

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

Office of the General Counsel



May 23, 2005

BY FACSIMILE AND MAIL

Mr. Geoffrey Griffis
c/o Ms. Jerrily Kress
441 Fourth Street, N.W, Suite 210S.
Washington, D.C. 20001

Re: *In the Matter of Patrick J. Carome*
BZA Appeal No. 17285

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Dear Mr. Griffis:

At the public hearing on May 3, 2005, the Appellant requested that the Board of Zoning Adjustment (BZA) require the appearance of the Zoning Administrator, Toye Bello, for the purpose of cross examination. The Appellant, Patrick Carome, argued that he had not been able to cross examine the Zoning Administrator (ZA) on the substance of the PowerPoint presentation used to accompany his oral testimony. The Board agreed with the District of Columbia that Mr. Bello did not need to appear again at the public hearing for further cross examination on a demonstrative visual aid. However, as a courtesy to appellant, the Board granted leave to the Appellant to submit five written questions as cross examination on the PowerPoint presentation *only*. The questions were submitted to the ZA on May 12, 2005, with responses due on May 17, 2005. Due to other time commitments, the ZA requested additional time to respond to the questions. The new deadline is today, May 23, 2005.

Attached please find the ZA's responses to the five questions. The District views the cross examination questions in the same light as testimony elicited through cross examination at the hearing. Accordingly, the same obligations and rules of evidence apply. Therefore, the District has objected to any questions to which Mr. Bello already has provided responses in that the questions are duplicative. The District also has objected to questions seeking information beyond the scope of Mr. Bello's prior testimony. Moreover, to the extent the questions raise hypothetical facts, refer to information upon which Mr. Bello did not testify or rely upon assumptions presented in the Appellant's case, a response was not provided.

BZA

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

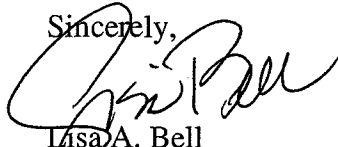
Board of Zoning Adjustment
District of Columbia
CASE NO. 17285
EXHIBIT NO. 89

Case No. 17285
Exhibit No. 89

Letter to G. Griffis
May 23, 2005
Page 2.

The District reminds the Board and the parties that the PowerPoint presentation was a demonstrative visual aid. It was intended to highlight Mr. Bello's testimony. It did not raise issues, information or facts which were not part of his oral testimony

We hope the Board finds this additional information helpful.

Sincerely,

Lisa A. Bell
Senior Counsel

cc: Toye Bello
Zoning Administrator

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
OFFICE OF THE ZONING ADMINISTRATOR**



May 23, 2005

BY FACSIMILE AND MAIL

Mr. Geoffrey Griffis
c/o Ms. Jerrily Kress
441 Fourth Street, N.W, Suite 210S.
Washington, D.C. 20001

Re: *In the Matter of Patrick J. Carome*
BZA Appeal No. 17285

Dear Mr. Griffis:

I have been asked to answer the following questioned posed by the Appellant, Patrick Carome. My answers are as follows:

1. Does the last sentence of the Zoning Code' definition of "yard" (quoted on page 6 of your PowerPoint presentation¹) limit the percentage of the required yard that may lawfully be occupied by a structure that qualifies as a "fence or retaining wall" that satisfies 11 DCMR § 2503.3? Please answer yes or not if possible, and please explain the basis for your answer (Footnote omitted).

Response: I don't believe this is a "yes" or "no" answer. The zoning regulations clearly intended to treat fences and retaining walls and, for that matter, stairs leading to the ground from the principal entrance of the building, separately from the type of structure of interest in Section 2503.2. It can only be reasonably concluded that if the zoning regulations intended to treat all structures meeting the broad definition for "structure" as set forth in Section 199.1, similarly, the existence of section 2503.2 obviates the necessity for Sections 2503.3 and 2503.4.

It should be noted that the pre-occupation of the proposed amendments to the Zoning Regulations in the Zoning Commission Case #76-15 was not with fences and retaining walls, which were already permitted to occupy any required yard. Instead, the pre-occupation was with the loophole within the definition for "yard" which up until then, allowed the occupancy of one hundred percent (100%) of a lot, including all required yards, by buildings and structures, provided the buildings and structures were below the

¹ / This sentence reads as follows: "no building or structure shall occupy in excess of fifty percent (50%) of a yard required by this title." 11 DCMR 199.1.

level of the main floor (see attached memorandum dated 9/1/76 from the Municipal Planning Officer, Ben W. Gilbert, to the Zoning Commission).

This preoccupation is further illustrated by the attached graphic illustrations, which are excerpts from the ZA Case No. 76-15, depicting the pictorial intent of the proposed amendments. Clearly, the fence is illustrated to encompass and shown to ring the entirety of the required side and rear yard. It is of note that the required rear yard is measured from the end of the building line to the rear lot line. A property, however, could conceivably have excess rear yard beyond that which is restricted as it pertains to the types of structures which may occupy such yard.

It is also instructive that the 50% rule did not appear prior to the public hearing of ZC Case No. 76-15. In its Notice of Public Hearing, published on September 8, 1976, the proposed amendment of the definition for "yard" was published to read as follows:

"An exterior space, other than a court, on the same lot with a building or other structures. A yard required by these regulations 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 these regulations."

As set down, a structure, such as a deck, but not including a fence or retaining wall, less than four feet out of grade, would still have been able to occupy any required yard and occupy 100% of the lot. It is understandable why this lingering loophole was plugged up by the 50% occupancy limitation, within the context of the BZA case (BZA #1115B) which precipitated these amendments, as summarized in the District of Municipal Planning Office memo to the Zoning Commission.

