District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

December 13, 2006

06-AA- 1454 Jeffrey Schonberger, et al vs. D.C. Board of Zoning Adjustment

District of Columbia Zoning Adjustment
Jerrily Kress, Director
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed December 12, 2006, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: _____
Information Center Supervisor

cc: Todd Kim, Esq./Edward Schwab, Esq.

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17414
EXHIBIT NO. 33

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17414
EXHIBIT NO. 33

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DEC 12 2006

Jeffrey Schonberger **5341 28th Street, N.W** **Washington, DC 20015**	)))Case No. 06-AA-1454) BZA Application No. 17414
Geraldine Rebach **5341 28th Street, N.W** **Washington, DC 20015** **V.**	)))))
DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT **One Judiciary Square** **441 4th Street, N.W.** **Suite 210** **Washington, D.C. 20001**	)))))))
Respondent.	)

FILED
DEC 12 2006
DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR REVIEW OF AN ORDER OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Petitioners Jeffrey Schonberger and Geraldine Rebach respectfully petition this Court for review of a Final Order of the District of Columbia Board of Zoning Adjustment (the "Board"), dated November 16, 2006, denying Appeal No. 17414 of Geraldine Rebach and Jeffrey Schonberger pursuant 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA") to issue a building permit (B456380, dated October 30, 2003) authorizing the construction of a two-story detached garage in the R-1-B District at premises 5362 27th Street, N.W. (Square 2292, Lot 27). In support hereof, Petitioners state as follows:

1. The Board's interpretation of the Zoning Regulations is plainly erroneous and inconsistent with the plain language of the Zoning Regulations.

2. The Order's findings are conclusory, incomplete and unsupported by the evidence and

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17414
EXHIBIT NO. 33

its conclusions do not flow rationally from the findings;

3. The Board's conclusions of law are erroneous;

4. The Board's decision is arbitrary, capricious, an abuse of discretion, in excess of its statutory authority, and otherwise not in accordance with applicable law.

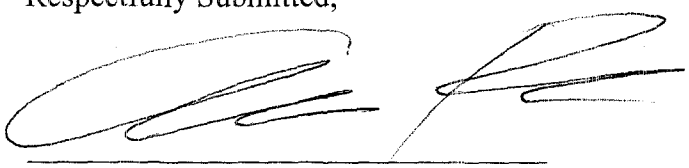
WHEREFORE, Petitioners respectfully request that this Court of Appeals

(a) Hold unlawful, reverse and set aside the Board's Decision and Order in Appeal No. 17414 issued November 16, 2006; and

(b) Grant such other relief as this Court may deem just and proper.

A copy of Order No. 17414 is attached.

Respectfully Submitted,



Andrea C. Ferster #384648
1100 17th Street, N.W., 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Attorney for Petitioners

Dated: December 12, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Review from Order No. 17414 of the District of Columbia Board of Zoning Adjustment was served by first-class mail, postage prepaid, this 27th day of October, 2006, upon:

Geoffrey Griffis, Chair
D.C. Board of Zoning Adjustment
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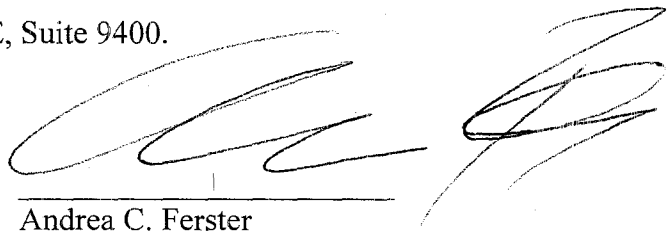


Andrea C. Ferster

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 17414 of Geraldine Rebach and Jeffrey Schonberger, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs (DCRA) to issue a building permit (B456380, dated October 30, 2003) authorizing the construction of a two-story detached garage. Appellant alleges that DCRA erred by allowing the permit for said construction to be issued in violation of 11 DCMR §§ 199, 404, and 2500.5. The subject property is located in the R-1-B District at premises 5362 27th Street, N.W. (Square 2292, Lot 27).

