Before the Board of Zoning Adjustment, D. C.

Appeal No. 11471 of Jacob Stein, et al from a decision of the Zoning Administrator in issuing building permits B-216636 and B-216650 inclusive for construction of single family dwellings in the R-1-B District pursuant to Section 7516 of the Zoning Regulation, on lot 824, Square 4109, (permits issued March 7 and March 29, 1973).

HEARING DATE: September 19, 25, 1973
EXECUTIVE SESSION: November 20, 1973

FINDINGS OF FACT:

1. The appellants are property owners in general neighborhood of the subject property.

2. No approval by the Board has ever been sought regarding the application of Section 7516 of the Zoning Regulations.

3. The property owners (Battery Associates) who have intervened in this appeal propose to construct 27 single family detached dwellings on the property, the permits for fifteen of which are the subject of the appeal.

4. The property involved in this appeal consists of 192,291 square feet located in the R-1-B Zoning District. The lot (designated 824, Square 1409) has a lot frontage of approximately 233.94 feet on Chain Bridge Road and approximately 70.06 feet on University Terrace, N. W.

5. The appellants contend that the determination of the Zoning Administrator in administering Section 7516 of the regulations is an unconstitutional exercise of administrative authority because there are no standards providing a guide for the Zoning Administrator to act. In absence of such express standards, the appellants contend that requests by persons seeking building permits under this Section of the regulations should be by the variance or special exception mechanisms.

6. Testimony of record by the Zoning Administrator indicates that no permits are issued under Section 7516 unless the plans of the proposed subdivision and construction meet the requirements of R-1-B Zoning District, and the street frontage requirements of Section 7516.3 of the regulations.

No specific language of the Zoning Regulations requires the Board to grant a variance or special exception from Section 7516 for the approval of the subject permits.

7. There is no discretion in the Zoning Administrator to determine whether or not to apply Section 7516 since said Section may be utilized at the option of the property owner or developer.

8. The legislative history of Section 7516, to be found in the 1966 Zoning Advisory Council report supporting the addition of Section 7516 to the regulations makes no reference to any Board of Zoning Adjustment action as a requirement for administering the regulation in question; See pg. 6-8 of the ZAC report.

CONCLUSIONS OF LAW:

Based upon the above Findings of fact, the Board is of the opinion that the decision of the Zoning Administrator should be affirmed. The Board is of the opinion that adequate standards exist to administer this Section of the regulations by virtue of the height, bulk, area, and use requirements for the various Zoning Districts, and that the regulation in question is an elective regulation applied for at the option of the developer for permission to build as would be requested in similar application for building permits. Based upon the plain meaning of the regulation and absent any express requirement in the regulations or legislative history of Section 7516, the Board concludes that it has no jurisdiction over the matter as a variance or a special exception unless within the theoretical lots a variance or special exception is otherwise required.

ORDERED:

That the decision of the Zoning Administrator be affirmed.

Vote: 3-1-0 (Lilla Burt Cummings, Esq. dissenting and Mr. McIntosh abstaining.)

FINAL DATE OF ORDER: FEB 26 1974

PUBLIC HEARING - - September 19, 25, 1973

Appeal No. 11471, Jacob Stein, et al.

Dissenting ~~Separate~~ Opinion of Lilla Burt Cummings, Affirming in part and Modifying in part the action of the Zoning Administrator.

Zoning Regulations must operate and be applied in conformity with the requirements of due process of law and the juristic ideal of impartiality, uniformity, and certainty in the law. Unity and order are in the public interest.

I therefore cannot see the wisdom or the equity in applying the Regulations in their full force to one individual but removing from their purview and control another individual, as has been done in this case, without action of this Board as provided in the Regulations. The neighboring land owners and residents are as much concerned with the construction of new houses under circumstances which depart from full compliance with all the requirements of the regulations, under one section of the Regulations as under another and are therefore no less entitled to notice and due process without the showing of a strong countervailing interest so weighty as to extinguish this right.

