

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Appeal No. 15644 of Advisory Neighborhood Commission 3E, pursuant to 11 DCMR 3105.1 and 3200.2, from the decision of the Zoning Administrator made on November 12, 1991, to the effect that a building permit be issued for a new single-family dwelling at premises 5103 Belt Road, N.W. (Square 1755, Lot 43).

HEARING DATE: May 13, 1992
DECISION DATE: June 17, 1992

ORDER

SUMMARY OF EVIDENCE OF RECORD:

1. The property which is the subject of this application is located at 5103 Belt Road, N.W., Square 1755, Lot 43. It is zoned R-1-B.

2. The subject lot was previously part of Lot 36. Lot 36 was a corner lot that fronted on Garrison Street. The rear of lot 36 abutted an alley. One side yard was on Belt Road and the other side yard abutted an adjacent property.

3. The Chevy Chase Land Company (CCLC) owned Lot 36. In 1940, CCLC transferred Lot 36 by deed to Barkley Brothers Company. The deed contained a number of restrictive covenants which placed certain limitations on the use of the property by the purchaser, its successors and assigns.

4. In 1941, Barkley Bros. Co. constructed a single-family house on Lot 36. The house faced Garrison Street and was known as 3949 Garrison Street, N.W.

5. From the early 1950's to 1984, Lot 36 and the house located thereon, was owned by the Johnson family. Following Mr. Johnson's death the property was purchased by the Bergers.

6. Records in the D.C. Office of the Surveyor reveal that in 1988, the Bergers recorded a subdivision of Lot 36 into two lots - lots 43 and 44. Lot 44 is that portion of Lot 36 that is located at the corner of Garrison Street and Belt Road. Lot 43, the other portion of former Lot 36, is located on what used to be the backyard. Lot 43 is situated at Belt Road and the public alley. It abuts Lot 44 on one side. Lot 43 was sold to Sterling Associates (Sterling) in 1989 or 1990. Lot 43 is the subject of this appeal.

7. On August 19, 1991, Sterling filed with the Zoning Division, Building and Land Regulation Administration, Department of Consumer and Regulatory Affairs (DCRA) an application for a building permit with plans to construct a single-family house on Lot 43. On September 9, 1991, the application and plans were filed with the Technical Review Branch of DCRA for construction of the house. The building permit was issued on November 12, 1991.

8. On December 12, 1991, Advisory Neighborhood Commission (ANC) 3E filed an appeal with the Board, claiming that the building permit was issued in error and must be revoked.

The ANC sets forth the following arguments on appeal:

- A. The Zoning officials deprived the neighbors of their due process rights;
- B. The burden of proof and persuasion in this appeal are not on the ANC;
- C. The restrictive covenants in the deed preclude building the second house on former Lot 36, regardless of the subdivision; and
- D. The building permit improperly allows the structure to front on the alley.

Due Process:

9. Paul Strauss, the current chairman of ANC 3E testified, on behalf of the appellant, about the events leading up to the appeal.

He stated that according to city records, the Bergers recorded the subdivision of Lot 36 into lots 43 and 44. Although the neighbors heard rumors of the subdivision sometime in late 1988 or early 1989, neither the ANC nor any of the individual property owners were given any formal or informal notice of the subdivision proposal. They were not informed that a subdivision was proposed or that one had ever been made. Further, none of the neighbors can recall seeing a surveying crew at this site.

10. Lot 44 was sold by the Bergers in 1989. The lot was sold through a real estate agent, and neighbors recall seeing a "For Sale" sign posted on that property. However, when Lot 43 was being sold, there was no "For Sale" sign seen by any of the neighbors.

11. Sometime late in the summer of 1991, the neighbors became aware of plans to build on Lot 43 when a real estate agent, who was selling another property, informed a neighbor that construction

plans were already underway. The real estate agent sent that neighbor a copy of drawings and the layout for the proposed house. Because the lot did not appear to be appropriate for construction, neighbors decided to find out what was happening and brought the matter to the attention of Mary Grumbine, the Advisory Neighborhood Commissioner for that single member district.

12. The appellant stated that Ms. Grumbine, acting in her capacity as an individual commissioner, requested that the Building and Land Regulation Administration (BLRA) inform her when building plans were filed or a building permit was applied for.

13. The appellant further stated that in early September, Commissioner Grumbine received notice that a permit application and plans had been filed. At the request of neighbors concerned by the unprecedented construction of a house on an alley and in view of the comments made to her by a number of neighbors who became aware of the project, Commissioner Grumbine sent a letter dated September 6, 1991 to the Department of Consumer and Regulatory Affairs (DCRA), with copies to the Building and Land Regulation Administration and to the Zoning Administrator, setting forth some of the concerns that had been expressed to her by her individual constituents.

More importantly, that letter requested a meeting with the appropriate officials in DCRA for the express purpose of presenting to them the neighbors' concerns, so that those concerns could be addressed during the consideration of the permit application.

No response either by mail or telephone was ever received to that letter. On their own, neighbors then began to circulate petitions throughout the neighborhood. The petitions sought a public hearing on the permit application.

Ms. Grumbine, received those petitions and forwarded them to the officials at the Building and Land Regulation Administration. In cover letters transmitting those petitions, she reiterated the request for a meeting with the appropriate officials.

14. The appellant stated that on at least three separate occasions, Ms. Grumbine telephoned the Office of the Administrator of the Building and Land Regulation Administration on this matter for the express purpose of requesting and scheduling such a meeting. On each occasion, the BLRA Administrator was unavailable. On each occasion, a message was left asking that the telephone call be returned. None of these calls were returned.

15. The appellant stated that the issue of the construction permit application was next raised by members of the public during the open forum portion of the ANC's next regular monthly meeting.