The only logical conclusion, therefore, is that the Zoning Commission sought to curtail how much a required yard may be occupied by a deck or other similar structure as prescribed in Section 2503.2, notwithstanding that a retaining wall or fence, traditionally and sensibly permitted to occupy any require yard, may appear to have been mired in the Zoning Commission's central pre-occupation in these amendments.

2. Assuming that the structure authorized by Permit No. B460927 was constructed in accordance with the plans that DCRA approved, what percentage of the required rear yard at 4825 Dexter Terrace does that structure not "occupy" within the meaning of the last sentence of the definition of "yard" (quoted on page 6 of your Power Point presentation)? Please explain how that figure was derived, and please state the extent to which areas occupied by each of the following materials were taken into

account in deriving that figure: mesa blocks, leveling pad(s), gravel, geogird, and compacted spoil and fill. (Footnote omitted).

Response: In my testimony, I indicated that the minimum depth of a required rear yard set forth in 11 DCMR § 404.1, the Zoning Regulations, is measured from the end of the building line out toward the rear property lot line such that the required rear yard is the area covering the first twenty-five feet measured from the farthest point of the building line, for the full width of the lot.

Though redundant in the context of my response to your first question, were the exercise required by your question necessary, it is elementarily discernible that the retaining wall is not only wholly outside of the area of description but, to the extent that is within it, its presence is so mathematically infinitesimal as to make the mechanics of the exercise unwarranted.

A yard required by the zoning regulations is required only to be open to the sky from the *ground up*, and not from what may have been natural grade up, in consideration of construction realities. Therefore, my response to the question is that none of the materials listed were taken into account in deriving my figure, for lack of relevancy.

3. On the enclosed photocopy of Carome Exhibit 23, please mark with a colored marker all of the areas (if any) that are both (a) part of or within a yard that is required by any provision of Title 11 of the DCMR and (b) occupies (within the meaning of the last sentence of the definition of “yard” quoted on page 6 of your PowerPoint presentation? By the structure that was purportedly authorized by Permit No. B460927. (Footnote omitted).

Response: The government objects to a cross-examination question which requires the Zoning Administrator to ‘mark’ an exhibit provided by the Appellant. Mr. Bello has continually indicated that the lot occupancy calculations do not apply to the any yard limitations for the retaining wall at issue in this appeal. Accordingly, there is no basis for him to identify the area where the ‘yard’ would be located on Appellant’s plan. *See*, Letter of Lisa A. Bell, Esquire, Counsel for DCRA, dated May 23, 2005.

4 & 5. If (hypothetically) the plans submitted by the owners to DCRA had indicated that the mesa block wall(s) would be fifteen (15) feet thick (measured from the exterior face of the wall to the interior face of the wall in contact with fill material), how and to what extent would the thickness of the walls have been taken into account in calculating the percentage of any required yard that the structure would occupy within the meaning of the last sentence of the definition of “yard” quoted on page 6 of the PowerPoint presentation? Please explain the basis for your answer.

Letter to G. Griffis
May 23, 2005
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Response: Similarly, the ZA will not provide responses to hypothetical questions. His testimony was based upon the facts as they exist in the application package for 4825 Dexter Terrace, N.W., Washington, D.C. Any opinion he could provide on hypothetical facts would be speculative and would not aid the trier of facts in its review of the appeal. *See*, Letter of Lisa A. Bell, Esquire, Counsel for DCRA, dated May 23, 2005.

Sincerely,

A handwritten signature in black ink, appearing to read 'TOYE BELLO', written in a stylized, cursive-like font.

Toye Bello
Zoning Administrator

In the Matter of Patrick J. Carome
BZA Appeal No. 17285

Attachments to Zoning Administrator Response to Question No. 1

Government of the District of Columbia
EXECUTIVE OFFICE



Municipal Planning Office
District Building
Washington, D.C. 20004

September 1, 1976

M E M O R A N D U M

TO: D.C. Zoning Commission

FROM: Ben W. Gilbert, Director
Municipal Planning Office

RE: Zoning Commission Case No. 76-15

Ben W. Gilbert

Application

The idea behind the text amendments proposed in this case was originally presented to the Zoning Commission by Mr. William S. Harps, Chairman of the Board of Zoning Adjustment. Mr. Harps proposed that the Zoning Commission clarify the Zoning Regulations as to what kinds of structures may occupy a yard required by the Zoning Regulations. Subsequently, following the directions of the Commission, the staff prepared and advertised specific text language (a copy of which is attached) which would define a yard as an exterior space unoccupied from the ground up, and would allow only certain prescribed structures to be located in a yard, as follows:

1. Accessory buildings in rear yards would be permitted as at present.
2. A structure, but not a building, may occupy a yard if it is less than four feet out of grade in its entirety.
3. A fence or retaining wall is permitted.
4. Stairs leading from the main story to the ground are permitted, provided that the highest tread is not more than 8 feet out of grade.

The effect of these proposed amendments is to change the current interpretation regarding occupancy of yards. The Zoning Administrator and the Board of Zoning Adjustment have determined that as long as a structure lies below the level of the main floor, and is thus not counted in the calculation of lot occupancy, it may occupy a yard.

Summary Recommendation

The Municipal Planning Office recommends that the Zoning Commission adopt the proposed text amendments with a clarifying modification regarding deck railings as a reasonable control on the occupancy permitted in yards required by the Zoning Regulations.

