BZA2010-0010
SUMMARY OF CASE ON APPEAL

BZA CASE #2010-0010
122 PRINCE STREET
RM, RESIDENTIAL
James and Christine Garner, owners: Appeal of the Director's January 28, 2010 decision to not permit the use of the half the width of a private alley toward the required side yard setback.

BOARD OF ZONING APPEALS ACTION OF JUNE 10, 2010: On a motion to deny by Mr. Lantzy, seconded by Mr. Koenig the appeal was denied by a vote of 6 to 0.

Reason: The director acted reasonably in her determination that an alley cannot be counted towards a required side yard setback.

Speakers:

John Foote, attorney for the applicant, made a presentation.

Joanna Frizzell, attorney for the City, made a presentation.

Curtis Martin, neighbor at 118 Prince Street, spoke in opposition of the appeal.

Docket Item #1
BZA Case #2010-0010

Board of Zoning Appeals
June 10, 2010

ADDRESS: 122 PRINCE STREET
ZONE: RM, RESIDENTIAL
APPELLANT: JAMES AND CHRISTINE GARNER

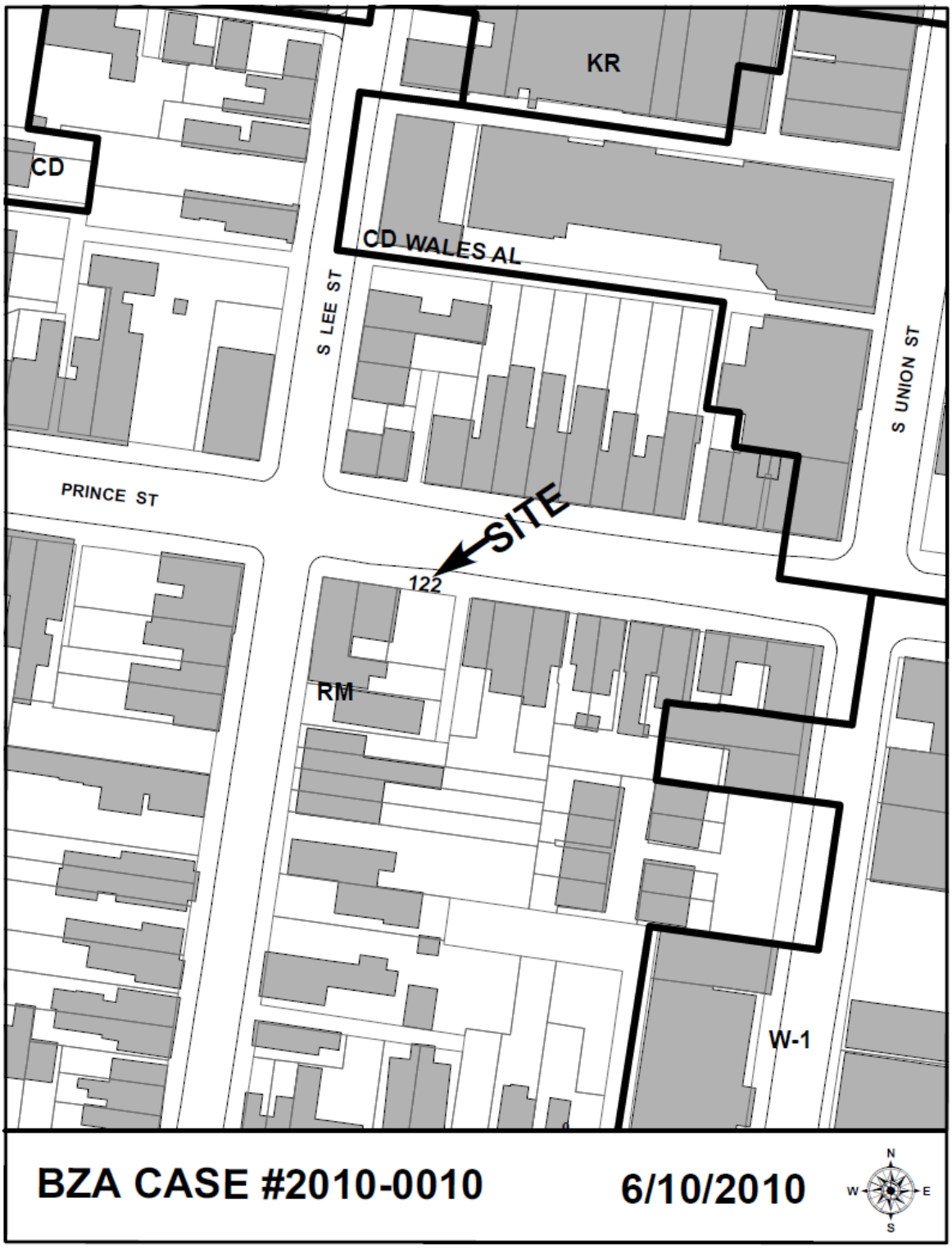
ISSUE: Appeal from a determination by the Director that a required side yard setback cannot include an alley.

