

Before the Board of Zoning Adjustment, D. C.

Appeal No. 11158 of Arthur H. Fawcett, Jr., pursuant to Sections 8102 and 8206 of the Zoning Regulations from a decision of the Zoning Administrator given on October 22, 1971 authorizing building permit (No. B203952) to permit construction of a deck at the rear of premises 1333 - 30th Street, N.W. (Square 1241, Lot 825).

HEARING DATE: November 8, 1972, July 18, 1973, November 19, 1975

DECISION DATE: July 24, 1973, March 23, 1976

FINDINGS OF FACT:

1. Premises 1333 - 30th Street, N. W. is a row dwelling located in an R-3 zoning district. Appellant contends that a sundeck at the rear of said premises approved by the Zoning Administrator and completed in December of 1971 is in violation of the Zoning Regulations.

2. In July 1971, the owners of the subject premises, through their registered architect, submitted preliminary drawings for the proposed construction of a sundeck at the rear of their premises to the Office of Zoning Administrator for review to assure compliance with the Zoning Regulations. The architect was advised that the deck with a safety railing required by the building code would be in compliance with the Zoning Regulations as long as the deck was open and uncovered, and as long as the floor of the deck was below the level of the main floor joists.

3. In accordance with the advice of the Zoning Administrator's office, final plans for the deck were completed and filed. These final plans indicated that the floor of the deck would be below the level of the first floor joists and that the safety railing required by the Building Code would be attached above the deck. On October 22, 1971, a permit was issued for the construction of the deck after approval of the Office of the Zoning Administrator (Building Permit B203952).

4. In reliance upon the permit, construction of the deck began in latter part of October, 1971, with the pouring of footings. The construction of the wooden portion of the deck began on or about November 17, 1971. The area of construction is in plain view from the adjoining properties.

5. During the construction of the deck, appellant complained to the District of Columbia Bureau of Building, Housing and Zoning, about the sundeck. However, the District officials told him that the sundeck was legal because the Zoning Regulations permitted this type of unroofed structure below the level of the main floor joists. At no time during construction of the deck, or shortly thereafter did appellant inform the property owners that in his opinion the deck did not comply with the Zoning Regulations. The cost of the deck and related interior work was approximately \$4,000.

6. While the work was in progress, the deck was twice inspected by representatives of the Bureau of Building, Housing and Zoning, and was found to be in compliance with the Regulations. After the work had commenced, appellant voiced disapproval of the deck to the owners of the premises. At the request of appellant and appellant's wife, the property owners agreed to construct an additional six-foot screen fence (approved as to design by appellant) on the north side of the deck separating the two properties. The deck was complete except for the screen fence by December 15, 1971. Construction was commenced on the fence on or about January 1, 1972. However, after inspection by a representative of the Bureau of Building, Housing and Zoning, work was stopped on the screen fence because the plan originally approved did not provide for the additional six-foot screen fence and because the six-foot screen fence exceeded the maximum height limitations.

7. In view of the responsible District of Columbia Zoning and Building officials, the deck with the required safety railing met all the applicable zoning requirements at the time it was constructed and continues to meet those requirements. The Zoning Administrator's approval was based upon his long-standing ruling in approving hundreds of similar decks, that such open unroofed sundecks could be constructed without regard to the twenty-foot rear yard requirements of Section 3304.1 of the Zoning Regulations as long as the deck was open, unroofed, and below the level of the first floor joists. Such rulings have been made consistently under the definition of "building area" which defines the maximum horizontal projected area of a building.

8. In May, 1972, seven months after the issuance of the building permit and six months after the completion of the deck, appellant filed the subject appeal with this Board seeking to reverse the decision of the Zoning Administrator approving the deck. During this seven-month period, the property owners were

never advised nor informed that appellant intended to file an appeal challenging the legality of the sundeck.

9. In this appeal, appellant contends that the longstanding application of the Office of Zoning Administrator with regard to the construction of rear sundecks is in error as it applies to the subject property. His principal contention is that the deck violates Section 3304.1 of the Zoning Regulations which requires a rear yard in an R-3 District of twenty-feet and Section 7107.2 of the Zoning Regulations concerning non-conforming structures. Appellant has additionally argued in this proceeding that even though the deck might appear to fall within the exclusion of the term "building area" since it did not extend above the level of the main floor joist, it was a balcony and, therefore, was excepted from the exclusion.

10. The property owners state that they have proceeded in good faith and in reliance upon the advice and approval of the District officials in issuing their building permit. They contend that this appeal should be dismissed or denied on any of the following grounds:

- (a) estoppel
- (b) stare decisis effect of prior administrative application of Zoning Regulations
- (c) laches
- (d) the deck complies in all respects with the Zoning Regulations.