Background

The subject amendments were proposed to the Zoning Commission primarily as a result of a long and complicated case before the Board of Zoning Adjustment (Docket No. 11158) which dealt with the issue of a rear deck on a property in Georgetown. The level of the floor of the deck was below the level of the main floor joists of the building, and thus would not be computed as part of the building area (specifically exempted by the definition of building area). Based on a long-standing interpretation, the Zoning Administrator approved the issuance of a permit for the deck to cover 100 percent of the required rear yard. On an appeal taken by an abutting property owner, the BZA determined that because the subject railing around the deck (required by the Building Code) extended above the level of the main floor joists, the whole structure could not be located in a rear yard. Following a remand of the case to the Board from the D.C. Court of Appeals and further hearings, the Board reversed its earlier decision and denied the appeal. The Board concluded that the Zoning Administrator was correct in allowing the structure in the rear yard as long as the structure was below the main floor joist

Detailed Description and Analysis

The present Zoning Regulations define a yard as "an unoccupied space other than a court, open to the sky on the same lot with a building or other structure". The interpretation placed on this definition by the Zoning Administrator and the Board of Zoning Adjustment implies that the space shall be unoccupied from the level of the main floor joists. Consequently, buildings and structures could occupy 100 percent of a lot, including all required yards, if the building and structures were below the level of the main floor. Since many dwellings in the District have basements, the ceiling of which may be from four to eight feet out of grade, the level of the main floor may also be well out of grade. In addition, if a lot slopes down from front to back, the main floor may be more than one story out of grade at the rear of the house.

The present Zoning Regulations do specifically provide for accessory buildings to be located in rear yards (Section 7601). This section limits the height of accessory buildings in required rear yards to 15 feet, and specifies that no more than 30 percent of the required rear yard may be occupied.

In clarifying and amending the Zoning Regulations regarding what should be allowed to occupy a yard, there are essentially three options available, as follows:

1. Clarify the Regulations to continue the present interpretation. This would allow a structure to occupy a yard as long as it is below the level of the main floor, and could be accomplished by defining a yard as a space unoccupied from the level of the main floor up. This option would allow for complete occupancy of a lot, but would still provide the required light and ventilation for any buildings on the lot by limiting coverage to below the first floor. Building and housing code provisions would govern the requirements for light and ventilation to basement areas, and would effect the exact design and coverage for buildings on a particular lot. From the negative side, such a regulation would allow buildings or structures 10 feet or more out of grade to cover an entire yard, with adverse effects on light, air, privacy and aesthetics for properties surrounding the particular site.
2. Prohibit any structures from occupying a yard. This could be accomplished by defining a yard as an unoccupied space from the ground up. This would prevent any structures from locating in a yard, and would preserve these areas as open spaces. Such an across-the-board prohibition would not allow any structures, including fences, swimming pools, tennis courts, etc.
3. Allow certain limited occupancy of a yard. This could be accomplished by defining a yard as an unoccupied space from the ground up except for certain specified items. There are a number of approaches which could be utilized under this option, from giving all discretion to the BZA to allow occupancy, to permitting coverage up to a certain specified percentage or by specifying certain exemptions as a matter-of-right.

The proposed regulations take the third, middle ground approach by allowing certain structures to be located in required yards. These regulations apply to side and rear yards, since these are the yards required by the Zoning Regulations. A yard is defined as a space unoccupied from the ground up except as specifically provided. Those items which are allowed are broken into two classes, those allowed as a matter-of-right and those allowed with BZA approval.

Those items which may occupy a required side or rear yard as a matter-of-right are as follows:

1. Accessory buildings allowed in rear yards under the provisions of Section 7601.
2. A structure, but not a building, which is four feet or less out of grade in its entirety. This would prohibit a basement or cellar from

extending into a required yard, but would allow swimming pools, tennis courts, air conditioning compressors, and low decks where the entire deck, except for required safety railing, is less than four feet out of grade.

3. A fence or retaining wall up to the heights established by the Building Code may be located in a side or rear yard.

4. Stairs leading to the ground from the main floor. The steps may not exceed eight feet in height out of grade (the approximate height of one story for residential purposes) nor project more than four feet into the yard (the same distance as for a fire escape). MPO notes that these requirements are based on normal situations, which may require steps to be oriented parallel to the building rather than perpendicular to it. The Zoning Commission may wish to consider other alternatives to the distance out of grade or the allowable projection, to take into account unusual situations caused by changes in grade or to allow for greater architectural flexibility in the design of such stairs without requiring BZA approval of each such situation.

The Board of Zoning Adjustment may permit other structures, again not including buildings, to occupy yards. Such structures would be those more than four feet out of grade or those which are not otherwise permitted as a matter-of-right. The Board is required to find that such structures are located below the level of the main floor, except for any railings required of the Building Code, that the structure will not block light and ventilation, and that the structure does not lessen access to the required yard. The Board thus has the discretion to permit greater occupancy of yards if certain safeguards are met. As always, in exception or unique circumstances, where a practical difficulty or hardship is present, the Board may grant a variance from the provision as well as any other provisions of the Zoning Regulations. Attached figures 1 and 3 show situations where structures would be allowed as a matter-of-right. Attached figures 2 and 4 show situations where structures would be permitted only with BZA approval.

The proposal, as advertised for hearing, does not specifically indicate whether the height of a required safety railing is to be included for the purpose of measuring the height of a structure out of grade. The Building Code requires that all decks (referred to as open porches in the Code) 24 inches or more above the ground shall have a safety railing of at least 31 inches and not more than 42 inches on all open sides. The proposed regulation, as advertised, would require BZA review of a deck where the surface of the deck would be 4 feet or less out of grade and where only the railing extended above the four foot level. MPO believes that this would result in an unacceptable burden for the BZA and is not the intent of the proposed regulation. MPO, therefore, recommends that a new sentence be added to proposed paragraph 7602.21. The whole paragraph would then read as follows:

7602.21 A structure, not including a building, which is four feet or less out of grade in its entirety may occupy any yard required under the provisions of this regulation. Any railing required by the Building Code shall not be calculated in the measurement of such height.

Recommendation

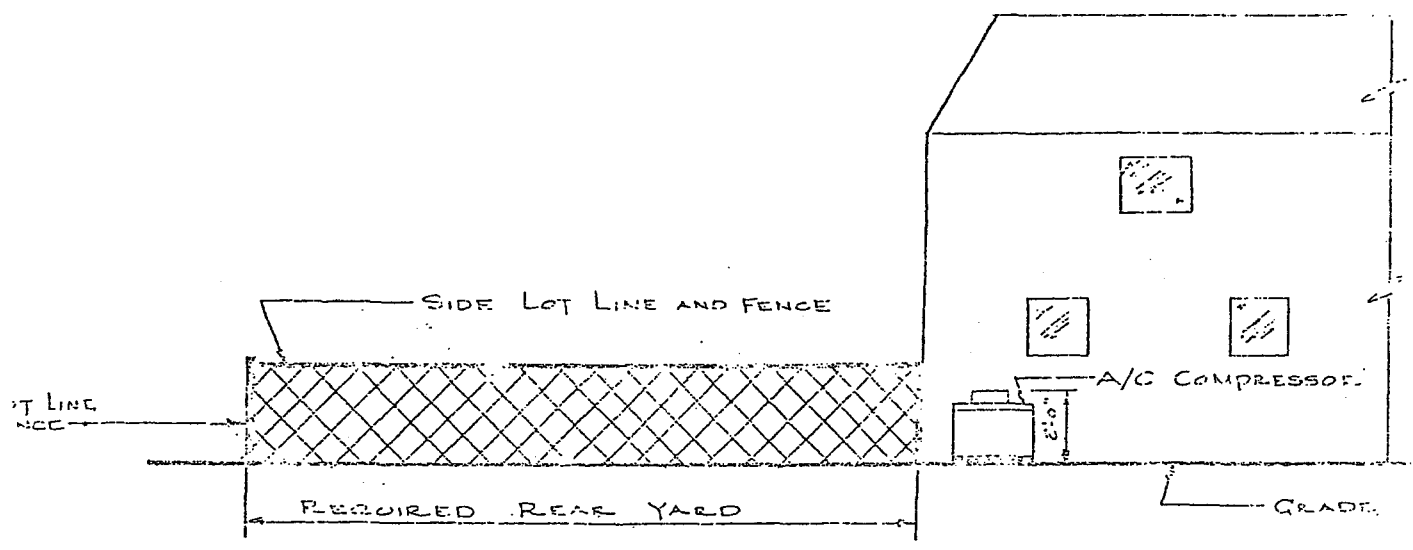
The Municipal Planning Office recommends that the Zoning Commission adopt the proposed text amendments to the Zoning Regulations, as clarified with the modification concerning safety railings, to provide for certain limited occupancy of yards. The MPO believes that neither complete occupancy of yards nor outright prohibition of all occupancy is a desirable approach. The MPO believes that the middle ground approach, allowing limited occupancy as a matter-of-right and giving the BZA authority to review any other situation, represents a sensible balance in resolving this issue, and therefore recommends adoption of the proposed language.

Report Prepared by:
Zoning Division, MPO
SES:ss

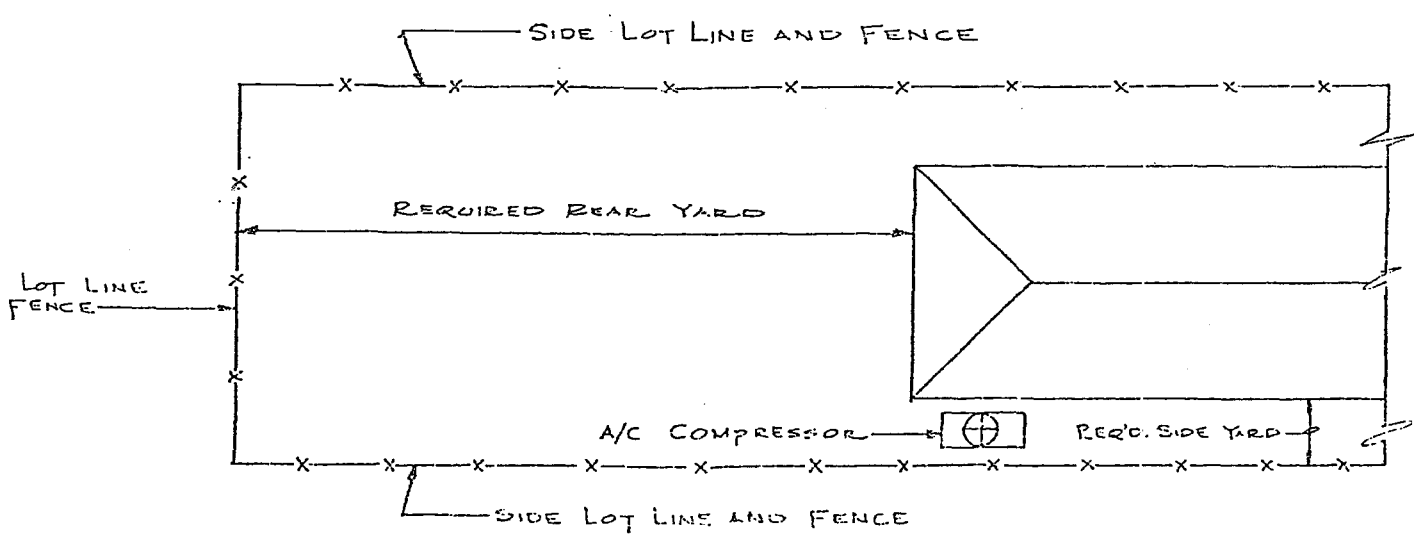
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NOTE:

PERMITTED UNDER PROPOSED REGULATION



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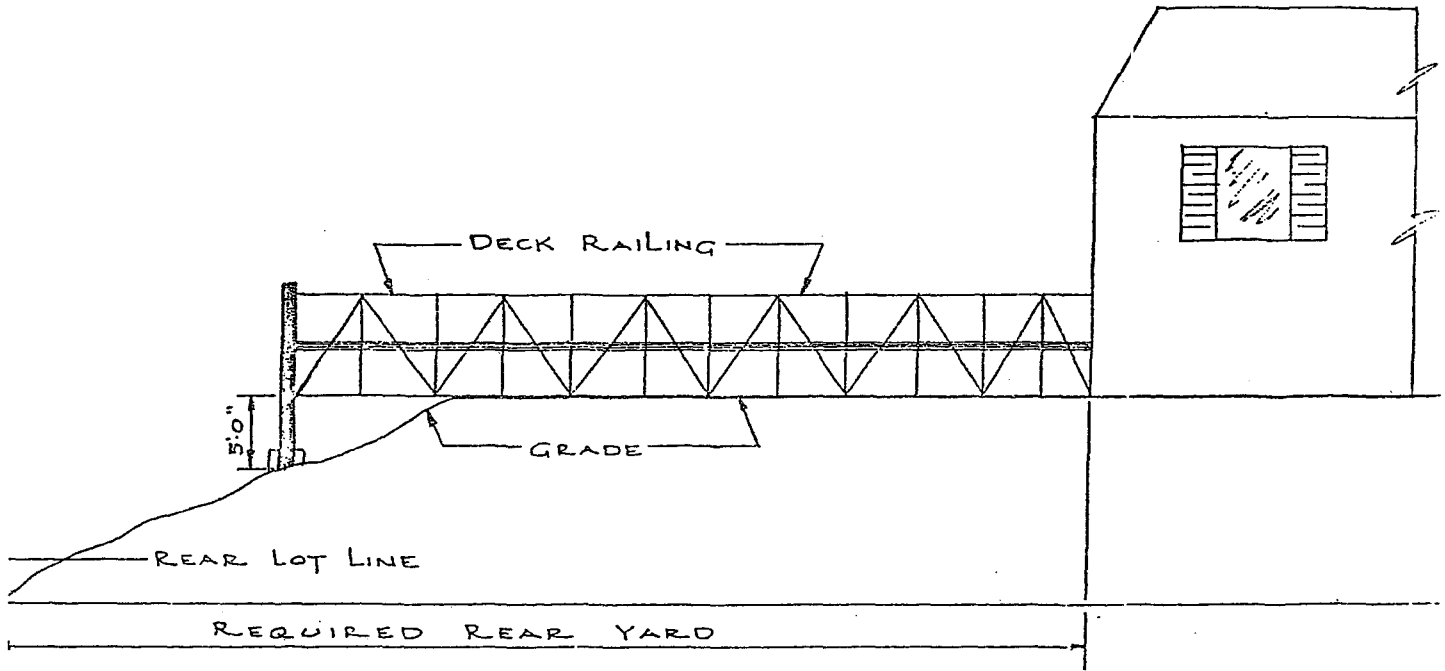


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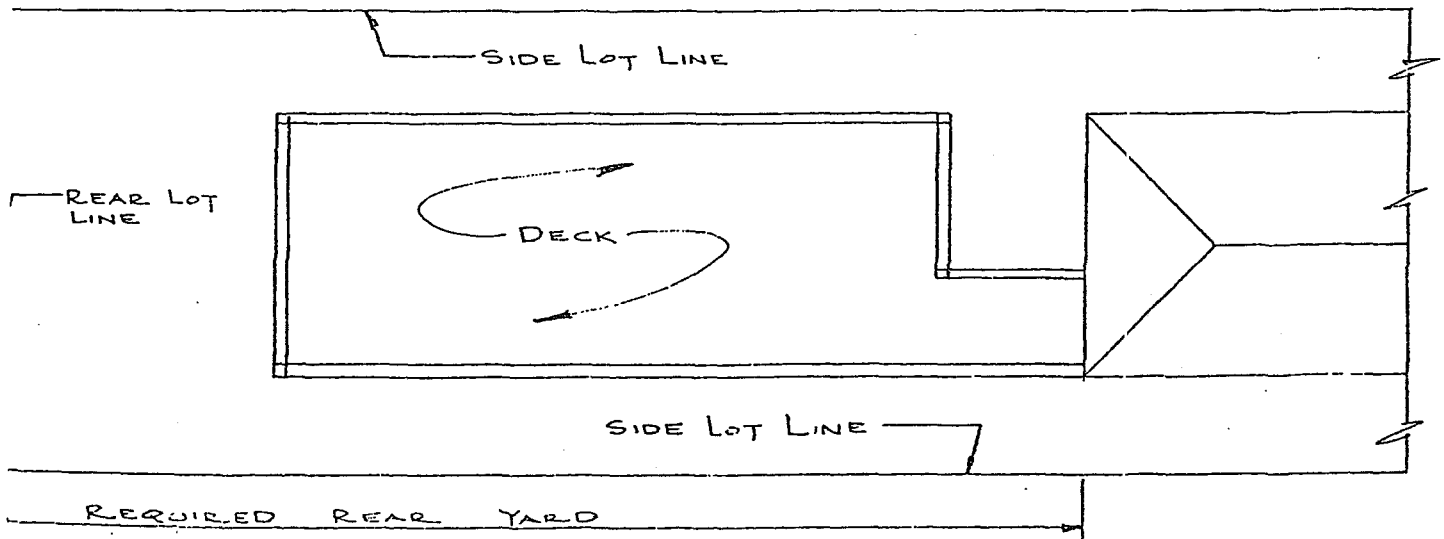
FIGURE 2