INTRODUCTION

This case concerns the appellants' desire to build a house on the only vacant building site on the 100 block of Prince Street. Variances associated with a new house at 122 Prince Street have been filed in the past, but staff recommended denial of those applications. Because a reasonably sized house could be built without a variance, staff was unable to find the requisite hardship. The BZA cases were withdrawn. Now, still wishing to increase the size of a new house, the applicants seek to construct a building on the western edge of the adjacent private alley. Because zoning requires that the building be set back five feet from the property line on the eastern side of the lot, the applicant claims the lot projects to the centerline of the alley and that the alley land may be used as the requisite side yard, alleviating the need for a side yard variance.

Specifically, appellants challenge the Director's determination of February 19, 2010, explaining that the zoning ordinance requirements for side yards preclude the use of alley land because a side yard must remain open, unoccupied and unobstructed, and a private alley used by adjoining owners does not meet this test. This ruling does not preclude the building of a new home, but it limits the size of that construction[1] to something less than the applicants apparently desire.

[1] The hypothetical house outlined by staff in the last variance case measured 23 x 28 and would include approximately 2400 square feet of floor space.


KR
CD
CD WALES AL
S LEE ST
S UNION ST
PRINCE ST
SITE
122
RM
W-1
BZA CASE #2010-0010
6/10/2010
N
W
E
S

ARGUMENT

The appellants' case is based on two questions with regard to the Director's determination that the alley land cannot be used for side yard purposes:

1. Does the zoning ordinance allow private alleys to be included as part of a lot for purposes of calculating the side yard setback; and

2. Does the appellant have to prove ownership of a piece of property in order to include it as part of the lot's side yard calculation?

Staff respectfully disagrees with the appellants' position on both points and asks the Board to uphold the Director's determination as it is being applied here and as it would be applicable in other similar cases. There are many private alleys in Old Town and elsewhere in the City. A decision in appellants' favor in this case would change the manner in which the zoning rules have long been applied and could allow larger houses, closer to property lines, changing the nature of the building pattern and historic fabric in established neighborhoods such as Old Town, Parker Gray, and Del Ray.

A. The Zoning Ordinance does not allow private alleys to be included as part of the lot for purposes of calculating the side yard setback.

1. A side yard must be open and unobstructed.

Even assuming that the appellant owns one half of the eight foot alley, the appellant describes it as being required to remain open for use by others.[2] It therefore cannot be used as a side yard. The appellant mischaracterizes the City's position, incorrectly claiming that the Director's determination turned on the disputed legal claim regarding ownership of the alley. It did not. Rather, the Director's determination clearly explains that the fact that the side yard must remain open to third parties for use as an alley prevents it from being included in the side yard for setback purposes.

Section 2-207 of the Zoning Ordinance requires that a side yard be "…open, unoccupied space…," Section 2-204 requires that the open area for a yard be on the same lot and "unoccupied and unobstructed," and Section 7-202 lists the items that are permitted obstructions in required side yards. An alley, as described by appellant and defined by section 2-107 is a "public or private right of way primarily designed to afford access to the side or rear of properties…" This particular alley is further subject to the original deeds that require the property to remain open for the use of the other surrounding properties. Therefore, the question before the Director was whether the alley in question constitutes open, unoccupied and unobstructed space.

[2] The question of proving ownership of the underlying fee is discussed further in Section B of this memo. However, it is undisputed that the property is encumbered with this requirement to keep the alley open for use by others and that access to this area will be retained by all who use the alley (See Appellant's Statement of Grounds for Appeal, page 1 and page 8).