11. At the first public hearing, the Zoning Administrator testified that the deck at the rear of 1333 - 30th Street, N.W., complied with the Zoning Regulations and was specifically permitted under the definition of "building area" because the deck was a portion of the principal building which did not extend above the level of the main floor and did not obstruct the light and ventilation of the main building or buildings on adjoining properties. The Zoning Administrator also testified that the deck did not constitute a balcony within the meaning of the Zoning Regulations.

12. The Zoning Administrator also testified that throughout the years he has approved virtually hundreds of similar decks under the same provisions of the regulations applicable to the

subject deck. The property owners submitted a list of specific addresses where similar decks have been approved by the Zoning Administrator with photographs of many of these decks.

13. On June 5, 1973, the Board voted to hold a further hearing to obtain facts related to the deck and safety railing and the relationship of the deck to the light and ventilation on the property owners' premises and the adjoining properties. Prior to the second hearing, Mr. Ralph C. Buote, Housing Inspector for the Housing Division, District of Columbia, Bureau of Building, Housing and Zoning, personally inspected the subject premises and the adjoining properties of appellant and intervenor Lenore Bryan in order to determine whether the deck obstructed the light and ventilation of any of these properties. On the basis of these applicable provisions of the Zoning and Building Codes and Regulations, Mr. Buote calculated the amount of light and ventilation needed for each property and determined that the property owner's deck did not obstruct the light and ventilation of their house, the Bryan house, the Fawcett house or any other house, under the applicable Code and Regulations.

14. At the second hearing, Mr. Buote was the only expert witness to appear concerning "light and ventilation". He testified without contradiction that the deck did not obstruct the light and ventilation of either the property owner's house or of neighboring properties. He further stated that the property owner's house, including the deck, was in compliance with the lighting and ventilation Regulations of the Housing Code. Finally, Mr. Buote pointed out that safety railings are required by the Housing code for structures such as stoops and steps as well as decks. No other expert witness testified and the testimony of the Zoning Administrator and Mr. Buote was neither contradicted nor refuted.

15. The definition of "rear yard" requires that the full width of the lot "shall be unoccupied except as herein specifically authorized". (Emphasis added.) The definition of "building area" which defines the maximum horizontal projection of a building on a lot, specifically authorizes "projections into open space" permitted elsewhere in the regulations and "portions of a building which do not extend above the level of the main floor of the main building if so placed as not to obstruct light and ventilation of the main building or other buildings on adjoining property." Section 7107.2 authorizes "enlargements or additions" to a

nonconforming structure devoted to a conforming use provided the structure conforms with the applicable provisions of the yard percentage of the lot occupancy of the district in which it is located. "Balcony" as defined in Webster's Unabridged Dictionary is "a platform projecting from the wall of a building, enclosed by a parapet or railing and usually resting on brackets or consoles; as, a balcony in front of a window."

Under the definition of "gross floor area," the deck is not computed in F.A.R. since it is uncovered and does not meet the definition of "story".

16. In B.Z.A. Appeals No. 6505 and 6509, this Board affirmed a similar ruling of the Zoning Administrator for construction at the rear of premises 1224-26-28 - 36th Street, N.W. where similar contentions were made that such construction violated rear yard requirements and Section 7107.2 of the regulations. The Board held under the applicable Regulations (definitions of "building area," "main floor," "yard, rear," "gross floor area") that there was no violation of the rear yard requirements or of Section 7107.2. Those appeals were appealed to the United States District Court for the District of Columbia in Smith v. Board of Zoning Adjustment, Civil Action No. 3061-62. The United States District Court affirmed the Board's decision as it pertains to the alleged violation of the rear yard requirements and Section 7107.2 of the Regulations.

17. More particularly, the Board finds with regard to the specific issues presented by the appellant that:

- (a) The deck is part of the building and is below the level of the main floor and the railing structures, necessary for safety, attached thereto are incidental to the deck.
- (b) The deck does not interfere with the light and ventilation of the subject premises and does not interfere with the light and ventilation of adjoining properties.
- (c) The deck does not constitute a balcony and, therefore, is not within the exception to the exclusion contained in the definition of "building area".

OPINION:

The appeal is dismissed on the grounds of estoppel and stare decisis. The undisputed facts demonstrate that the property owners meticulously complied with every procedural and substantive requirement in obtaining the building permit and constructing the sundeck at issue. They were assured at every step of the way by the responsible District of Columbia officials that the sundeck was in full conformity with the Zoning Regulations. These assurances were in accordance with the Zoning Administrator's long-standing and established interpretation, as confirmed by a decision of this Board in B.Z.A. Appeals Nos. 6505 and 6509, as affirmed by the United States District Court for the District of Columbia in Smith v. Board of Zoning Adjustment, Civil Action No. 3061-62 (decided November 22, 1963), pursuant to which hundreds of similar structures, including appellant's own deck, had been approved. Under these circumstances, the District of Columbia Government and appellant is estopped from seeking to revoke the issuance of the building permit. See District of Columbia v. Cahill, 60 App. D.C. 342, 54 F. 2d 453 (1931).