HEARING DATE: February 21, 2006
DECISION DATE: February 21, 2006

ORDER

PRELIMINARY MATTERS

On August 9, 2005, Jeffrey Schonberger filed this appeal on his own behalf and on behalf of his neighbor, Geraldine Rebach, collectively, "Appellants." The Appellants challenge DCRA's authorization of construction of a detached two-story garage behind the dwelling at 5362 27th Street, N.W. (Square 2292, Lot 27) ("subject property") by the property owners, Mathew and Amy Epstein. The Appellants take issue with both the use and placement of the garage structure, claiming primarily that its location violates applicable rear yard provisions of the Zoning Regulations.

The Board heard and decided the appeal on February 21, 2006. After considerable testimony and argument, the Board deliberated and voted 5-0-0 to deny the appeal.

FINDINGS OF FACT

Background

1. The subject property is located at address 5362 27th Street, N.W., in Square 2292, Lot 27, within an R-1-B zone district.

2. In 2003, 27th Street, L.L.C., an entity controlled by Zuckerman Brothers, a builder, purchased the then-vacant land underlying what is now Lot 27 in order to build a new home on it.

3. Lot 27 is a rectangle, 50 feet wide and approximately 172 feet long, and abuts a 15-foot wide public alley at the rear.

4. On October, 30, 2003, DCRA issued Permit No. B456380 (the "first permit"), authorizing the construction of a single-family dwelling, a detached garage, and site retaining walls on the subject property.

5. The documents submitted to DCRA in support of Permit No. B456380 included a plat showing a 2-story garage and a statement that the garage height would be 20 feet, but neither the height nor the number of stories was specified on the permit itself. *See,* Exhibit No. 22, Attachments Nos. 1 & 9 and Exhibit No. 24, Attachment A.

6. Zuckerman Brothers apparently intended to construct a 2-story garage, but after receiving objections to the second story from the neighbors, abandoned the idea and decided to construct a single-story garage on the subject property instead.

7. The dwelling and the detached single-story garage on Lot 27 were completed in 2004 and were purchased in the summer of 2005 by Michael and Amy Epstein, as trustees of the Michael Sears Trust ("property owners").

8. The property owners decided to add a second story onto the garage, and on July 11, 2005, commenced the construction of the second story, apparently under the auspices of Permit No. B456380, a copy of which was posted on the subject property.

9. At least one, and possibly two, stop work orders were issued to the property owners because there were neither original stamped construction plans nor an original permit posted on site. It is unclear whether the stop work orders were enforced.

10. On August 8, 2005, the Appellants filed this appeal of the issuance of the first permit, claiming that the second garage story violated the Zoning Regulations.

11. Two days after this appeal was filed, on August 10, 2005, DCRA issued Permit No. B476241, to "complete" construction of the garage, *i.e.,* to add the second story. Permit No. B476241 (the "second permit") stated that it was a "revision to Permit No. B456380 to reflect new ownership and complete construction in accordance with approved plans." Exhibit No. 22, Attachment No. 8.

12. The garage roof was demolished and the second garage story was completed in the fall of 2005.

13. The Appellants learned of the issuance of the second permit in late November or December, 2005, and, on February 6, 2006, filed an amendment to include the second permit in this appeal.

The Property

14. The dwelling on the subject property has a rear yard of approximately 72 feet, which extends from the rear of the dwelling to the public alley running behind the property.

15. The detached, two-story, private garage on the subject property is an allowable accessory building in this R-1-B district, and its second story is permitted as long as it is being used for the sleeping or living quarters of domestic employees of the family occupying the main dwelling. 11 DCMR § 2500.5.

16. The Appellants plan to house a domestic employee, the nanny to their children, in the second story above the garage.

17. The two-story garage on the subject property is located behind the main dwelling.

18. The two-story garage is 26.05 feet long and is set back 8 feet from the alley. There is approximately 38 feet of open space between the rear of the dwelling and the closest wall of the garage, leaving an open and unobstructed required rear yard of more than 25 feet.