The fact that the alley is subject to the regular and uninterrupted use by others means that it cannot be "open and unoccupied" and "unobstructed" as required for a side yard. The use of the land is already reserved for others and is, therefore, by definition, occupied with inhabitants and contrary to the requirement that it be unoccupied. The appellants attempt to turn the obvious on its head by citing the dual use of the word "open." While recorded or prescriptive rights require the alley to remain "open" for adjoining owners to use, and appellants claim they will adhere to that requirement, it is that very openness and availability to others that means it is not "open" and "unoccupied" in the sense of being *empty*. Stated another way, the appellants do not have full control over the use of this land. They are required to allow others to use it as a pathway to their back or side yards located on the interior of the block. The Director was clearly reasonable in finding that the side yard must be calculated from the border of the alley because the alley is occupied space subject to use by third parties and therefore cannot be included as part of the side yard.

2. Zoning Ordinance guidance as to intent of side yard requirement.

Other sections of the Zoning Ordinance are useful to determine how City Council[3] intended the regulations of side yard to be read, interpreted, and applied. The appellants argue that some sections of the Zoning Ordinance can be used to help interpret other sections of the ordinance while, at the same time, they argue that other sections cannot be. It is a well settled tenet of Virginia law, that when interpreting statutes, courts must apply the plain meaning of the words used and cannot add words or ignore the language in the statute. *Signal Corp. v. Keane Federal Systems*, 574 S.E.2d 253, 257 (Va 2003). Additionally, other related statutes can also be considered when interpreting the plain language of a particular statute. *City of Virginia Beach v. Board of Supervisors of Mecklenburg County*, 435 S.E.2d 382, 384 (Va 1993). Further, "[T]he mention of a specific item in a statute implies that the other omitted items were not intended to be included within the scope of the statute." (citations omitted) *Smith Mountain Lake Yacht Club, Inc. v. Ramaker, et all*, 542 S.E.2d 392, 395 (Va 2001).

City Council enacted a very specific side yard requirement in the Zoning Ordinance. In Section 2-207 it defined "side yard" and included language indicating that a side yard must be "open" and "unoccupied." It also included Section 7-202, specifying those items that are *permitted* within a side yard. The list does not include alleys or pathways. Likewise, in defining a rear yard, the City Council defined a rear yard at Section 2-206 and further specified in Section 7-1003 a different method to calculate a rear yard, including using an alley to calculate the setback ratio.

The appellant refers to other sections of the code, specifically, Section 2-108, that defines open space and section 1-400 that defines how to calculate floor area and density.

[3] On page 11 and 12, the appellant mischaracterizes and in fact misquotes the determination letter by stating that staff has somehow given itself the power to determine when circumstances warrant precluding the use of the alley. The Determination Letter states that the City (which means the City Council who adopts the zoning ordinance) is able to express itself where it intends to express itself. At no time has the staff ever indicated that they have the authority to rewrite the code.

In both of those cases, the City Council includes the items that it believes should be specifically *prohibited*. In defining open space, it specifically prohibits roads, alleys, emergency vehicle easements, etc.; and in clarifying how floor area and density are calculated, it specifically prohibits the inclusion of public or private streets including alleys. In both of these cases, City Council chose to prohibit rather than permit and, in those cases, they specifically prohibited alleys. Staff notes that the changes to these provisions from 2000 were the result of Planning Commissioners Wagner and Leibach's championing of open space in new developments. A review of the full text amendment with its attached site drawings in appellants' submission shows clearly its genesis in dense development applications with little open space and the desire to change that practice. It was not meant to and does not apply to this case.

These two sections of the ordinance are irrelevant to the discussion of side yards because they address different types of regulations – density and open space – but are relevant to show the difference between permissive code sections and prohibitive code sections. Very simply, section 7-202 does not prohibit alleys because the section is a permissive provision; it does not identify any of the prohibitions for side yards. The City Council clearly chose permissive code sections for the regulation of what can be included in a required yard and did not include alleys within that list. If City Council intended for alleys to be included in side yards, it would have specifically listed that as a permitted use in Section 7-202.

It is thus clearly reasonable, and not erroneous, for the Director to interpret the ordinance in the manner City Council intended and to determine that alley land must be excluded from required side yards.

B. The appellants are required to prove that they own the property in fee and that it is included on the same lot as the proposed building in order to count it as a side yard.