It is the regular practice of ANC 3E to set aside a portion of the monthly meeting in the beginning for the airing of concerns.

At that meeting, then Chairperson Steve Raiche promised the neighbors that they would be given a meeting with the appropriate officials before action was taken on the permit application.

The neighbors were relieved having heard this from the ANC Chairperson who is familiar with BLRA procedures. However, during a week that Mr. Raiche was out of town, the Zoning Administrator telephoned Ms. Grumbine on the afternoon of Wednesday, November 6, 1991 requesting to meet with the interested neighbors the following morning at 11:00 a.m. Because it is difficult to get everyone together on short notice, he was told that a meeting on such short notice would not be possible. In its place a meeting for the following week was suggested by Ms. Grumbine so that all of the neighbors could be contacted and the process could go forward as everybody was led to believe that it would.

16. The appellant stated that prior to any such meeting being scheduled, the following Tuesday, November 12, 1991, which is the day after the Veterans Day public holiday, a telephone call was received from Mr. Raiche indicating that the Zoning Administrator had signed off on the permit application that previous Friday, only two days after he had been called regarding a meeting with the neighbors. It is the ANC's understanding that the Zoning Administrator said that he signed the permit because the building permit applicant was anxious to purchase building materials for the construction.

17. On Wednesday, November 13, 1991, Mr. Raiche found that the building permit had actually been issued the previous day, November 12th. He notified Ms. Grumbine of this.

18. On November 13, after the issuance of the building permit, the Zoning Administrator called Ms. Grumbine's husband Mr. Jack Simmons, and asked Mr. Simmons to set up a meeting with the neighbors. Mr. Simmons told the Zoning Administrator that his request was untimely in light of the issuance of the permit. He further told the Zoning Administrator that it was unfair to the neighbors for BLRA to act on a permit after they had been given the understanding that they would have an opportunity to present their views before action was taken.

19. Following this, a series of letters were sent to the Council of the District of Columbia, and the people in the community were quite upset. They felt that they would be operating under one set of circumstances and instead found out that the permit was issued and, their opportunity to appear, which had been promised to them, never materialized.

20. The Zoning Administrator finally met with a number of neighbors on November 19, 1991. At that meeting, the Zoning Administrator and the neighbors examined the plans for the proposed construction.

The Zoning Administrator described some of the process of examining the permit application. He discussed such matters as the calculation of lot size based solely on the subdivision plat on file, and the maximum height of the building. The Zoning Administrator stated, among other things, that the permit would not be revoked or suspended unless it was demonstrated that there was an unequivocal error in the decision. The Zoning Administrator made it very clear that he perceived no errors in his examination of the application. It was from that decision that this appeal followed.

21. Notwithstanding the filing of this appeal and the appropriate notice to all parties, construction has begun on the lot and is actually underway or may even be in a substantial state of progress at this point in time.

22. The appellant maintains that the handling of the permit process by BLRA officials deprived the neighbors of their due process rights. Appellant stated that it is evident from the neighbors' efforts that they had concerns about the building permit application. They sought to bring their concerns to the attention of the appropriate administrative officials at BLRA so that those views could be considered administratively. It is further apparent, in the ANC's view, that the neighbors' efforts were disregarded by BLRA.

The appellant argued that zoning is a legitimate exercise of the police power of the municipality to regulate the use of land, including the examination of building permit applications. Zoning, when properly administered, ensures that uses for individual parcels of land conform to the broader patterns of land use that have been established by the municipality. Zoning is undertaken in the public interest to protect the entire community, including the neighbors to property for which building permit applications are made.

The appellant argued that the neighbors of the property are most directly affected by the building permit, not only in terms of potential effects on property values, but also in terms of the noise, dirt, and disruption brought about by months of construction activity. They are usually the best informed people about land use around the lot in question and are the most directly affected by the application for the building permit. Thus, the inclusion of their concerns in the permit application and examination process is in the public interest, as they can bring forth concerns about which others may not be aware. Here, the neighbors were never

given the opportunity to be heard as they had requested. On the other hand, building permit applicants routinely are given the opportunity to meet with administrative officials. The neighbors have been informed that in this instance, the building permit applicant and/or its attorney met with BLRA officials on several occasions to discuss the building plans and the permit application.

The appellant maintains that the permit process is not a process designed to be carried on behind closed doors. Building plans are available for public examination. The BLRA is required to publish and submit to each ANC, on a timely basis, a list of building permit applications. The appellant pointed out that while it receives information on permits that have been issued, it receives no information from BLRA on a regular basis regarding permit applications.

The appellant stated that the permit application process involves an examination of a permit application in light of controlling law and regulation, however, the law does not exclude the neighbors and the ANC from the process. BLRA is not to disregard the legitimate efforts of neighbors to have their concerns heard and examined. The fact that D.C. law requires that a list of building permit applications be forwarded to each ANC is a clear indication of the public policy of permitting neighbors and affected ANCs to participate.

The appellant argued that the neighbors sought to participate in what is supposed to be an open process. However, they were denied the fundamental due process right to be heard in a timely fashion. The denial of due process is compounded by the fact that the developer had access to BLRA officials. Moreover, this permit application raises questions not only about compliance with technical requirements but also about zoning policy. Where policy questions are concerned, the right to have one's views heard and examined is even more significant.

23. Joseph L. Bottner, the Zoning Administrator testified at the hearing in opposition to the appeal. On the issue of due process, the Zoning Administrator provided similar testimony with regard to matters such as when the property was subdivided, when the permit application and plans were filed and when the permit was issued.