19. Because the alley is 15 feet wide, and the garage is set back 8 feet from its edge, the garage is set back approximately 15.5 feet from the center line of the alley.

20. The garage is 20 feet high, and a 20-foot height for a two-story accessory building is permitted in an R-1-B district. 11 DCMR § 2500.6.

21. The two-story garage has side setbacks of at least 8 feet on both sides, satisfying the requirement of 11 DCMR § 2300.2(a) that a private accessory garage be removed from the side lot lines a distance equal to the side yard required in the zone district where it is located.

22. The area of the first story of the garage is approximately 572 square feet, below the maximum of 900 square feet permitted for a private garage. *See,* 11 DCMR § 199.1, definition of "Garage, private."

23. The second garage story is placed precisely above the footprint of the first story and is also approximately 572 square feet in area.

24. The first story of the garage provides a parking space for the motor vehicle(s) of the property owners.

25. The garage is located approximately 17 feet from the single-story garage on adjacent lot number 26 and approximately 20 feet from the opposite side lot line.

26. The garage is located a distance of at least 48 feet from the Appellants' homes -- 23 feet (the 8-foot alley setback and the 15-foot alley width), plus the length of the Appellants' rear yards, presumably a minimum of 25 feet, as required.

CONCLUSIONS OF LAW

Timeliness

An appeal to the Board must be filed within 60 days of the date the person appealing knew or should have known of the decision complained of. 11 DCMR § 3112.2(a). The Board may, however, extend the 60-day period for unforeseeable exceptional circumstances outside the appellant's control which impaired his ability to file the appeal if the parties will not be prejudiced by such extension. 11 DCMR § 3112.2(d).

In this case, there were, in effect, two "decisions complained of." The first was the issuance of Permit No. B456380, authorizing the construction of the dwelling and the 20-foot garage, and the second was the issuance of Permit No. B476241, revising the first permit to allow the "completion" of the construction of the garage. The first permit was issued on October 30, 2003, and the second on August 10, 2005. As to the first permit, the 60-day window for filing an appeal would have run on December 30, 2005. As to the second permit, the 60-day window would have run on October 10, 2005. The appeal was filed on August 8, 2005.[1]

Clearly, the appeal was not filed within 60 days of the issuance of the first permit. The Board finds, however, that there were exceptional circumstances outside the Appellants' control which impaired their ability to file this appeal within the required 60 days. The permit authorizing a 20-foot (*i.e.*, possibly two-story) garage was issued on October 30, 2003, but the property owners did not commence construction of the second story until July 11, 2005, almost two years after the first permit was issued. Appellants, voiced concerns over the possibility of a second story to the builder as soon as they learned of the permit, and he represented that he would not build the second story, only the first. Once the builder had completed construction of the dwelling and one-story garage on the subject property, there was no reason for the Appellants to believe that a second story would be added onto the garage. The actions of the builder and the completion of the

[1]Ironically, the appeal was actually filed two days before the issuance of the second permit, but the Appellants did not request that the appeal be amended to include it until more than 60 days after its issuance. It is unclear whether the request to amend occurred more than 60 days after the Appellants knew of the second permit's issuance. The second permit, however, was a "revision" of the first, not an outright new permit. The Board therefore concludes that the "decision complained of" and appealed is the issuance of the first permit and that the question of timeliness goes back to that permit's issuance.

garage at one story constitute the circumstances required by § 3112.2(d). The Board finds that, at this point, the Appellants would not have had any reason to file an appeal and could not have anticipated that a second story would ever be added to the garage.

Even if the Appellants knew, within 60 days of its issuance, that the first permit had been issued, due to the intervening exceptional circumstances, the earliest they knew or could have known that the new owners were adding a second story to what was a completed single-story garage structure was on or around July 11, 2005. Accordingly, there were unanticipated exceptional circumstances outside the Appellants' control which prevented them from filing this appeal within 60 days of the issuance of the first permit.