My thinking must start in this case with the juristic proposition that the interests of the public, as well as individual interests, are best served when secured by law - procedural no less than substantive. There is a public interest

in so securing individual interests so far as securing them conduces to general security, stability of districts, protection of neighborhoods, and the general morale and neighborhood life of individuals. I cannot see that the public interest or welfare in this case could exist in any discernible sense that would outweight or conflict with these individual interests of neighboring landowners and residents, congenial with fairness and compatible with and in conformity with the requirements of due process, or, more strongly, that any social interest exists here in depriving the individual of notice and due process guarantees secured by other sections of the Regulations. This belief is formed and held in the absence of evidence which would reduce individual rights and interests in importance, a fortiori, in pre-eminence.

How can this situation, the case before the Board, be claimed to be so special as to be frozen into one set of absolutes, which can only be masquerading as in the public interest, so as to extinguish safeguards protected by the normal variance procedures set forth in the Regulations, which section (8207.11) requires notice and hearing, in short, where there are no presumptions in favor of so doing and no presumptions in favor of the expertness of the Zoning Administrator and no showing sufficient to establish the need to disregard such safeguards nor the reasoned experience of the Board, which Board by statute has the sole jurisdictional authority to grant variances.

There is no plausible argument in favor of reading the Regulations in such a way that they:

can impose additional burdens on the neighborhood,

appear to make some unusual exception to the requirements that bind others in other sections of the Regulations without action of this Board.

appear to unjustifiably deprive affected neighborhood landowners and residents of notice and fair hearing as to actual or projected impact,

purport to empower the Zoning Administrator in fact to grant variances, by law within the exclusive jurisdiction of the Board (§ 8207.11 and D. C. Code §5-420).

Any such reading, necessarily resulting in such unwarranted delegated power to the Zoning Administrator, inasmuch as it has the effect of depriving affected neighboring citizens of notice and fair hearing, assails in fact and in spirit the due process concepts developed over the last decade and would seem to be barred by these concepts, these magnificent accretions, as lacking in safeguards and as constituting an extravagent and improvident award or investiture of power in the Zoning Administrator in deprivation of exclusive statutory jurisdiction in the Board over variances, contrary to an act of Congress.

All argument that this was intended or that this is, in fact, the case appears to this Member to be languent, nay, moribund.

But there is no war between the Regulations and common sense, and this case does not present a tangle of competing Regulations, but a single transcendent principle which need only be identified for the solution to be plain - can the Regulations, taken together, be read in such a way so as to save them from infirmity? The answer is clearly yes.

It is urged that the Zoning Commission did not intend, be enacting Section 3301.6 (mandatory street frontage requirement), to set up a game of Regulation Roulette, enabling one developer to escape compliance with "all requirements of these regulations", including the mandatory street frontage requirement , under Section 7516, but requiring other developers to be bound by them under all other sections of the Regulations. And this is clearly the case because whether one is confronting record lots or theoretical lots is immaterial, because the Commission enacted a blanket Regulation, applicable to all without exception on its face:

Section 3301.6 of the Regulations provides, in pertinent part, "Each lot . . . to be used and occupied by a one-family detached dwelling . . . shall have a street frontage measured along the street . . . equal to .... etc." (emphasis added). Lot is defined in the Regulations (p. 4, 9-1-73) as follows: "Lot: the land bounded by definite lines . . . to be occupied by a building or structure . . , includes the open spaces required under these regulations. A lot may or may not be the land so recorded on the records of the Surveyor, District of

Columbia." (emphasis added). THEORETICAL LOTS OR RECORD LOTS SHALL HAVE A STREET FRONTAGE AS SET FORTH IN 3301.6, by definition. The provision is mandatory and applicable without exception to ALL lots.