However, with regard to his contact with the community the Zoning Administrator stated that on October 2, 1991, he received a letter dated September 30, 1991 from Cynthia Giordano, who was representing neighbors in the vicinity of 5103 Belt Road, N.W. The letter advised him that prior to his final disposition of the building permit application, she wanted to make sure the interests of many concerned neighbors were fully and directly addressed.

The letter included two copies of letters which were sent to Mr. David Caney, the Administrator for the Building and Land Regulation Administration. These letters were dated September 6, 1991 and September 13, 1991 and signed by Mary Grumbine, ANC 3E-04.

Before the application was assigned for review, the Zoning Administrator met with Ms. Grumbine and her husband in the Review Branch and went over the plans. She alerted the Zoning Administrator to her concerns and he indicated to her that he understood them. He asked her to put them in writing and stated that he would be glad to have it as part of the record.

The Zoning Administrator stated that Ms. Grumbine reviewed the plans as an ANC representative, as a private citizen and as a neighbor to the property. Also, her husband reviewed the plans. The two of them discussed their concerns with the Zoning Administrator and he accommodated their inquires.

Mr. Bottner stated that the plans were assigned for review in the Zoning Review Branch on October 4, 1991. However, when the plans for the proposed construction were found to be complete, he did not allow approval because of neighborhood concerns.

On November 6, 1991, Mr. Bottner called Cynthia Giordano and asked her who she represented. She stated that she represented the neighbors, including Ms. Grumbine. He advised Ms. Giordano that a review of the plans had been completed and that he wanted the neighbors to have the opportunity to meet with him on zoning issues.

Mr. Bottner testified that appointments were made for November 7, 1991 at 11:00 a.m. and also on November 8, 1991 at 11:00 a.m. Mr. Bottner called Ms. Giordano on November 6, 1991 to determine when she and her clients could come in. She stated she could contact them and request them to come in on November 8, 1991 at 11:00 a.m.

The Zoning Administrator testified that on November 8, 1991, while he was in a meeting within his department, his secretary received a message that Cynthia Giordano was canceling, but would be down before lunch to look at the file. However, no one came in. At 2:30 p.m. on November 8, 1991, the Zoning Administrator authorized his staff to approve the application, as the applicant was requesting approval. He advised the applicant that there was neighborhood concern, and the neighbors could very well appeal his decision to the Board of Zoning Adjustment.

On November 12, 1991, Building Permit No. B353531 was issued to Sterling Associates authorizing construction of a single-family detached house at 5103 Belt Road, Lot 43, Square 1755.

Subsequent to the issuance of the building permit, the Zoning Administrator received copies of letters dated November 12, 1991 and November 13, 1991, which were addressed to Councilmember John Ray and signed by Mary Grumbine. He then called and left a message for Ms. Grumbine to call him to make an appointment to review the Belt Road project.

The Zoning Administrator stated that on November 26, 1991 he met with a group of citizens who had concerns with the proposed construction. This meeting was held in the office of Steve Raiche, then chairman of ANC 3E. Several issues were discussed, namely the minimum lot area, the orientation of the house toward the alley, and the width of Belt Road. The citizens questioned the minimum lot area because they saw several stakes on the property placed beyond what they thought was the property line. The Zoning Administrator stated that the official subdivision plat recorded in the D.C. Office of Surveyor shows 5,339.80 square feet. The minimum area required for the R-1-B zone is 5,000 square feet. The Zoning Administrator maintains that he did meet with concerned neighbors prior to issuing the building permit.

24. Sterling Associates, the current owner of the property, appeared as the intervenor in opposition to the appeal. Responding to the ANC's due process claim, Sterling argued that the appellant was not deprived of due process during the permit application process.

Sterling stated that before the building permit for the subject property was issued in November 1991, ANC 3E had ample notice of the proposed construction and the statutory opportunity to issue written recommendations regarding the proposed dwelling to the Zoning Administrator. Therefore, under D.C. law, the ANC received the due process to which it was entitled.

Sterling stated that the ANC is entitled to statutory notice of proposed actions by governmental agencies thirty (30) days prior to the taking of such actions. D.C. Code Ann. Sect. 1-261(b). However, the appellant ANC concedes that neighbors were aware of the proposed construction and even given drawings of the single-family house sometime late in the summer of 1991. In early September, at least two months before the permit was issued, ANC Commissioner Mary Grumbine, was informed that a permit application had been made. The full ANC considered the permit application at its regular monthly meeting held September 19, 1991.

Sterling argued that a list of building permit applications sent regularly to ANCs constitutes sufficient statutory notice of proposed action by the Zoning Administrator. Tenley and Cleveland Park Emergency Committee v. D.C. Board of Zoning Adjustment, 550 A.2d 331, 342 (D.C. App. 1988). After considering the proposed action in a public meeting, the ANC is then expected to outline any

concerns in written recommendations to the Zoning Administrator. D.C. Code Ann Section 1-261(d). While ANC 3E indicates it does not regularly receive lists of pending permit applications, it does not state in its memorandum to the Board that it did not receive notice of this one. Moreover, it clearly had actual notice of this permit application, and considered it at an open meeting, well in advance of the statutory thirty (30) days before the permit was issued November 12, 1991. The ANC failed to provide recommendations to the Zoning Administrator; however, Mr. Bottner still met with representatives to address their concerns and attempted to meet with others before issuing the building permit. ANC 3E received all the opportunity to be heard to which it was entitled. Its due process claim is therefore without merit.

"Great Weight" and the Burden of Proof and Persuasion:

25. In its memorandum to the Board, the appellant stated that under the standard practice of the Board, there is a burden placed on the appellant to persuade the Board that there has been an error in the zoning decision. The ANC maintains that the burden is not applicable in this case for two reasons. First, the appellant is an ANC, whose views are entitled to "great weight" under the law. The Board cannot accord the ANC's views great weight while, at the same time, imposing on the ANC a requirement that its presentation must meet the same standards of persuasion as a private appellant, whose views are not entitled to "great weight."

26. Second, the appellant argued that because it was denied due process by BLRA officials, it would be unfair to place the burden of persuasion on the ANC. The appellant stated that burdens of proof and persuasion exist on appeals of administrative decisions because it is presumed that, until shown the contrary, administrative officials have considered all issues and heard all arguments before making their decisions. Accordingly, the purpose of the burden of persuasion is not implicated when neighbors were not given the opportunity to present their views as they had been promised. The neighbors sought an opportunity to have their views heard and considered by appropriate BLRA officials. However, they were rebuffed at every turn. The appellant argued that to place the burden on the ANC in this proceeding before the Board would be a denial of due process and an evasion of the purpose for which the burden of persuasion exists.

27. Sterling Associates argued that the appellant ANC must meet the same burden of proof as any appellant before the Board. Sterling stated that the Board's rules are explicit: "[I]n all cases before the Board, the burden of proof shall rest with the appellant or applicant." 11 DCMR 3101.7. Sterling maintained that under no circumstances is the appellant relieved of the burden of proof because of its status as an ANC.

Sterling also argued that the appellant is not entitled to "great weight" before the Board. Sterling stated that by filing the appeal, ANC 3E has abandoned its advisory role and forfeited its right to have its written recommendations accorded great weight by the Board. In this proceeding, ANC 3E can not wear "two hats." Having assumed the role of legal advocate with respect to the interpretation and application of the Zoning Regulations, ANC 3E cannot at the same time be entitled to the great weight reserved for its neighborhood-oriented advisory function. In forwarding its strictly legal arguments on appeal, issues of community concern or interests which ANCs were established to represent should play no part and are in fact irrelevant to the Board's decision-making process.

Sterling further argued that while the appellant has demanded to have its ANC status recognized, it has failed to meet the very basic procedural requirements imposed upon all ANCs for submitting written documents to the Board. In violating the standards of 11 DCMR Section 3307.1, the appellant has failed to provide the information required, including: 1) date of public meeting when the case was considered; 2) certification of proper meeting notice; 3) statement of quorum standard and attendance at meeting; 4) official ANC action; and 5) vote of the ANC.

In the absence of this documentation, the Board cannot accept the submission of the appellant as the official actions of an ANC. The procedural requirements imposed are not a matter of convenience that can be ignored, but are a critical safeguard to ensure that the commissioners fulfill their representational responsibility to the community.

The Restrictive Covenants:

28. The appellant argued that the restrictive covenants in the deed of 1941 preclude the building of a second house on former lot 36, regardless of subsequent subdivision of that lot.

The appellant stated that when the property was transferred from Chevy Chase Land Co. to Barkley Brothers in 1940, title was not passed in an unrestricted fashion. The deed by which title was transferred contained restrictive covenants. These covenants run with the land and place significant limitations on the use of the land. Those covenants are contained in the deed of title from the official District of Columbia land records.

The first provision with which the appellant is concerned states as follows:

And the said party of the second part, for itself, its successors and assigns, does hereby agree that no building shall be erected on the land hereby conveyed unless and until

the plans of the elevations, the design and color scheme thereof, as well the location of said building on said land shall be first approved in writing by the Chevy Chase Land Company of Montgomery County, Maryland, or its successors.

The appellant pointed out that Barkley Brothers, for itself, its successors and assigns, accepted title with this restriction. Therefore, subsequent purchasers, such as the current owners, are bound by these restrictions and cannot build on the property without prior written approval from the Chevy Chase Land Co.

The appellant stated that the neighbors are unaware of anything that demonstrates that the restrictions of this deed have been complied with. The neighbors are not aware that the present developer has either sought or received the requisite written approval of the Chevy Chase Land Co. To the appellant's knowledge, the records of BLRA contain no written approval of the building plans by Chevy Chase Land Co.

Moreover, efforts by neighbors to contact the Chevy Chase Land Co. to determine whether such written approval had been sought or received have been unavailing. Several telephone calls to the Chevy Chase Land Co. have been made but have not been returned.

The appellant argues that without the requisite written approval of plans by the Chevy Chase Land Co., the present developer had no legal right to apply for a building permit because the application was defective. Certainly, the appellant feels, the developer had no right to construct a building on the property.

The other provisions in the deed that are addressed by the appellant are as follows:

1. That all buildings erected, or to be erected, upon the land hereby conveyed, shall be built and used for residence purposes exclusively, except that stables, carriage houses, sheds, or other out-buildings, to be used only in connection with such residences, may be erected upon the rear of, and not elsewhere upon, said land.
2. That the land hereby conveyed, or any building which may be erected thereon, shall not be used or permitted to be used, for any trade, business, manufacturing or mercantile purpose.
3. That no house shall be erected on the land hereby conveyed which shall cost less than \$7,500.00.

4. That any house erected upon the land hereby conveyed shall be designed for the occupancy of one family, and that no Apartment House or Apartment Houses shall be erected upon the hereinafter described land.

The appellant stated that these restrictions are specifically referred to in the deed as "covenants to run with the land." Those restrictions clearly contemplate that only one residence (exclusive of stables and other outbuildings) would be built on each of the lots conveyed. In particular, covenant number 4 contemplates occupancy by a single family, thus, precluding the construction of two houses on lot 36. Because subdivision in itself cannot create rights greater than those held by the owner of the lot immediately prior to subdivision, the subsequent subdivision of lot 36 into lots 43 and 44 cannot create a right to have one house on each of the successor lots.

The appellant argued that while the restrictions in the deed may be in excess of the restrictions contained in current zoning law and regulations, it is well settled that restrictions contained in the title to land may be more restrictive than zoning law and regulations and that less restrictive zoning provisions cannot abrogate otherwise valid restrictive covenants. E.g., Martin v. Weinberg, 109 A.2d 576 (Md. 1954); City of Harrisburg v. Capitol Housing Authority, 543 A.2d 620 (Pa. 1988); Rofe v. Robinson, 329 N.W.2d 704 (Mich. 1982); Allen v. Axford, 231 So.2d 122 (Ala. 1969); Lidke v. Martin, 550 P.2d 1184 (Colo. App. 1972). It is likewise settled that where a permit is issued without knowledge of the restrictive covenants, the permit was improperly issued and must be revoked. G.L.M. Land Corp. v. Foley, 246 N.Y.S.2d 338, aff'd, 200 N.E.2d 201 (Ohio 1964). See Willott v. Hendricks, 396 P.2d 609 (Ariz. 1964); Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. App. 1966). In G.L.M., for example, it was held that no vested right may be acquired under a permit issued in accordance with existing zoning regulations where restrictive covenants prohibited construction.

Accordingly, the restrictions in the title conveyed to Barkley Brothers and its successors in interest in the land remain valid to this day. The more lenient zoning provisions cannot abrogate those restrictions. Since those provisions have not been complied with, the permit issued to Sterling Associates was not properly issued and must be revoked.

The appellant stated that either Sterling Associates or BLRA may argue that the restrictive covenants are nothing more than a private contract between the Chevy Chase Land Co. and Barkley Brothers. However, this argument would not be sound because the covenants are binding on Barkley, its successors and assigns. Furthermore, they are said to run with the land. The appellant

stated that the restrictions are in a deed transferring title, not in a private contract of sale between the two parties. By placing the restrictions in a deed of title which sets forth the extent of interest and title being conveyed in the land and recording that deed, the parties viewed the restrictions as something far different from a one time agreement. Both the city and the neighbors to the property are entitled to rely on the official documents of transfer of title recorded in the official land records.

29. Responding to the argument raised by the appellant, the Zoning Administrator testified that he was unaware of the covenant requiring prior approval or of the deed itself, until after the building permit was issued. He stated, however, when the Zoning Division is made aware of private covenants, the officials have to honor them and ensure that they are not violated. The Zoning Administrator stated that if he had been aware of the covenant he would have required the building permit applicant to clear the issue related to the covenant. However, he did not have a copy of the deed when he approved the building permit.

In the Zoning Administrator's view the covenants would not prohibit the subdivision or the construction of the house. In his view, the only relevant covenant is the one that requires written approval of the Chevy Chase Land Co. before construction can take place.

30. Sterling Associates, responding to the appellant's arguments, testified about the effectiveness of the covenants.

First, Sterling stated that private covenants are not enforceable by the Board of Zoning Adjustment. Sterling argues that the ANC is incorrect to conclude that private covenants running with the subject property make the issuance of the building permit an error. Sterling stated that it is well-settled law that zoning, as a public exercise of police power, and covenants, as private agreements between parties, operate independently of one another. Whiting v. Seavey, 188 A.2d 276, 280 (Me. 1963); Lakes Environmental Association v. Town of Naples, 486 A-2d 91 (Me. 1984); Singleterry v. City of Albuquerque, 632 F.2d 345, 348 (N.M. 1981), Rathkopf, The Law of Zoning and Planning Section 57.02 (1989).

Sterling stated that "Restrictive Covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law." Whiting, 188 A.2d at 280.

Sterling argued that as a government board charged with administering zoning regulations, the Board of Zoning Adjustment has no jurisdiction over private covenants between parties.

Moreover, the District of Columbia was neither a party to, nor a beneficiary of the covenants running with the subject property, and thus has no legal interest in their enforcement. Under this standard, the Board is required to act strictly in accordance with existing zoning laws and cannot consider allegedly more restrictive private covenants in deciding whether a building permit was properly issued. See also, Suess v. Kogelgesang, 281 N.E.2d 536 (Ind. App. 1972).

Sterling stated that the appellant improperly cites several cases to support its argument that a permit must be revoked when issued without knowledge of restrictive covenants. The appellant describes G.L.M. Land Corp. v. Foley, 346 N.Y.S.2d 338 (App. Div. 1964) as holding that no vested right may be acquired under a permit where restrictive covenants prohibited construction. However, the G.L.M. court decided only that a zoning commissioner, under New York City ordinances, had the authority to determine whether vested rights had accumulated in a building permit prior to a change in the zoning regulations, and when the property owner had clearly started construction with knowledge of the restrictive covenant. G.L.M., 246 N.Y.S.2d at 340. However, that is not the issue here. Nowhere in G.L.M. did the court hold that a permit must be revoked wherever covenants and zoning conflict.

Sterling maintains that other cases cited by the appellant are similarly off the mark. Decker v. Hendricks, 396 P.2d 609 (Ariz. 1964), was a private action to enforce covenants, and no zoning authority was involved in the case. In Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla.App. 1966), the effect of restrictive covenants was allowed by the court to be considered in deciding proper compensation for condemnation of the property; again, not a zoning matter. In Willott v. Village of Beachwood, 197 N.E.2d 102 (Ohio 1954), the court specifically refused to consider the existence of private covenants relied upon by neighbors in deciding whether a town council had authority to amend zoning regulations.

[T]he council of a municipality, by changing a residence zone to a business zone, does not presume to pass upon the effectiveness of a restrictive residential covenant, nor does this court, in passing upon the validity of a municipal zoning ordinance. Willott, 197 N.E.2d at 203.

Sterling argued that if anything, Willott reinforces the common principle that public zoning and private covenants operate independently.

Once Sterling Associates became aware of the existence of covenants in the original 1940 deed, such as that requiring approval of plans by the Chevy Chase Land Co., it attempted to comply with them. After contacting the Chevy Chase Land Co. by

letter, Sterling received a letter from counsel for Chevy Chase dated December 31, 1991 confirming that

the Land Company disclaims any continuing interest in the said particular covenant and will not seek to enforce the provisions thereof to the effect that plans for building improvements must first be approved by the Land Company.

Sterling maintained that this letter was obtained days after Sterling learned of the covenant and prior to substantial construction of the subject property. This letter was submitted to the Board at the public hearing of May 13, 1992.

Finally, Sterling argued that the Board of Zoning Adjustment is not the proper forum in which to discuss restrictive covenants. Should ANC 3E have further concerns stemming from the covenants, it should address them in a private action.

31. By memorandum dated May 28, 1992, the Board sought advice from the Office of Corporation Counsel (OCC) on whether the Board can impose conditions of approval related to private covenants where the District of Columbia is not a party to or beneficiary of the covenant.

32. By memorandum dated June 1, 1992, OCC stated the following:

While there is no prohibition in the Zoning Regulations on the BZA from imposing conditions on private parties arising from a covenant to which the District is not a party, such an action would be a sharp departure from prior administrative practice of the BZA. Moreover, administrative burdens of monitoring compliance and enforcement which would be placed upon the BZA and its staff would be significant. Finally, such imposition of conditions would clearly place the BZA at risk of incurring legal liability in the event of breach of a covenant by a private party, even if such liability were without any apparent merit. Exposure to litigation between the private parties would be a similar risk to the BZA resulting from the imposition of such conditions.

For the above reasons, we advise the BZA to follow its current, long standing practice of not imposing conditions arising from agreements or covenants between private parties to which the District is neither a party or beneficiary.

33. Responding to the arguments made by Sterling and the advice of OCC, the appellant noted that no one in this proceeding contests the existence of the restrictions. Sterling went out of its way to try and cure one of the defects in the process by

obtaining a release from Chevy Chase. However, Sterling's contact with Chevy Chase did not occur until after the building permit was issued and after the appeal was filed. The fact still remains that there existed neither an approval or release when the building permit application was filed. Therefore, the appellant argued, the permit application was void ab initio. Sterling had no legal right to seek a building permit as it did not own the rights to build a second house on a parcel of land for which only one house was allowed.

More important, the ANC argued, is the fact that the 1940 deed reflects the zoning restrictions in place when the subdivision that created lot 36 was made. Those restrictions were created by the District of Columbia and the 1940 deed was issued in accordance with the subdivision that was created by the city. Of course, the deed could create no rights beyond those permitted under the subdivision. The city has the obligation to enforce those zoning restrictions created by its own actions, regardless of whether they are found in the DCMR or are found incorporated into deeds of conveyance of land.

It is for this reason that the memorandum from the Corporation Counsel is inapposite. Since the city created the zoning limitations under which the deeds were issued, the question is not one of enforcing private covenants, but one of enforcing the subdivision that was created under the zoning laws and the rights that were permitted to run with each of the lots created by that subdivision.

Regardless of whether Chevy Chase Land Co. now wishes to disavow the covenants in the 1940 deed to Barkley Brothers (and Chevy Chase has indicated that it intends to waive only one of those restrictions, if this is even permissible) the obligation remains with the city to enforce the covenants placed on the land in accordance with the city's zoning policies. The city may not abdicate this responsibility.

The "Front" of the House:

34. The appellant's final argument is that the building permit impermissibly allows the developer to face the house toward the alley, rather than the street.

The appellant stated that the building plans as approved, and the house as constructed, have the functional front of the house facing the alley that runs parallel between Garrison Street and Harrison Street, N.W. The front door, the front porch, and a drive-up parking area all face the alley. The elevation of the house that is typically considered the front faces the alley.

At the same time, the BLRA deemed the street side of the house (i.e., that side facing toward Belt Road) to be the front for purposes of calculating side yard and back yard set backs. The appellant argues that as a simple matter of logic, it is inconceivable that a house can have two fronts. Moreover, placing the architectural front of the house toward an alley violates the definition of "street frontage," 11 DCMR Section 199.9, which requires that the front be toward the street.

The appellant further maintains that because the front of the house is the alley side, the parking spaces required by 11 DCMR 2116.2(b) are not located within a side yard or a backyard.

Finally, one of the Comprehensive Plan's policy objectives for Ward 3 is "to protect and enhance existing residential neighborhoods." The neighbors are aware of no houses facing an alley in this neighborhood. Permitting this kind of architectural aberration does not "protect" or "enhance" this neighborhood, Ward 3, or the city.

It may be argued that permitting a house to face an alley is a matter of discretion by the Zoning Administrator. Such an argument would be incorrect. Aside from the reasons set forth above, to allow this kind of decision to stand would transfer the power to make zoning policy decisions from the Board of Zoning Adjustment to the Zoning Administrator.

35. The Zoning Administrator testified that when he met with the concerned neighbors, the orientation of the house was an issue because the house is designed with the front door facing the alley. He stated that there is only one street frontage, and that is on Belt Road. The height was taken from the finished grade at the center of the house facing Belt Road. The height and number of stories, as well as setbacks, conformed with the R-1-B zone requirements. The rear yard is being provided opposite from Belt Road. The required parking space is being provided within the garage, which is a part of the house. There is also a circular driveway on the alley side of the house. The plans, including the orientation of the house, meet the Zoning requirements.

The Zoning Administrator testified that it has always been the practice and policy of the Zoning Review Branch not to require a house with only one street frontage to be designed with the front or entrance to the house facing the street.

He stated that the height, rear and side yards were determined from what was designated as the street frontage. However, the Zoning Regulations do not require the front entrance to be from the street side of the house. The Zoning Administrator maintains that the building permit was properly issued given what was before him on November 8, 1991.

36. Sterling Associates argued that the permit was properly issued because the single-family dwelling complies with all applicable Zoning Regulations. Sterling stated that after careful review of the building permit application, the Zoning Administrator determined that all zoning requirements had been satisfied and that Sterling was entitled to proceed as a matter-of-right. The following zoning requirements are applicable in an R-1-B District.

- | | |
|-----------------------------|----------------------------|
| 1. Minimum lot area: | 5,000 square feet |
| 2. Minimum lot width: | 50 feet |
| 3. Maximum lot occupancy: | 40 percent |
| 4. Maximum height: | 40 feet or three stories |
| 5. Minimum front yard: | building restriction line |
| 6. Minimum rear yard: | 25 feet |
| 7. Minimum side yard: | eight feet |
| 8. Minimum street frontage: | 20 feet |
| 9. Minimum parking: | one for each dwelling unit |

Sterling maintains that the Zoning Administrator was correct to issue the building permit after determining that each of the applicable zoning requirements had been satisfied. Sterling also argued that the Zoning Administrator correctly considered the front yard to face Belt Road once he determined that the front yard did not violate any building restriction line.

Sterling maintains that the appellant's argument reveals a misinterpretation of the Zoning Regulations and attempts to impose nonexistent requirements on the owner of the property. Sterling stated that there is no requirement in the Zoning Regulations that links the location of a principal entrance to a dwelling with a particular yard, or side, of a building. As defined, "street frontage" requires only that the front yard be the side of the property that "abuts upon a street." 11 DCMR 199. As Mr. Bottner testified during the public hearing, neither the Zoning Regulations nor any interpretation by the Board has ever required that the front door of a structure be located in the front yard. To the contrary, the Board has found the Zoning Administrator to be in error when he required the rear yard of a building to be located on the opposite side from the front entrance. BZA Appeal No. 6186 (January 25, 1961). In reversing the Zoning Administrator and directing the issuance of the requested building permit, the Board refused to hold that the location of the principal entrance must be

the basis for other zoning determinations, including designation of the rear yard, or in this case, the front yard. The Board cautioned against any interpretation that adds a new requirement to the Zoning Regulations without rulemaking action by the Zoning Commission.

Sterling further stated that in addition to arguing that the front door cannot be located anywhere but in the front yard, the appellant claims that the architectural orientation of this house is unique and therefore unacceptable. To the contrary, many houses throughout the city feature principal entrances that face the side yard rather than the street. With a front yard of proper size facing Belt Road and side and rear yards also meeting or exceeding R-1-B standards, the subject dwelling is in compliance with applicable Zoning Regulations. On these grounds, Sterling argues, the building permit was properly granted.

37. Finally, Sterling Associates argued that the Board is estopped from revoking the building permit. Sterling contends that, under D.C. law, the Board of Zoning Adjustment is estopped from revoking the building permit for the subject property, due to Sterling Associates' large expenditures in good-faith reliance on a valid permit. See District of Columbia v. Cahill, 60 A.2d 342 (D.C. App. 1931).

To establish estoppel of a government agency, it must be shown that (1) the actions were taken in good faith; (2) some affirmative response was obtained from the District; (3) the petitioner made expensive and permanent improvements in reliance; and (4) the equities are strongly in the petitioner's favor, Hilton Hotels Corp. v. D.C., 435 A.2d 1062, 1065 (D.C. App. 1981). All four elements are present here.

Sterling maintains that it followed the prescribed procedure in applying for its building permit. As testified to during the public hearing, Sterling's principals investigated the Zoning Regulations prior to drawing up plans to ensure their compliance. After assuring itself that the plans were in compliance, the Office of the Zoning Administrator issued a valid building permit. Affirmative responses from the District had come in the form of inspections and approvals of the work accomplished, including a wall check which established that the house was being constructed in accordance with the approved plans.

The improvements to the subject property, in the form of a large, single-family dwelling, are expensive and permanent. A large percentage of construction costs were incurred or committed by the time this appeal was filed. Since that time, the house has been substantially completed and is ready to be marketed. Therefore, Sterling argued that the equities are strongly in their favor since it relied on a valid building permit and since the

house complies with all applicable zoning regulations. Under the standard formulated by District of Columbia courts, the Board is estopped from revoking this validly-issued permit.

FINDINGS OF FACT:

Based on the summary of evidence the Board finds as follows:

1. The Zoning Administrator met with Single Member District Commissioner Mary Grumbine and her husband prior to assigning the plans for review on October 4, 1991.

2. Ms. Cynthia Giordano held herself out as the representative of neighbors to the property.

3. The Zoning Administrator contacted Ms. Giordano to set up a meeting on November 7, 1991.

4. Representatives of the concerned neighbors told the Zoning Administrator that they would be unable to organize the neighbors to meet with the Zoning Administrator on November 7, 1991.

5. The Zoning Administrator made appointments to meet with concerned neighbors and their representatives on November 7 and 8, 1991 at 11:00 a.m. No one showed up at either meeting.

6. Advisory Neighborhood Commission (ANC) 3E is the appellant in the subject appeal. All rules relative to the burden of proof and persuasion are applicable.

7. The ANC did not submit into the record an ANC report which meets the requirements of 11 DCMR 3307.1.

8. The District of Columbia is neither a party to nor a beneficiary of the contract or agreement containing the restrictive covenants. The contract or agreement is between private parties.

9. The Zoning Regulations do not explicitly provide for the location of the front entrance of a single-family dwelling.

CONCLUSIONS OF LAW AND OPINION:

Based on the foregoing Findings of Fact and evidence of record, the Board concludes that Advisory Neighborhood Commission 3E is appealing the decision of the Zoning Administrator to issue a building permit for the construction of a single-family dwelling in an R-1-B District.

Due Process:

The Board concludes that the Zoning Administrator met with a representative of the neighbors prior to issuing the building permit. He also provided the other concerned neighbors with an opportunity to meet with him prior to issuing the permit.

The Board points out that the review process under BLRA does not include the right to a full public hearing. Because the Zoning Administrator discussed the matter with interested persons and made himself available to meet with other interested neighbors before the permit was issued, the Board concludes that the appellant, ANC 3E, was not deprived of the due process to which it was entitled.

Burden of Proof:

Pursuant to 11 DCMR 3324.2, "the burden of proof shall rest with the appellant." Therefore, the Board concludes that the ANC has the burden of proving that the Zoning Administrator erred in his decision to issue the building permit.

"Great Weight":

Subsection 3307.2 of the Zoning Regulations states that:

The written report of the ANC shall be submitted to the Board at least seven (7) days in advance of the hearing and shall contain the following information:

- (a) An identification of the appeal or application;
- (b) When the public meeting of the ANC to consider the appeal or application was held;
- (c) Whether proper notice of that meeting was given by the ANC;
- (d) The number of members of the ANC that constitute a quorum and the number of members present at the meeting;
- (e) The issues and concerns of the ANC about the appeal or application, as related to the standards of the Zoning Regulations against which the appeal or application must be judged;
- (f) The recommendation, if any, of the ANC as to the disposition of the appeal or application;
- (g) The vote on the motion to adopt the report to the Board;

- (h) The name of the person who is authorized by the ANC to present the report; and
- (i) The signature of the chairperson or vice chairperson of the ANC.

Subsection 3307.2 provides that "the Board shall give 'great weight' to the written report of the ANC . . ."

The Board concludes that the appellant has not submitted into the record a document containing items b, c, d, g and h listed above. Therefore the ANC's submission does not constitute a "written report" to which great weight can be given. The Board therefore concludes that the views of the ANC in this appeal are not entitled to great weight.

Restrictive Covenants:

The Board concludes that because the District of Columbia is not a party to the contract or agreement in which the restrictive covenants appear, the Board lacks the authority to enforce these covenants in its final order. Further, relying on the advice of the Office of the Corporation Counsel, the Board is of the opinion that to enforce the covenants would not be in the Board's best interest.

The "Front" of the House:

The intervenor argued that the Zoning Administrator properly issued their building permit because in a previous similar appeal (No. 6186) the Board reversed the Zoning Administrator's decision not to issue a building permit. However, the factual circumstances in the two appeals are different. In Appeal No. 6186, the lot fronted on two streets. In the subject appeal, the lot fronts on a street and an alley. The Board concludes therefore that the argument is without merit.

The Zoning Regulations contain a definition of "street frontage" which states as follows:

Street frontage - the property line where a lot abuts upon a street. When a lot abuts upon more than one (1) street, the owner shall have the option of selecting which is to be the front for purposes of determining street frontage.

The Board concludes that the Zoning Regulations do not spell out where the front entrance to the structure shall be located. Therefore, to require the developer to place the front entrance on the street frontage would impose a requirement that does not currently exist in the Zoning Regulations. The Board concludes that it is without the authority to create such additional

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requirements. The Board is therefore of the opinion that the Zoning Administrator's decision to issue a building permit for the construction of a house with the current orientation is not improper.

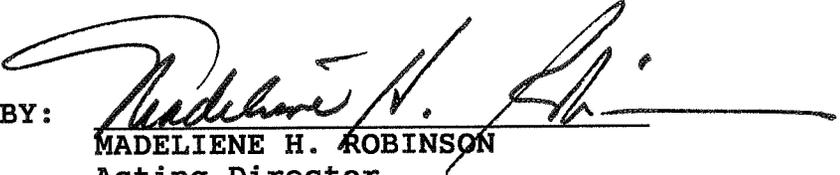
Having found the decision of the Zoning Administrator to be proper, the Board finds it unnecessary to address the issue of estoppel raised by the intervenor.

In light of the foregoing, the Board concludes that the appeal is hereby DENIED and the decision of the Zoning Administrator is UPHeld.

VOTE: 3-0 (Angel F. Clarens and Paula L. Jewell to deny; Sheri M. Pruitt to deny by proxy; William L. Ensign and Carrie L. Thornhill not voting, not having heard the case).

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

ATTESTED BY:


MADELIENE H. ROBINSON
Acting Director

FINAL DATE OF ORDER: _____

JAN 13 1993

UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

15644Order/bhs

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



BZA APPEAL NO. 15644

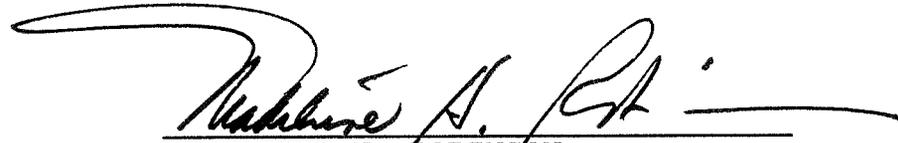
As Acting Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on JAN 13 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

Paul Strauss
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J. Patrick Brown, Jr., Esquire
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Chairperson
Advisory Neighborhood Commission 3E
P.O. Box 9953
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MADELIENE H. ROBINSON
Acting Director

DATE: JAN 13 1993

15644Att/bhs