BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17310
EXHIBIT NO. 43

Appeal No. 17310 of Deidre O. Stancioff pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit Nos. B461964, B467431, B468744 and B477090[1], allowing an addition to a single-family dwelling, allegedly in violation of lot occupancy and side yard requirements of the Zoning Regulations in the R-3 District at premises 1812 35th Street, NW (Square 1296, Lot 802).

HEARING DATES: September 20, 2005, October 25, 2005
DECISION DATES: November 8, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) challenging DCRA decisions to approve building permits allowing an addition to a single family dwelling at 1812 35th Street, NW. The property owner moved to dismiss the appeal as untimely, but the Board found that the appeal had been timely filed. Following a public hearing on the merits of the appeal, the Board voted to grant the appeal.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for September 20, 2005. In accordance with 11 DCMR § 3112.14, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 2E (the ANC for the area within which the subject property is located), the property owner, and DCRA.

Parties

The Appellant in this case is Deidre O. Stancioff (the Appellant). The Appellant was represented by Laurie Horvitz, Esq., of Finkelstein and Horvitz, PC. The owner of the subject property, 1812 35th Street Associates LLC (the Owner), was represented by George Keys, Esq., of Jordan & Keys, LLP. As the property owner, 35th Street Associates LLC is automatically a party under 11 DCMR § 3199.[2] DCRA was represented by Stephanie Ferguson, Esq.

[1] This permit was not part of the original filing, but was added as an amendment to the appeal and superseded the earlier permits.

[2] The Owner also moved to intervene in the proceeding; however, the Board found that such relief was not necessary in view of its automatic party status.

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Persons/Entities in Support of the Appeal
The ANC wrote in support of the appeal (Exhibit 31), and its representative, Charles Eason, appeared in support of the appeal.

Preliminary Matters
Prior to the public hearing, the Owner filed a motion to dismiss the appeal as untimely. DCRA joined in the motion and Appellant and the ANC opposed it. After oral argument by the parties on September 20, 2005, the Board voted to deny the motion to dismiss. On October 25, 2005, the Board granted Appellant's motion to amend the appeal to include revised Building Permit No. B477090 (the revised permit) and a hearing was held on the merits of the appeal.

FINDINGS OF FACT

The Property
1. The subject property is an existing single-family dwelling located at 1812 35th Street, NW (Lot 801, Square 1296) in the R-3 zone. The property is improved with a one and one-half story masonry dwelling that was built around 1910.

2. The lot of only 2,400 square feet, on which the dwelling is situated, is nonconforming. It does not meet the minimum lot size requirements in the Zoning Regulations, but was improved prior to May 12, 1958 when the Regulations took effect. *See*, 11 DCMR § 401.3.

3. The original dwelling was a small structure which occupied approximately 31% of the lot and was within allowable lot occupancy limitations. *See*, 11 DCMR § 403. As originally developed, the property had a nonconforming side yard of approximately 2.5 feet on one side. *See*, 11 DCMR 405.9. The other side of the dwelling extends to the side lot line.

The Appellant
4. The Appellant owns and resides at the adjacent property to the north located at 1814 35th Street. Her property abuts the lot line wall at the subject dwelling.

The Permits and Construction History
5. The Owner purchased the property in 2003, after a fire had destroyed the interior of the original dwelling.

6. On or about April 23, 2004, the Owner filed an application with DCRA for a building permit to repair the dwelling. The proposed work was described as "[a]lteration and [r]epair" to the existing single-family dwelling (Exhibit 6).
7. On or about May 19, 2004, DCRA issued Building Permit No. B461964 to "repair the fire damage" at the property (Exhibit 7).

8. On or about August 12, 2004, the Owner filed an application with DCRA for a building permit to expand the dwelling. The proposed work was described as both an "alteration and

repair" and an "addition" to the dwelling. The "addition" was further described as an "[e]xpansion as per enclosed plans" (Exhibit 6).