The appellants argue that they should not be required to prove that they own the property before moving forward with an application for a city permit. While it was not its principal purpose, the Director's determination letter did refer to the need for the appellants to prove ownership in order to move forward with the building of a house. The appellants appear to be asking the Board to make a decision about this matter as well. *This question only becomes important if the Board finds that an alley can be included in a side yard, and the side yard setback should be calculated from the center of the alley.*

If the Board does find that the alley can be part of the "lot" for building purposes, then it is the City's position that the appellants must show they do own to the centerline of the alley and that the property where the alley is located is a part of the same lot as the proposed building before they can use this portion of property for their side yard. The legal ownership question at issue relates to the ownership of the fee of the property that is half of the alley adjacent to the appellant's property. The fact that the alley is burdened by the requirement that it remain open for the surrounding property owners to use for access is not in dispute. They now claim ownership to the centerline of the alley. On the other

hand, the property owner on the other side of the alley claims that appellant does not in fact own to the centerline.

Clearly, the City cannot move forward with an application for any kind of permit unless the appellants show proof that they own the property. Were the City to allow applicants to move forward on applications when it knows that the ownership of the property is in dispute, the City puts itself at risk with regard to potential hostile claims. For this reason, it is the City's long practice not to proceed with permits or applications when ownership has been questioned. While the appellant may be correct that a dispute about property ownership is a private law matter, the City cannot turn a blind eye to this controversy and can require that the dispute be resolved before moving forward. The City does have the right, and in fact, obligation, to require proof of ownership of property that is the subject of a city permit.

Furthermore, the ownership issue relates to whether the lot the appellants claim is theirs is a lot *for zoning and building purposes*. If others own part of it, if, as in this case, it is land used for other purposes, then it fails to meet the requirements of a lot "usable as a building site" pursuant to section 2-166 and 3-1105(B)(1) of the zoning ordinance. Finally, Section 2-204 that defines yard as "The required open area on the same lot with a building or group of buildings…and is unoccupied and unobstructed from the ground upward." Therefore, the appellant must be able to prove that they own to the centerline of the alley and that it can be a part of the lot where their proposed house will be located in order for it to be within the definition of yard.

In this case, not only is it important for the City to have proof of ownership before approving permits for construction on a property to preserve the rights of the owners of the property, but the actual definition of yard requires that the property used for the yard be on the same lot as the building and therefore, requires the appellant to show they own it in order to be considered a yard.

C. Standard of Review: Deference to the Director

The City Charter and Zoning Ordinance delegate to the Director the authority and responsibility to administer and enforce the Zoning Ordinance. Under settled principles of administrative law, the interpretation given a legislative enactment by public officials charged with its administration and enforcement is entitled to be given significant weight by the courts. *See Payton v. Williams*, 145 S.E.2d 147 (1965). In Virginia, it is settled law that a presumption of correctness attaches to the actions of state and local officials. *See Hladys v. Commonwealth*, 366 S.E.2d 98 (1988). Such actions are presumed to be valid and will not be disturbed by a court absent clear proof that the action is unreasonable, arbitrary, and bears no reasonable relation to the public health, safety, morals or general welfare. *See County of Lancaster v. Cowardin*, 391 S.E.2d 267, 269 (Va. 1990); *Board of Supervisors of Fairfax County v. Robertson*, 587 S.E.2d 570 (Va 2003)(discussing the presumption of reasonableness attached to the Board's legislative acts). Thus, the Director's determination under the Zoning Ordinance is entitled to substantial deference.

Unless the Board can find that the Director's decision was made without reasonable basis, the Board should uphold that decision.

The City Attorney's Office has also provided the Board of Zoning Appeals with analysis that shows that "substantial deference" to a Director's determination is the appropriate standard of review. The City Attorney's Office has found that the Board of Zoning Appeals stands in the same relationship to the Director as a reviewing court when it reviews an administrative interpretation or decision. Thus, the Director's determination is entitled to substantial deference, both by this Board and a reviewing court. *See* Opinion to the Chairman and Members of the Board of Zoning Appeals, at 2-3 (April 12, 1989)(available for review).

D. Conclusion

An alley cannot be included within a required side yard because the burden of keeping it open for the adjacent owners' use means, as a zoning matter, that the property is occupied, obstructed and not open. Section 7-202, a permissive provision, does not permit alleys or pathways to be part of a side yard. The Director's decision that a side yard may not be located in a private alley subject to use by third parties is reasonable, within the scope of the terms and intent of the zoning ordinance, and not arbitrary or without reasonable relation to the public health and welfare. The Board should therefore uphold her determination.