The appeal is also dismissed on the grounds of laches. Here, the appeal was not filed until seven months after the issuance of the building permit and five and one-half months after the construction of the deck was completed. The testimony at the last public hearing established that the sole ground of complaint by appellant to both the property owners and the District officials during and after construction was that the deck infringed upon the privacy of their own deck. Likewise, intervenor complained that she simply did not like the deck. Thus, the property owners were not in any way put on notice by appellant or intervenor that the deck might have violated the Zoning Regulations. The construction of the deck was accordingly undertaken and completed entirely in good faith. If the adjoining neighbors believed that the permit was issued in error, the proper course of action was to have brought an immediate appeal and to have sought a judicial stay of further construction. Their failure to act in a timely manner requires dismissal of the appeal in the fact of the substantial expense (approximately \$4,000 for the deck and related interior work) incurred by the property owners in good faith reliance upon their building permit.

While we do not have to reach the substantive claims of appellant, the Board concludes that they are lacking in merit and that the action of the Zoning Administrator was clearly correct. Since the deck was constructed in accordance with the plans approved by the Zoning Administrator and the floor of the deck was below the level of the first floor joists, the Board concludes that the deck is excluded from the definition of "building area" within the meaning of Section 1202 of the Zoning Regulations. Accordingly, the deck and its required safety railings are not in violation of the rear yard or lot occupancy requirements or provisions of Sections 7106 and 7107. The Board is further of the opinion, from the evidence and testimony of record, including the plans and photographs that the deck does not interfere with the light and ventilation of either the principal building or the buildings on the adjoining lots.

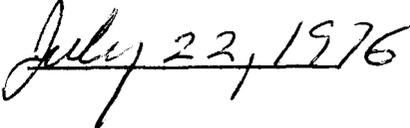
The Board believes that the property owners at all times proceeded in good faith in processing their permit. The construction of the deck took place in reliance upon the permit. It would be inequitable to reverse the decision of the Zoning Administrator for this additional reason. It is THEREFORE ORDERED: that the appeal herein be DISMISSED and that the decision of the Zoning Administrator is affirmed.

VOTE:

4-0 (Walter B. Lewis, William S. Harps, William F. McIntosh and Leonard L. McCants to Dismiss, Lilla Burt Cummings, Esq. not voting having recused herself)

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED By:   
ARTHUR B. HATTON  
Executive Secretary

FINAL DATE OF ORDER: 

Before the Board of Zoning Adjustment, D. C.

Appeal #11158, of Arthur Fawcett, from the issuance of a building permit by the Zoning Administrator, issued on October 22, 1971, to construct a sun deck below the level of the main floor at the rear premises located at 1333 30th Street, N. W., Lot 825, Square 1241.

HEARING DATE: July 18, 1973

EXECUTIVE SESSION: July 24, 1973

ISSUES ON APPEAL:

a. Whether or not the sun deck obstructs light and air on the subject property?

b. Does the sun deck obstruct light and air on the adjoining property?

c. Whether or not the sun deck and railing in question is a structure within the meaning of Section 1202 of the Zoning Regulations, and is above the first floor joists thereby being in violation of Sections 3304.1 and 7107.2 of the Zoning Regulations.

FINDINGS OF FACT:

1. The property is located in a R-3 District.
2. The area of the structure located on the subject property below the surface of the sun deck is cut off from light and air by the sun deck structure.
3. The use of the sun deck structure restricts the privacy of the adjoining property owner's bedroom.
4. The sun deck does not restrict the light and air from the other adjoining property owner.
5. The sun deck and railing are of the same structure.
6. The sun deck is located above the first floor joists.

7. The appellants filed this appeal May 4, 1972, seven (7) months after the Zoning Administrator's action, and four (4) months after the sun deck structure was constructed.

CONCLUSIONS OF LAW:

Based upon the findings of fact, we are of the opinion that the sun deck structure obstructs light and air from the subject property, and pursuant to Section 8206.1 of the Zoning Regulations, we find that the Zoning Administrator was in error in issuing a permit to build the sun deck. We are of the opinion that the railing and sun deck are part of the entire structure which is above the first floor joists placing the structure in violation of Section 3304.1 and 7107.2 of the regulations.

ORDERED:

That the determination of the Zoning Administrator on appeal be REVERSED.

VOTE: 4-0, with Lilla Burt Cummings not voting.

BY ORDER OF THE D. C. BOARD OF ZONING ADJUSTMENT

ATTESTED By: *James E. Miller*  
JAMES E. MILLER  
Secretary of the Board

FINAL DATE OF ORDER: **AUG 28 1973**