Index animi sermo (Broom, Max. 622) - language is the exponent of the intention. If the intent of the Regulation (3301.6) was to except theoretical lots bounded by definite theoretical lines, it would not have spoken in absolutes, thus: "EACH lot . . . to be used and occupied by A one-family detached dwelling ... SHALL HAVE A STREET FRONTAGE . . . equal to . . . etc." NOR WOULD THE DEFINITION OF LOT HAVE SPOKEN UNAMBIGUOUSLY, thus: "... A LOT MAY OR MAY NOT BE THE LAND SO RECORDED ON THE RECORDS . . ."

Section 7516.3 of the Regulations is no bar to this reading of the Regulations in that it makes reference to "Where a principal building has no (actual) street frontage (in fact), . . . , the front of such building shall be the side upon which the principal entrance is located. Open space in front of such entrance shall be provided equivalent to ... etc." (emphasis added). The sole concern here is with open space, and how to ensure the sufficiency thereof, the means by which it may be determined; Section 7516.3 addresses itself to and refers to principal buildings, (here houses), without actual street frontage in front of them, and attempts to secure, under such circumstances, ONLY that sufficient OPEN SPACE will be provided.

It does not and never did address itself to the provision of street frontage but to the provision of open space.

A fortiori, under Section 7516.2 of the Regulations,"The number of principal buildings permitted hereunder shall not be limited, provided the applicant for a permit to build submits satisfactory evidence that ALL REQUIREMENTS OF THESE REGULATIONS, such as, use, height, bulk and open spaces around each building ... WILL BE COMPLIED WITH." (emphasis added). "All the requirements of these Regulations" INCLUDES § 3301.6, the mandatory street frontage requirement, and the listing of the requirements under § 7516.2, "such as use, height, bulk and open spaces..." is not exhaustive. Street frontage is ejusdem generis, things of the same general kind or class as those specifically mentioned, and must be complied with under "ALL THE REQUIREMENTS OF THESE REGULATIONS."

No other reading of the Regulations, taken together, appears to be supportable on any readily apparent rational ground. A fortiori, any other reading of the Regulations is insupportable as an attempted enactment (Section 7516) beyond the power of enactment as being a deprivation of authority or divestiture of jurisdiction already granted to the Board of Zoning Adjustment under 5-420 of the D.C. Code, and an illegal attempt to delegate that authority, in part, to the Zoning Administrator, in avoidance of what would otherwise necessarily involve variance procedure before the Board, extinguishing, in the process, the requirements of notice and fair hearing.

CONCLUSION

Jurisdiction of this Board is invoked under Section 8206 (as well as 8102) of the Regulations - Appellate Jurisdiction - which provides relief "where it is alleged by appellant that there is error in any... requirement ... made by any administrative officer in the administration ... of these regulations."

The Regulations cannot grant, and may not be read to grant, powers to the Zoning Administrator, even if properly circumscribed, which, in effect, divest this Board of powers or jurisdiction granted solely to it by Act of Congress because any such attempted investiture by Order of any appointive officials would be in contravention of an Act of Congress and therefore void and of no effect. A fortiori, any grant of power under the Regulations, otherwise legal, which fails to provide for proper notice and an opportunity to be heard, as required under the District of Columbia Administrative Procedures Act and that substantial body of case law which, through gradual accretion, has set forth and shaped what is today recognized as elemental fairness in cases where property rights of parties are or may be substantially affected, would be lacking in procedural due process and therefore void.

I would therefore modify the Zoning Administrator's Order in this R-1-B District insofar as any building erected or to be erected per theoretical lot fails to comply with "all the requirements of these regulations" (§ 7516.2) including the

mandatory street frontage requirements of § 3301.6 of the Regulations, said section added to the Regulations in 1966.

For each building per theoretical lot failing to so meet the street frontage requirements of the Regulations, as set forth in § 3301.6, appellees are in a position to seek relief through application to the Board of Zoning Adjustment for a full hearing on the merits of their application, after proper notice, in accordance with procedural and substantive due process rights of appellants, here lacking, as extinguished by action of the Zoning Administrator in error under Section 7516, but which cannot be infringed by officials at any level of government.

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

ATTESTED BY: James E. Miller
JAMES E. MILLER
Secretary to the Board

FEB 26 1974