TE:

PERMITTED ONLY WITH B.Z.A. APPROVAL UNDER PROPOSED
REGULATION



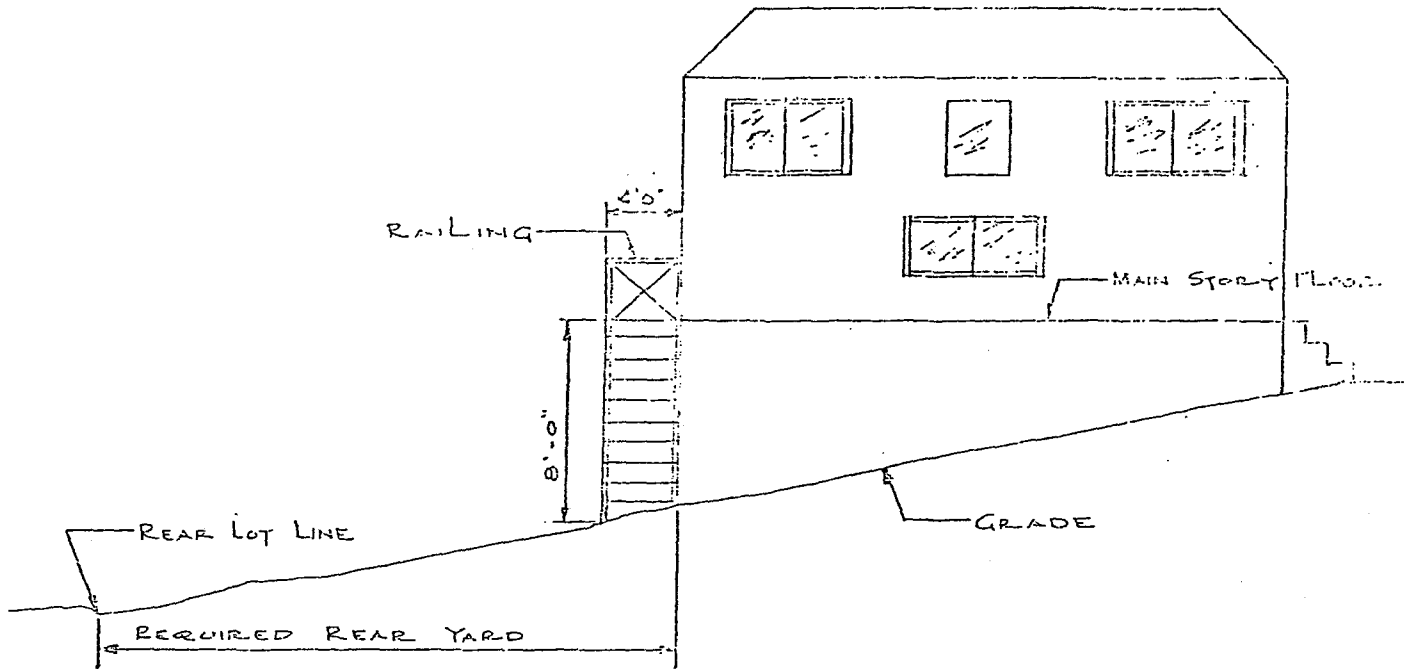
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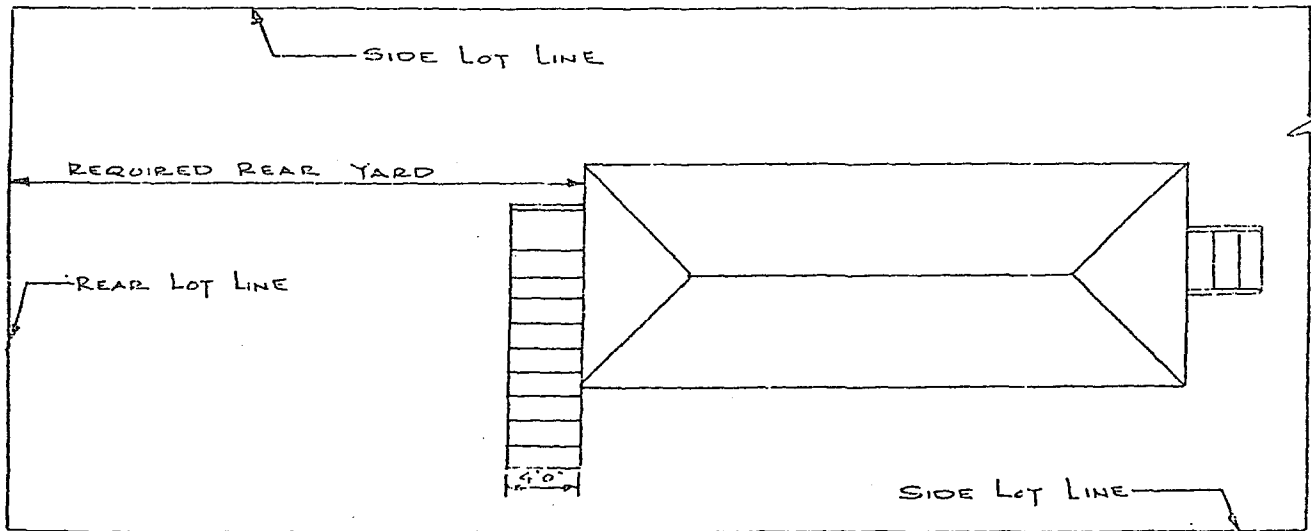
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PERMITTED UNDER PROPOSED REGULATION



