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December 12, 2003

D.C. ZONING COMMISSION
2003 DEC 12 AM 11:31

Jerrily R. Kress, FAIA
Director
Board of Zoning Adjustment
441 4th St., N.W., Suite 210-S
Washington, D.C. 20001

Re: BZA Appeal No. 17066 (4624 Brandywine St., N.W.)

Dear Director Kress:

This letter is submitted in response to the December 10, 2003, submission of intervenors John Walsh and Linda Jewell, entitled "Motion for Summary Judgment to Deny the Appeal." We would appreciate your making this letter available to the Board in advance of the hearing scheduled for December 16, if possible.

1. "Summary Judgment" is Improper in This Case

The Walsh-Jewells argue that the Board should follow the complex summary judgment rules of the Federal Rules of Civil Procedure and, on that basis, deny the appeal without a hearing. The Board of Zoning Adjustment Rules of Practice and Procedures provide for no such process, however. The long-scheduled hearing in this appeal is certainly reasonable in view of the importance of the issues to be discussed and considered.

Indeed, this appeal would be particularly inappropriate for the type of truncated consideration urged by intervenors, in light of the fact that the intervenors' addition is opposed by every adjacent neighbor – by the neighbors on both sides of the property and by the rear-yard neighbor.[1]

2. Section 405.8 Does Not Authorize Substandard Side Yards For Additions

While relying on "the clear language of the regulation," intervenors never actually quote the provision that supposedly authorizes a substandard side yard. That is understandable. Section 405.8 – as discussed in the memorandum accompanying the appeal in this case – refers only to "the width of the *existing* side yard" (emphasis added), and says nothing one way or another about the side yard of any addition that is built pursuant to that section.

To avoid the effect of that language, intervenors refer to a July 6, 1976, memorandum from the Municipal Planning Office to the D.C. Zoning Commission, which they erroneously label "legislative history." Intervenors do not cite any authority for their view that the interpretation of Section 405.8

[1] See letter of Edward F. Gerber to Jerrily R. Kress, Nov. 28, 2003 (opposition of rear-yard neighbor to addition based on impact upon light, air, noise, and loss of privacy).

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should be governed by an unpublished internal agency memorandum, let alone by illustrations attached to such a memorandum.[2] Nor could intervenors do so.

The District of Columbia Zoning Regulations set out the rules for their own interpretation, and those rules make no reference to such hidden sources. (It is not even clear that the memorandum was in any way connected with the process that led to the adoption of Section 405.8, since the annotations to the Zoning Regulations make no reference to amendments to the section in that time frame.[3]) Rather, Section 101.1 makes clear by its terms that any ambiguity in the Zoning Regulations must be resolved in favor of providing "adequate light and air" and avoiding "overcrowding of land."

3. Section 2001.3 Must Govern in the Event of Any Conflict with Section 405.8 in This Case

Intervenors concede that "Section 2001.3 would preclude an extension of a nonconformity, *i.e.*, prevent the construction of an addition that would continue the nonconforming 5.1 side yard. . . ." Intervenors' Motion p. 7.

They argue, however, that Section 2001.3 and Section 405.8 are in conflict, and that Section 2001.3 must therefore give way. In truth, the two provisions are not in conflict: Section 2001.3 forbids the extension of the nonconformity, and Section 405.8 does not authorize it.

But even assuming there were a conflict, the approach urged by intervenors – giving effect to the less protective regulation and disregarding the more protective one – is exactly the opposite of what proper interpretation requires. As noted, Section 101.1 mandates that such a conflict must be resolved in favor of providing *more* protection to "adequate light and air" and *more* protection against "overcrowding of land," not less.

4. The Reasoning in *Pritchard* Is Applicable Here

Intervenors argue that the Board's analysis in *Appeal No. 16811 of David and Janet Pritchard* (Oct. 15, 2002) is inapplicable to this case and that the *Pritchard* decision has been invalidated by a later order of the Board in any event. Both arguments are meritless.

The difference between this case and *Pritchard* is that the property at issue here is in an R-1-B zoning district, while the property in *Pritchard* was in an R-4 district in which row dwellings may be constructed as a matter of right. The homeowners sought to build an addition onto an existing dwelling. The homeowners had a colorable argument that their right to build a row dwelling overrode the side yard setback requirement. The Board, relying on close analysis of the regulatory provisions and the overall rules of interpretation in Section 101.1, held that the side yard setback requirement must prevail. The Board specifically noted that the required eight-foot side yard must be maintained throughout the rear portion of the property despite the front of the property having a nonconforming side yard. In the present appeal, where the property owners do not have the "row dwelling" argument that was available to the homeowners in *Pritchard*, the reasoning of the Board in *Pritchard* has even greater force.

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[2] As it happens, the *text* of the memorandum is not in conflict with appellants' position. Like the regulation itself, the memorandum refers only to the "existing side yard" – unlike the memorandum's analysis of the *rear* yard requirement, which explicitly states, "This proposed amendment would allow the expansion of such buildings in residential districts into a required rear yard if the expansion is limited to that portion of the rear yard which was included in the building area in 1958." Memorandum p. 4.

[3] As reproduced in unofficial form at http://dcoz.dc.gov/info/reg/chapter4_pdf.shtm.

Contrary to intervenors' suggestion, the analysis in *Pritchard* was not cast aside by the Board in *Appeal No. 16935 of Southeast Citizens for Smart Development* (Sept. 8, 2003). Indeed, it is not very plausible that the Board would have reversed a unanimous decision less than eleven months following that decision, and with no change in the Board's membership. *Southeast Citizens for Smart Development* involved the question of whether new semi-detached dwellings are required to have one side yard or two side yards. The Board reasonably held that a semi-detached dwelling, by definition, has only one side yard. The Board incidentally stated that "[t]o the extent *Pritchard* suggests otherwise, it is overruled." But nothing in the Board's analysis undermines the reasoning of *Pritchard.* Moreover, the Board in *Southeast Citizens for Smart Development* reaffirmed the overall rule of interpretation that favors the assurance of light and air:

> SCSD's interpretation of § 405 would, in effect, require two side yards instead of one whenever a semi-detached dwelling has a lot line wall instead of a common division wall. As pointed out by DCRA, this interpretation would also foster the development of row dwellings – which have no side yards – instead of semi-detached dwellings. This outcome is not logical if the underlying policy favoring side yards is to assure light, air and safety.

Conclusion

For the above reasons, and for the reasons set out more fully in the memorandum accompanying the appeal, appellants respectfully request that the Board deny the intervenors' motion for summary judgment and cancel the permit following a hearing.

Respectfully submitted,

Judy Brinckerhoff

Clarke Brinckerhoff

Susan Buck

David Price