fax: (202) 442-9447

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

Office of the General Counsel

NOV 21 2002

William E. Timmons
4426 Garfield Street, N.W.
Washington, D.C. 20007-1142

RE: Complaints concerning the property at 4417 Garfield Street, N.W

Dear Mr. Timmons:

This letter is in response to your letters dated August 29, 2002, October 2 and 23, 2002, concerning the property at 4417 Garfield Street, N.W. Your October 2 and 23, 2002 letters referenced a letter dated September 24, 2002, which was not received by the Department of Consumer and Regulatory Affairs (Department). In the letter dated August 29, 2002, you expressed some frustration in dealing with the alleged zoning violations at the above referenced address. You alleged that there were several zoning violations at the subject premises located in the Wesley Heights Overlay district.

Contrary to your belief, the Department took your allegations seriously, and scheduled several inspections of the premises. The inspections revealed that the premises at 4417 Garfield is a single-family dwelling located in the Wesley Heights Overlay district and a R-1-B district. The garage is considered an accessory building, and such structure cannot exceed one (story) or fifteen feet (15 ft.) in height. The inspection also revealed that the height of the garage was sixteen and one-half (16-1/2) feet in height, which is one and half feet over the maximum allowable height. Based on these findings, the owner was cited for violation of Title 11 DCMR 2500.4. Section 2500.4 provides: "An accessory building in any district shall not exceed one (1) story or fifteen feet (15 ft.) in height."

The Department will address the four questions raised in the August 29, 2002 letter as follows:

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Question 1. **Are cellars, as opposed to basements, habitable spaces? If the answer is yes, do they count as a story and in the gross floor area?**

The response to question 1 is No. A cellar is not a habitable room pursuant to 11 DCMR 199. Section 199 provides in part: "... The term habitable room shall not include, cellars..."

941 North Capitol Street, N.E., Room 9400, Washington, D.C. 20002
Phone: (202) 442-8475 Fax: (202) 442-9447

Question 2. Can accessory building garages located within a rear yard setback contain habitable space? If the answer is yes, what is the restriction on the amount of livable space permitted?

The response to question 2 is No as to the subject property. The subject garage is not constructed as a habitable space. A garage is an accessory building to the main building which shall not exceed one (1) story or fifteen feet (15 ft.) pursuant to 11 DCMR 2500.4. However, in a R-1-B district, an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building pursuant to 11 DCMR 2500.5. A two (2) story accessory building allowed under Section 2500.5 shall not exceed twenty feet (20 ft.) in height, and shall not be located within the required rear yard pursuant to 11 DCMR 2500.6.

Question 3. Must the Zoning office have legitimate reasons to measure the height of a residence building from grade to the ceiling of the top story rather than the curb to the highest point of the roof?

The response to question 3, is that the Zoning office must follow the zoning laws and regulations in a R-1-B district. If the requirements for measuring the height of the structure are not followed in accordance with the zoning regulations, the matter must be referred to the Board of Zoning Adjustment. In accordance with 11 DCMR 199.1, the Zoning Administrator would measure the height of the vertical distance from the level of the curb opposite the middle of the front of the building to the highest point of the roof or parapet. Also, in those districts such as R-1-B in which the height of building is limited to forty feet (40 ft.), the height of the building may be measured from the finished grade level at the middle of the front of the building to the ceiling of the top story.

Question 4. Are swimming pool, patios, and retaining walls considered structures" and therefore counted in lot occupancy?

The response to question 4 is No. The inspection revealed that the subject property does not have a retaining wall and patio, therefore, these items are not an issue. The inspection also revealed that the swimming pool is below grade level (in ground pool), therefore the swimming pool is not an issue. The inspection and the plans indicated that the swimming pool at the subject premises is not considered a structure, and therefore, was not included in the lot occupancy pursuant to 11 DCMR 199.1 and 2503.2. Section 199.1 provides in part:

> "A *structure* is anything constructed, including a building, the use of which requires permanent location on the ground, or anything attached to something having a permanent location on the ground and including, among other things, radio or television towers, reviewing stands,

platforms, flag poles, tanks, bins, gas holder, chimneys, bridges, and retaining walls..."

Section 2503.2 provides in part that:

"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. Any railing required by the D.C. Building Code shall not be calculated in the measurement of this height."

On November 4, 2002, the Department served the owners with a Notice of Violations and Notice to Abate the zoning violations. Agency Counsel had numerous conversations and conference calls with the owners of the premises. On November 19, 2002, a meeting was held with the owner and architect. The owners are cooperating with the Department, they too want to bring the structure into compliance with the zoning laws of the District of Columbia.

If you have any questions, you may contact me at (202) 442-8475

Sincerely,

Doris A. Parker-Woolridge
Agency Counsel

David A. Clark, Director, DCRA
Denzil Noble, Acting Administrator, BLRA
Theresa Lewis, Deputy Director for Operations and Chief of Staff
Robert Kelly, Zoning Administrator
Grant Moy, Deputy General Counsel, OGC
Karen M. Edwards, General Counsel, OGC
Mr. & Mrs. William Miller

DCRA
OFFICE OF THE
GENERAL COUNSEL

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DCRA NO. _____

William E. Timmons
4426 Garfield Street, N.W.
Washington, DC 20007-1142

2 October 2002

Doris Parker-Woolridge, Esquire
Office of the General Counsel
DCRA
Suite 2000
941 North Capitol Street, N.E.
Washington, DC 20002

Dear Ms. Parker-Woolridge:

I would very much appreciate replies to my letters of 29 August, 9 September, and 24 September about failure to enforce illegal construction at 2708 – 44th Street, N.W. and 4417 Garfield Street, N.W. You will recall that after years of complaints by the ANC, Historical Society, and Citizens Association the government finally – and I think reluctantly - found both properties in non-compliance.

I am enclosing copies of earlier communications to refresh your memory of efforts by citizens and their elected representatives to enforce the zoning regulations.

Sincerely,

William E. Timmons

Enclosures

Cc: Honorable Kathy Patterson
John Finney, Chairman ANC3-D
George Watson, President, Wesley Heights Historical Society

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