9. During DCRA's zoning review of this application, notations were made stating that the proposed addition could not be allowed. DCRA prepared a "Plan Correction List" dated October 5, 2004 stating that the proposed addition would result in a lot occupancy that exceeded the maximum 40% allowed in the zone. The document stated:

> "Existing structure has a non-conforming side yard, proposed addition over existing footprint cannot be allowed. Structure is a semi-detached dwelling and the max lot occupancy is 40%. You need to modify proposed work to bring into compliance or seek relief thru the BZA to build proposed work. Reroute decision to Zoning for action." (Exhibit 8)

10. On October 16, 2004, DCRA again noted the problem with lot occupancy, stating that "the proposed lot occupancy is 44%" because the nonconforming side yard must be included in the calculations (Exhibit 8).

11. Notwithstanding these notations, on or about November 5, 2004, DCRA issued Building Permit No. B467431 allowing for an addition "per [the] enclosed plans" (the addition permit). It specifically allowed for "one room and [a] bathroom on [the] existing basement," a "family room" on the "existing first floor," a "bath" and "stairs" on the existing "2nd floor," and a new "third floor with two bedrooms and a [a] bathroom" (Exhibit 7).

12. The owner posted the addition permit in the front window of the dwelling on or about November 5, 2004.

13. Construction on the addition began on or about November 15, 2004, and was largely completed before the public hearing on this appeal. The resulting three-story renovated dwelling expanded twenty-seven and one-half feet further into the rear yard.

14. The Owner showed building plans to the Appellant before the first addition permit was issued in early November, 2004. However, these plans did not have accurate dimensions from which lot occupancy could have been ascertained. The parties also discussed changing the foundation wall from cinder block to reinforced concrete prior to the issuance of the foundation permit in late December, 2004.

15. Appellant had difficulty obtaining the building plans that were filed with DCRA in connection with the addition permit. The plans were unavailable at DCRA for a protracted period of time and, when available, did not show the dimensions that were necessary to calculate the lot occupancy.

16. Appellant made inquiries (by telephone and e-mail) to DCRA about the permit and construction activity after construction began in November, 2004. The exact date of each of

these inquiries is not clear from the record, except there is evidence of e-mail communications with DCRA beginning on January 5, 2005.

17. Appellant filed a lawsuit against the Owner in D.C. Superior Court on or about December 20, 2004. In that lawsuit she sought a temporary restraining order and preliminary injunction against the Owner's construction activity, alleging damage from excavation at the property. Appellant reviewed DCRA's permit file in connection with this lawsuit but the file lacked sufficient information to permit her to determine whether or not a lot occupancy violation had occurred.

18. On or about December 29, 2004, the Owner applied for and obtained a revised building permit that changed the foundation materials from cinderblock to poured concrete. (See, Building Permit No. 468744, Exhibit 7) (the foundation permit).

19. DCRA issued the November 5, 2004, addition permit based upon the structure's classification as a row dwelling, a dwelling without side yards that is permitted as-of-right in the R-3 zone. Initially, DCRA found that "introduction of a trellis structure" converted the semi-detached dwelling to a row dwelling on the rationale that the trellis eliminated the side yard (See, DCRA letter to ANC of March 21, 2005, Exhibit 30, Tab 2).

20. Appellant challenged the agency's review and urged DCRA to consider the structure as a semi-detached dwelling instead of a row dwelling. She claimed in communications with DCRA that the structure could not be considered a row dwelling under the Regulations because it had a side yard. As such, she claimed, the dwelling with addition exceeded the maximum lot occupancy allowed for semi-detached dwellings in the R-3 zone.[3]

21. Appellant urged DCRA to revoke the addition permit (Exhibit 30, Tab 2), and filed this appeal on February 22, 2005 (Exhibit 1).

22. Attempting to resolve these irreconcilable positions, DCRA suggested that the Owner obtain zoning relief for the addition under § 223 of the Zoning Regulations (Exhibit 30, Tab 2). Relief under this provision allows an addition to a single-family residence where the addition results in (among other things) excessive lot occupancy. DCRA referred the Owner to this Board for special exception relief on March 2, 2005, noting that the lot occupancy of the dwelling with addition was 43.75% (Exhibit 4). The Owner filed the application for relief on March 21, 2005 (BZA Application No. 17327). However, in a separate Decision and Order dated September 13, 2005, this Board denied the Owner's application.[4]

23. On or about September 2, 2005, DCRA issued Building Permit No. B477090 to revise the addition permit (the revised permit). This revised permit approved a "revision to permit #

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[3] The maximum lot occupancy for semi-detached dwellings is only 40% in the R-3 zone, as compared to 60% for row dwellings in the same zone.