In light of the fact that the appeal was filed 2 days prior to the issuance of the revised permit, the Board finds that the other parties will not be prejudiced by this extension. The Board therefore concludes that this appeal was timely filed.

The Merits of the Appeal

The Appellants make several arguments on appeal, but their primary contention is that the Zoning Administrator erred in not requiring the garage on the subject property to have a 25-foot rear yard. They claim that, pursuant to 11 DCMR § 404.1, because the garage is a "structure," it must itself have a required rear yard of 25 feet in this R-1-B District. The Board, however, reading §404.1 in the context of the other applicable Zoning Regulations, concludes that this accessory garage building does not require its own rear yard.

Section § 404.1 must be read harmoniously with the other Zoning Regulations that come into play here. Section 404 is a generally-applicable section setting forth the required rear yards for all residence districts. Section 204, however, applies specifically to accessory buildings in R-1 districts, and subjects such buildings to the provisions of Chapter 23. Chapter 23 is *specifically* devoted to "garages, carports, parking lots and gasoline service stations," and therefore its provisions are controlling. *See*, 11 DCMR § 3102.3. Section 2300.2(a) states that a private garage that is an accessory building in a residence district "[m]ay be located ... within a rear yard." Nowhere in § 2300 does it say that an accessory garage building must have its own rear yard, and, in fact, it would be difficult to determine where this rear yard would be located. The definition of rear yard states that it is the "yard between the rear line of a building or other structure and the rear lot line." 11 DCMR § 199.1, definition of "Yard, rear." The rear line of the property-owners' garage faces the rear wall of the dwelling, but if one continues further through the lot, one does not encounter the rear lot line, as is necessary to demarcate the rear yard. Instead, one encounters the front lot line, abutting the street.

Requiring an accessory garage to have a rear yard between it and the rear lot line does not make sense because the front of the garage faces the rear lot line. This would actually be

a "front yard" and the Zoning Regulations do not require front yards in any zone district. A 25-foot yard between the garage and the rear lot line is also counter to § 2300.2(b), which states that a private garage abutting an alley must be set back at least twelve feet from the center line of the alley. If the garage is permitted to be set back a minimum of twelve feet from the center line of the alley, it follows that it need not be set back a minimum of 25 feet from the edge of the alley to create a "rear yard." The point of situating a garage abutting an alley is to create easy alley access. It would make no sense to require the garage to have a rear/front yard of 25 feet between it and the alley, necessitating a paved driveway of 25 feet to reach the alley.

Section 2500, dealing specifically with accessory buildings, is also applicable here. Section § 2500.2 states, with some exceptions not relevant here, that an accessory building may be located "*only* in a rear yard." (Emphasis added.) In the case of a two-story accessory garage, § 2500.6 states that a two-story accessory building may not be located in the *required* rear yard. Therefore, although a one-story garage may be located in a required rear yard, *i.e.,* within 25 feet of the rear of a dwelling in an R-1-B district,[2] a two-story garage may not be located within this 25-foot area. The practical effect of this regulation is to create a 25-foot open buffer area between a dwelling and its two-story accessory building. The Board reads the buffer area to constitute the required rear yard of the dwelling, not a required rear yard for the accessory garage.

The property owners' garage is not located within this required 25-foot rear yard area, but is located approximately 38 feet away from the rear wall of the dwelling. Therefore, the garage in question here is properly located in the rear yard, but is also properly not located within the *required* rear yard.[3] Although the garage is a "structure," the Board concludes that it does not require its own rear yard under § 404.1.