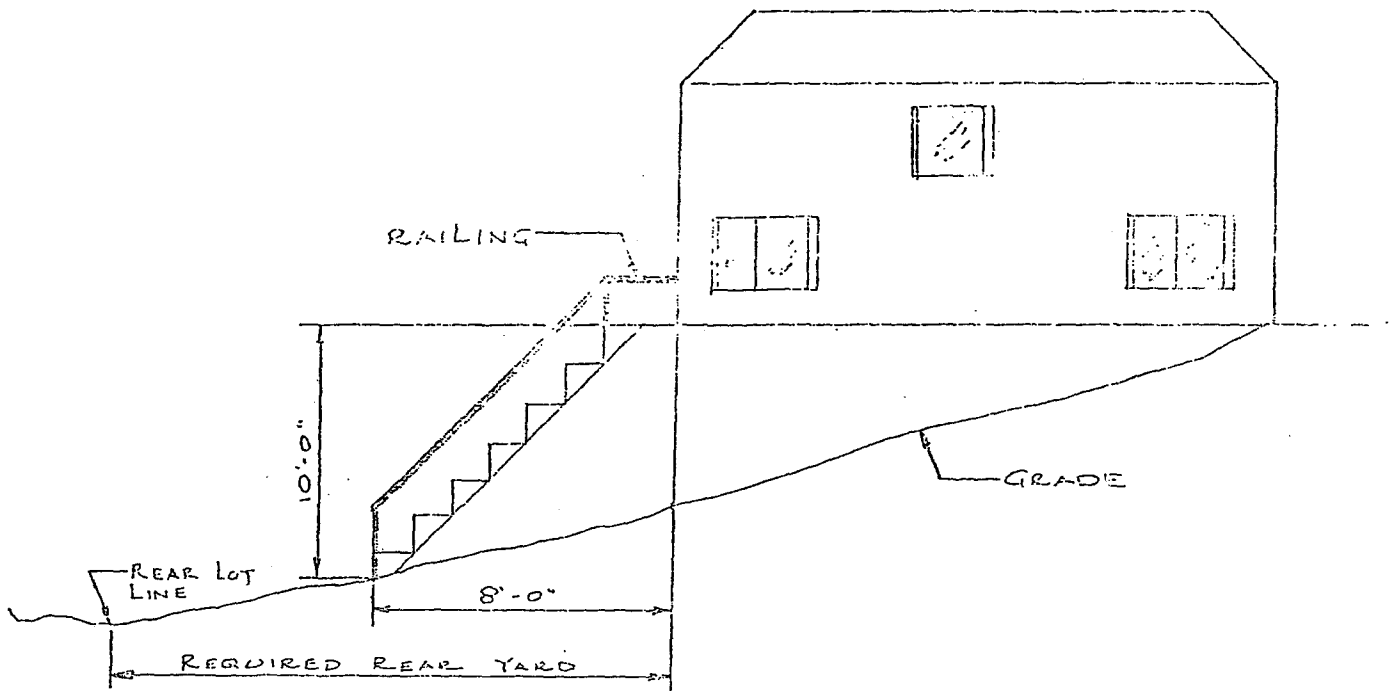
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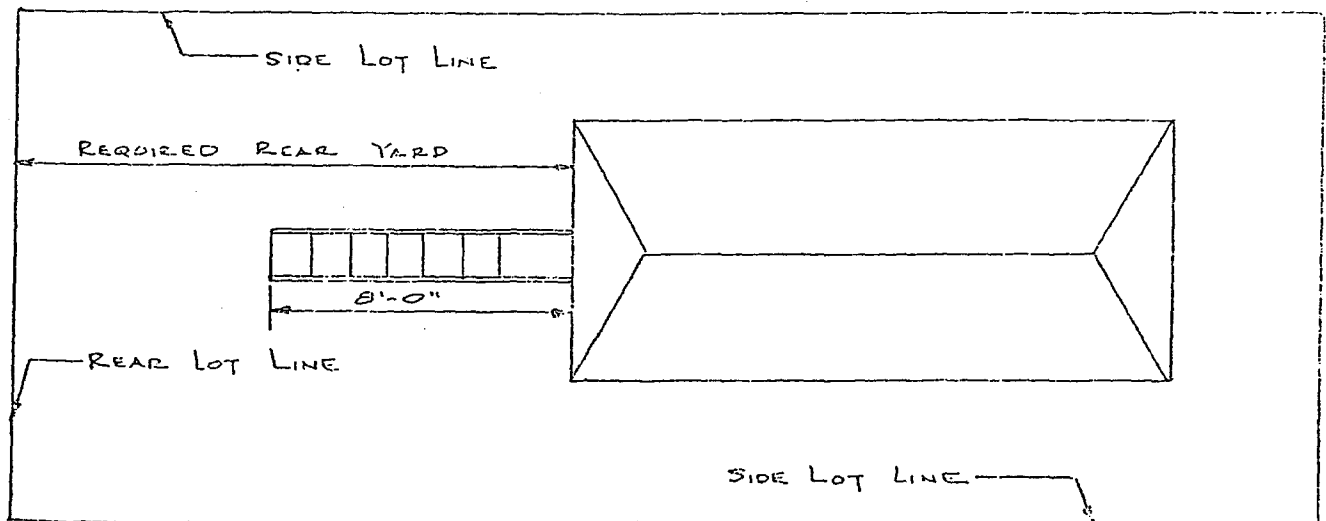
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PERMITTED ONLY WITH B.Z.A. APPROVAL UNDER PROPOSED REGULA



ELEVATION
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PLAN
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In the Matter of Patrick J. Carome
BZA Appeal No. 17285

Attachments to Zoning Administrator Response to Question No. 2

District of Columbia Zoning Commission

NOTICE OF PUBLIC HEARING

TIME AND PLACE:

Wednesday, September 8, 1976, 10:00 a.m.,
Room 11A, District Building, 14th and E
Streets, N.W.

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

CASE NO. 76-15 (Occupancy of Yards Text Amendment)

Proposed amendment to the text of the Zoning Regulations of the District of Columbia, pursuant to the Zoning Act (Act of June 20, 1938, 52 Stat. 797, as amended, Section 5-413 et. seq. of D.C. Code, 1967 ed.).

This case has been initiated by the Zoning Commission. The public hearing on this case will be conducted in accordance with the provisions of Part III of the Rules of Practice and Procedure of the Zoning Commission of the District of Columbia (18 D.C. Register 891, Supp. No. 3, July 6, 1972). Pursuant to said Rules the Commission will impose the following time limitations on testimony presented to it in this public hearing; 10 minutes for an individual and 15 minutes for an organization or association.

All individuals and organizations or associations wishing to testify in this case must file their intention to testify in writing with the Secretary of the Zoning Commission, District Building, Room 11, 14th and E Sts., N.W., Washington, D. C. 20004, no later than September 3, 1976.

-2-

It is proposed to amend the Zoning Regulations to clarify which structures may occupy a side or rear yard required by the Zoning Regulations. The proposed amendments would prohibit any structure (by definition, "anything constructed, including a building, the use of which requires permanent location on the ground. . . .") from occupying a yard, except for the following:

1. A structure, but not a building, may occupy a yard if it is less than 4 feet out of grade in its entirety (e.g., air conditioner compressor, swimming pool, etc.).
2. A fence or retaining wall is permitted.
3. Stairs leading from the main story to the ground are permitted, provided that the highest tread is not more than 8 feet out of grade.
4. There will be no change in the provisions of Section 7601 which currently permit accessory buildings in rear yards.

The proposed amendments also authorize the BZA to allow a structure, but not a building, to occupy yards in excess of the above limitations provided:

1. the structure is below the level of the main floor;
2. there will be no blocking of light or air;
3. access to the yard will not be diminished.

The specific text language is as follows:

1. Amend Section 1202, Definitions, to redefine a yard as follows:

"An exterior space, other than a *court*, on the same lot with a *building* or other *structure*. A yard required by these Regulations 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 these Regulations."

2. Amend Section 7602, Projections into Required Open Space, to add the following Sub-section:

7602.2 Except for the following specified *structures*, every part of a *yard* required under the provisions of these regulations shall be open and unobstructed to the sky from the ground up.

7602.21 A *structure*, not including a *building*, which is four or less out of grade in its entirety may occupy any *yard* required under the provisions of these Regulations.

7602.22 A fence or retaining wall constructed in accordance with the Building Code may occupy any *yard* required under the provisions of these Regulations.

7602.23 Stairs leading to the ground from a door located on the *story* in which the principal entrance of a building is located may occupy any *yard* required under the provisions of these Regulations. Such stairs shall include any railing required by the Building Code. The level of the highest tread or platform shall not exceed 8 feet out of grade, and the stairs shall not project further than 4 feet into the required yard.

7602.24 The Board of Zoning Adjustment is hereby authorized to permit a *structure*, not including a *building*, to occupy a *yard* required under the provisions of these Regulations if such occupancy is not otherwise permitted as a matter-of-right, provided:

1. Any such *structure* shall be located entirely below the level of the *main floor*, except for any railing required by the Building Code.
2. Any such *structure* will not block light and ventilation for any *building* located on the subject property or any abutting properties.
3. Any such *structure* shall not lessen access from any building on the lot to the required *yard*.

3. Amend Sub-section 8207.2, jurisdiction of the BZA to grant special exceptions, to add to the table of special exceptions the following:

<u>Type of Special Exception</u>	<u>District</u>	<u>Section, Paragraph or Sub-paragraph in which conditions are specified</u>
Structure in required yard	any District	7602.24

Written statements, in lieu of a personal appearance or oral presentation, may be submitted for inclusion in the record. Information should be forwarded to the Executive Secretary to the Zoning Commission, Office of the Zoning Commission, Room 9, District Building, 14th and E Streets, N.W., Washington, D. C. 20004. Please include the number of the particular case.

RUBY B. MCZIER, THEODORE F. MARIANI, RICHARD L. STANTON, WALTER B. LEWIS, GEORGE M. WHITE -- ZONING COMMISSION OF THE DISTRICT OF COLUMBIA, By ARTHUR B. HATTON, Executive Secretary.