[4] The application was denied because it failed to meet the criteria for relief under § 223.2(c) of the Regulations. However, that determination does not bear upon the issues presented in this appeal.

B467431" (the addition permit) and allowed the Owner to "extend [the] roof overhang on one wall to [the] property line" (Attachment to Exhibit 35).[5] DCRA stated that, because the overhang extended to the lot line, the structure could be classified as a row dwelling for zoning purposes.

24. On February 8, 2005, Appellant's counsel met with DCRA's Zoning Administrator. At that meeting Appellant learned for the first time of the Plan Correction List and of a possible lot occupancy violation.

25. Appellant filed this appeal on February 22, 2005, approximately 109 days after the addition permit was issued on November 5, 2004, and 14 days after learning of the possible lot occupancy violation,

CONCLUSIONS OF LAW

The Motion to Dismiss.

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended, however, if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

The Board finds that the addition permit, issued on November 5, 2004, reflects the first decision relating to the alleged zoning errors; i.e., approval of an addition which resulted in excessive lot occupancy and violation of the side yard requirements. That permit authorized an addition with a trellis connection to the side lot line... The second decision relating to the same zoning error is the revised permit, issued September 2, 2005, authorizing construction of the addition with an eave, instead of the trellis, that projects to the side lot line.

Appellants filed this appeal February 22, 2005, 109 days after the issuance of the addition permit and more than 6 months before the issuance of the revised permit. Thus the Owner and DCRA argued that Appellant was both too late and too early in filing this appeal. The Board finds to the contrary.

With respect to the addition permit, it is undisputed that Appellant knew of its issuance as of the date it was issued, November 5, 2004. Accordingly, absent exceptional circumstances

[5] As explained above, the appeal was amended to include a challenge to this permit as well as the earlier permits.

beyond Appeallant's control, to be timely, the appeal was required to have been filed by January 2, 2005. The Board finds such exceptional circumstances in this case.

The record is full that Appellant made diligent efforts with both the owner and DCRA to determine the nature and extent of the construction at the neighboring property. Despite the availability of other information concerning the construction, it was not until February 8, 2005, when DCRA's Zoning Administrator shared the Plan Correction List with Appellant's counsel that Appellant learned of a possible lot occupancy violation. Prior to this time Appellant had no notice nor should she have known from any other available information that the zoning error alleged in this appeal may have occurred. She filed her appeal February 22, 2005, just 14 days later. Therefore, the Board concludes that while Appellant did not file an appeal within 60 days of the issuance of the addition permit of which she had knowledge, there were exceptional circumstances outside of the Appellant's control that impaired her ability to file a timely, good faith appeal at that time – that being that Appellant did not have access to information that would have put her on notice of the alleged violation prior to February 8, 2005, despite her diligent efforts to obtain information related to the neighboring construction.

To extend the 60 –day time limit, the Board must also find that the extension will not prejudice any of the parties to the appeal There was no argument that DCRA was prejudiced in any way by this extension. Nor was the Owner prejudiced by an extension of time. While construction had been substantially completed by the time this appeal was filed, the Owner chose to proceed with construction while he was aware of potential lot occupancy problems. The facts show that the Owner knew of these problems as early as October 5, 2004, when the Plan Correction List was issued. Moreover, the Owner did not wait for the 60 day appeal period to run before beginning construction. The Owner started construction on or about November 15, 2005, 10 days after the addition permit was issued. While he was within his rights to do so, he proceeded at his peril.

Accordingly, because the Appellant has satisfied the criteria in § 3112.2, the Board finds that the appeal was timely filed.

Finally, with respect to the revised permit, the Board finds that it was proper for the Appellant to amend her initial appeal to include the revised permit because the zoning error alleged is the same as that alleged in the initial appeal. As the revised permit was issued September 2. 2005, and Appellant moved to amend the appeal on October 11, 2005, Appellant appealed the permit within the 60-day time period.

Accordingly, the Board grants Appellant's motion to amend the appeal and denies Owner's motion to dismiss based on timeliness.

The Merits of the Appeal

The Positions of the Parties

The Appellant maintains that the permits approving an addition to this dwelling were issued in error. She argues that neither a "trellis" (approved in the addition permit) nor an

"overhang" (approved in the revised addition permit) changes the structure from a "semi-detached dwelling" to a "row dwelling". Appellant also claims that a roof overhang to the side lot line constitutes a projection that unlawfully extends into the side yard of the property. The Owner and DCRA contend that the last revised permit approving an "overhang" or "eave" was correctly issued.[6] They claim that approval was correctly based upon the structure's classification under the Zoning Regulations as a "row dwelling," a dwelling without side yards that is permitted as-of-right in the R-3 zone. *See,* 11 DCMR § 320.3(b). They contend that an "overhang" or "eave" which extends from the roof to the lot line eliminates the existing side yard, thereby creating a "row dwelling."

The Appeal is Granted

The Board concludes that the addition permits of November 5, 2004 and September 2, 2005 were issued in error. The dwelling with the addition is not a row dwelling under the Zoning Regulations. It is a "semi-detached one-family dwelling." The term "row dwelling" is defined in the Zoning Regulations as "a one-family dwelling having no side yards" *See,* 11 DCMR 199.1. As explained above, one side of the property has a lot line wall. The other side of the property has a side yard, albeit a small nonconforming one. Had DCRA properly considered the structure as a semi-detached dwelling, it would have found that the maximum lot occupancy limitation – 40% -- had been exceeded.

The Owner and DCRA contend that the proposed "eave" or "overhang" transforms the structure into a row dwelling because it extends to the lot line and eliminates the small but existing side yard. The Board finds to the contrary for the following reasons:

First, a roof overhang is not part of the dwelling structure. DCRA concedes that the proposed overhang is merely a continuation of the roof and provides no living space or functional purpose. As such, it would be unreasonable to conclude that the overhang alters the zoning classification.

Second, the Board finds that the proposed eave would unlawfully project into the required side yard. The terms "eave" and "overhang" are not defined in the Zoning Regulations. However, the term "eave" is found within the section prohibiting projections into required open spaces. Section 2502.2 limits projection into any required yard for a distance of 2 feet. Because the side yard here is 2.5 feet and the eave reaches to the lot line, the eave necessarily projects over the yard for more than 2 feet.

The Board acknowledges that it is possible to convert a semi-detached dwelling into a row dwelling with an addition that extends to the side lot line. However, that is not the situation at hand. Permitting a small roof overhang to transform this structure into a row dwelling would only circumvent the limits on lot occupancy and allowable projections.

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[6]The proposed overhang in the revised addition permit replaced the trellis in the November, 2004 addition permit.

Accordingly, the Board concludes that the Zoning Administrator erred in issuing the revised permit and the addition permit, because they authorized construction in violation of the lot occupancy limitation for a semi-detached dwelling. Therefore, the appeal should be granted.

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. To give great weight, the Board must articulate with particularity and precision why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC's issues and concerns. In this appeal, the ANC concurred with the views advanced by the Appellant. For the reasons stated above, the Board finds this advice persuasive.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. The **motion to dismiss** the appeal as untimely is **DENIED**

VOTE: 3-2-0 (Ruthanne Miller, John A. Mann II and Kevin Hildebrand in support of the motion; Geoffrey H. Griffis and Curtis Etherly, Jr. opposed to the motion)

Vote taken on September 20, 2005

b. The **motion to amend** the appeal is **GRANTED BY CONSENSUS**

Granted on October 25, 2005

c. The motion to grant the appeal is approved and the appeal is hereby **GRANTED.**

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and John A. Mann II to grant; Kevin Hildebrand to grant by absentee ballot)

Vote taken on November 8, 2005

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

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

FINAL DATE OF ORDER: JUN 13 2006

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

SG