The Appellants also complain about several other aspects of the size and use of the garage. They contend that the definition of "Garage, private," at 11 DCMR § 199.1 limits the total gross floor area of a two-story accessory garage to 900 square feet. Although neither this definition nor § 2500 is entirely clear on this point, the Board interprets this requirement to apply to the first floor of the garage, or the part that is normally used to store a vehicle. Sections 2500.5 and 2500.6 set forth certain area requirements which come into play when a second garage story is added, but no maximum square footage is mandated for the second story. All garages in all zones other than R-1-A and R-1-B are limited to one story. The Board concludes that the regulations permit a greater square footage allowance in the R-1-A and R-1-B zones because the addition of a second story is permitted, necessitating an increase in square footage. It

[2]The Board agrees with the Zoning Administrator that a "rear yard" begins at the rear wall of a building and runs to the rear lot line. *See,* Board Order No. 16696 (Application of Craig and Ann Goodman), Finding of Fact No. 17.
[3]Because the garage is not located in the *required* rear yard, it cannot violate 11 DCMR § 2500.3, another Zoning Regulation which, at the hearing, was discussed as having been possibly violated here.

would be unreasonable to read the Zoning Regulations to permit a one-story garage at 900 square feet and to constrain a two-story garage to the same square footage maximum.

Appellants question whether the garage was removed a proper distance from the subject property's side lot lines. Section 2300.2(a) mandates that a private garage must be "removed from the side lot line a distance equal to the required side yard." The required side yard in this R-1-B district is 8 feet. 11 DCMR § 405.9. The garage is 8.5 feet from the side lot line dividing Lot 27 from Lot 26 and is substantially more than 8 feet from the other side lot line. The Board finds no problem here.

The Appellants also argue that the open space between the rear of the dwelling and the rear of the garage is a court, and not a yard. They base this argument on their interpretation of the definition of "court" in 11 DCMR § 199.1. The definition states that a court is : "an unoccupied space, not a court niche, open to the sky, on the same lot with a building, which is bounded on two (2) or more sides by the exterior walls of the building or by two (2) or more exterior walls, lot lines, or yards." The Appellants interpret this to mean that the area between the dwelling and the garage is a court because it is bounded by the two side lot lines and two exterior walls, *i.e.,* the two rear exterior walls of the dwelling and the garage. The Zoning Administrator disagreed and stated that the definition of court, in its reference to two exterior walls, means *two or more exterior walls of the same building*, and therefore that the open area in question is a rear yard. The Board agrees with the Zoning Administrator's interpretation and notes that the first clause of the definition of court specifies "the exterior walls of *the* building," (emphasis added) lending strength to the "same building" interpretation. The Board concludes that the area between the rear of the dwelling and the garage is the rear yard of the dwelling.

The second garage story is permitted if it is to be used for the sleeping or living quarters of a domestic employee of the main dwelling. 11 DCMR § 2500.5. At the hearing the property owners proffered that such would be the case. Any deviation from this use would be a question of compliance and enforcement beyond the purview of this Board.

Finally, the Appellants stated general concerns about negative impacts on the light, air, and privacy of neighbors due to the existence of the two-story garage. *See,* 11 DCMR § 2500.9. (An accessory building shall not obstruct light and ventilation.) The garage is located at a substantial distance from the Appellants' homes and is properly set back from the alley and the side lot lines. *See,* Findings of Fact Nos. 28, 20, and 22, respectively. The Zoning Commission, in the Zoning Regulations themselves, set forth the minimum area requirements for the R-1-B zone and for the height, bulk, massing, and placement of two-story accessory buildings therein. These minimum requirements ensure adequate light and ventilation for surrounding properties. All these requirements are met by the garage that is the subject of this appeal; therefore, the Board concludes that it does not obstruct light or ventilation.

For the reasons stated above, the Board concludes that the Appellant did not meet its burden of demonstrating that DCRA erred in issuing Building Permit No. B445380, and its revision, Building Permit No. B476241, and in consequently allowing the construction of a two-story accessory garage on the subject property. Therefore, it is hereby **ORDERED** that this appeal be **DENIED.**

VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Anthony J. Hood to deny)

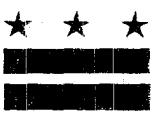
Each concurring Board member has approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

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

FINAL DATE OF ORDER: NOV 16 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.

GOVERNME[illegible] OF THE DISTRICT OF COLUM[illegible]
Board of Zoning Adjustment



BZA APPEAL NO. 17414

As Director of the Office of Zoning, I hereby certify and attest that on NOV 16 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

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ATTESTED BY: _____

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR