

**BOARD OF ZONING ADJUSTMENT
441 4th STREET N.W., SUITE 200S
WASHINGTON, DC 20011**

IN RE APPEAL OF:

Advisory Neighborhood Commission 4C,

Appellant,

DEPARTMENT OF CONSUMER & REGULATORY
AFFAIRS,

Respondent.

BZA No. 19067

APPELLANT’S AND INTERVENOR’S RESPONSE TO DCRA’S MOTION TO STRIKE

At the January 19, 2016 deliberations for this appeal, the Board delayed a decision to give the Department of Consumer and Regulatory Affairs (“DCRA”) and Allison Street LLC & Khalid Alizzi (“Property Owner”) (collectively “Respondents”), an opportunity to respond to a new permit Appellant entered into the record as Exhibit 71. The Board established a deadline of January 26, 2016 for the responses. On January 27, 2016, DCRA served Appellant and Intervenor with a Request to Strike Exhibit 71. On January 28, 2016, the Property Owner served Appellant with an Affidavit from Khalid Alizzi, Managing Member, of cancellation of the new permit. If the Board rules to accept DCRA’s and the Property Owner’s late filings, then Appellant and Intervenor request that the Board accepts this response in the interest of fairness.

On December 24, 2015, DCRA issued a new permit as a revision to the October Permit (the “December Permit”). The December Permit plans now retain the existing front porch that the October plans removed.¹ The Property Owner applied for the December Permit three weeks after

¹ BZA Exhibit 71 (December Approved Plans).

the hearing date of December 1, 2015 in this matter. This revision is further evidence that the Property Owner never intended to remove the front porch, and that the October revision was a subterfuge for the December 1 hearing to convince the Board that the permit conformed to the Zoning Regulations. Further, the revisions in the December Permit plans exceed the 60% maximum percentage of lot occupancy allowed for a conversion in R-4. The dimensions of the front porch, existing building, addition, rear porch and rear stairs total 1902 SF or 61% lot occupancy. As with the May Permit, the Zoning Administrator approved a new permit in December that exceeds the maximum percentage of lot occupancy and does not fully conform to the Zoning Regulations.

The record was open when Appellant submitted the December Permit. The hearing transcript indicated the record would remain open until January 12, 2016, and Appellant submitted the December permit to the record on January 12, 2016. The addition of the December Permit to the record did not prejudice Respondents. Both parties knew about the permit on December 22, 2015, the date the Property Owner applied for the permit. The Zoning Administrator approved the Permit because it is stamped with the Zoning Administrator's stamp. Neither DCRA nor the Property Owner informed Appellant or Intervenor that a new permit had been issued for the Project. Although DCRA asserted that Appellant did not inform them about the December Permit, Appellant cannot be blamed for the Zoning Administrator's failure to reveal to his counsel that he had approved yet another permit that exceeded the maximum percentage of lot occupancy.

The Property Owner purchased the property with the existing permits in October 2015. However, he was in negotiations to purchase the property since at least July 2015 and was well aware of the building plans and design for the Project. *See Attachment A.* The negotiations resulted in the Property Owner filing a lawsuit against the then owners for failure to reveal the full scope of the building plans. *See Attachment A.* Moreover, the Property Owner has been a party to this appeal since October 2015 and is fully aware of the proceedings. *See BZA Exhibit 55 (Letter*

of Authorization dated October 26, 2015 from Khalid Alizzi authorizing representation from Sullivan & Barros).

Appellant and Intervenor note that DCRA did not address the violation of lot occupancy in its Motion to Strike. Contrary to what DCRA asserted in its response, the neighbors of the project never communicated a concern about the removal of the front porch to the Property Owner. DCRA erroneously asserted that the Property Owner obtained the December Permit to retain the front porch to address concerns from the community.

The October Permit made material changes to the May Permit, and the December Permit made material changes to the October Permit to retain the status quo of the May Permit (keeping the front porch). DCRA did not issue the December Permit to correct “scrivener’s errors”, as it claimed for the October Permit, and the issuance of the permit violates lot occupancy. To benefit their arguments, Respondents have cancelled the December Permit because they know its existence impeaches their earlier statements in this proceeding. However, the subsequent cancellation of the December Permit is moot and irrelevant. The December Permit proves that the Property Owner always intended to retain the front porch, as is demonstrated by the May Permit plans (Exhibits 65A & B, Sheets A3 and C1), and that the Zoning Administrator approved the May Permit even though it violated the lot occupancy requirements.

In addition, the Property Owner may choose to reapply for the permit at any time, and DCRA has shown a willingness to approve any revisions regardless of the scope and whether the permit complies with the law. The Zoning Administrator again has ignored the requirement in the Zoning Regulations that “[a]ny amendment of the permit *shall comply* with the provisions of [the Zoning Regulations] in effect on the date the permit is amended.”² (emphasis added).

² 11 DCMR § 3202.4(b).

Respondents stated that the Property Owner is cancelling the December Permit because it has “muddied the waters” and “complicated the appeal.” Yet, Respondents were not concerned about “muddying the waters” or “complicating the appeal” when they injected the October Permit revisions into this appeal. Appellant and Intervenor urge the Board to estop Respondents from taking a contrary position and rule that the December Permit must remain in the record.

The District of Columbia courts recognize the “doctrine of judicial estoppel” which “precludes a litigant from playing fast and loose with a court of justice by changing his position according to the vicissitudes of self interest....” *Lofchie v. Washington Square Ltd. Partnership*, 580 A.2d 665, 668 (D.C. 1990); *See also Lassiter v. District of Columbia*, 447 A.2d 456, 461 (D.C. 1982) (appellant judicially estopped to proffer new facts contrary to his prior testimony in earlier proceeding). “The purpose of applying this [judicial estoppel] doctrine is ‘to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.’” *Mason v. United States*, 956 A.2d 63, 66 (D.C. 2008) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). The Supreme Court did not “establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.” *New Hampshire*, 532 U.S. at 751. However, two factors enunciated by the Court are: (1) “a party's later position must be 'clearly inconsistent' with its earlier position”; and (2) “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id* at 750-51 (citations omitted).

Courts have applied judicial estoppel in quasi-judicial proceedings such as in the appeal before this Board. *See Department of Transp. v. Coe*, 112 Ill. App. 3d 506 (Ill. App. Ct. 1983) (finding that judicial estoppel applied to positions taken during quasi-judicial proceedings before two administrative bodies). Courts also have applied the doctrine to the government, *See New Hampshire* 532 U.S. at 749 (judicial estoppel barred state of New Hampshire from reneging on

concession to state of Maine that it had made in prior consent decree), and to a party's inconsistent positions taken in the same proceeding. A New York Court proclaimed that a "court cannot ignore a party's opportunistic use of inconsistent representations when one allegation serves an argument at one stage of a case and the other serves an argument at a later stage." "Accepting the plaintiffs' situational about-face would undermine the integrity of the judicial process and the ability of courts to accept and rely upon the unequivocal representations of parties." *Intellivision, et al. vs. Microsoft Corp.*, 784 F.Supp.2d 356 (S.D.N.Y. 2011) (applying judicial estoppel to grant summary judgement) (decision affirmed on appeal).

Likewise, in this appeal Respondents' situational about face and deliberate change of positions that the December Permit would "muddy the waters" and "complicate the appeal", when they did not take that position for the October Permit revisions, would undermine the integrity of this appeal, give Respondents an unfair advantage and impose an unfair detriment on Appellant and Intervenor. We respectfully request that the Board estop Respondents from taking this clearly inconsistent and contrary position and rule that the December Permit the Property Owner applied for and the Zoning Administrator approved in violation of lot occupancy must remain in the record.

Respectfully Submitted,



Lyn Abrams
Representative for ANC 4C



Andrew Wible
Representative for Intervenor

After Recording Return to:
Scott Sweitzer, Esq.
Hughes & Bentzen, PLLC
1100 Connecticut Avenue, NW
Suite 340
Washington, DC 20036

NOTICE OF LIS PENDENS

PLEASE TAKE NOTICE THAT that the real property, owned by 1117 Allison Street, LLC (the "Owner") and located at 1117 Allison Street, Northwest, Washington, D.C. 20011 and legally described as Lot 0059 Square 2918 (the "Property"), is the subject of pending litigation, requesting that the Superior Court of the District of Columbia in the matter of *Khalid Alizzi, et al. v. 1117 Allison Street, LLC, et al.* (the "Action") whereby judgment in favor of Khalid Alizzi, Allison Street, LLC, and Alizzi, LLC ("Plaintiffs") is sought. Plaintiffs filed the Action on July 24, 2015. The civil case docket number is 2015-CA-005615-B. The Action asserts a claim for fraud and breach of contract against Owner relating to the negotiation and presentation of a proposed contract for the sale of the Property from Owner to Khalid Alizzi. The amount of the claim as of the date the Action was filed is \$855,285.00.

ALL PERSONS ARE HEREBY NOTIFIED that title to the Property is hereby subject to the Action and clear title to the Property cannot be taken until such time as this litigation is resolved.

1. **Name of Court Where Action Pending:** Superior Court for the District of Columbia
Civil Division
2. **Title of the Action:** *Khalid Alizzi, et al. v.*
1117 Allison Street, LLC, et al.
3. **Case/Docket Number:** 2015-CA-005615-B
4. **Date of Filing:** July 24, 2015
5. **Object of the Filing:** The object of this filing is to put the public on notice that title to the Property cannot be taken until such time as the Action is resolved. The Action asserts a claim against Owner and other defendants for fraud and breach of contract. Owner, in negotiating and presenting a contract to sell the Property to Plaintiff Alizzi, LLC, intentionally made material misrepresentations with respect to permits and building plans that had been revoked by the District of Columbia Revenue Authority. Owner concealed from Plaintiffs that building permits and building plans relating to the Property upon which the parties to the sale premised and negotiated the purchase price for the Property, had been revoked and superseded by a different permit and different building plans, materially affecting the value of the Property. If judgment is entered

against Owner, Plaintiffs intend to foreclose on the Property, as it is the Owner's sole asset.

6. Amount of Claim Asserted/
Nature of Relief Sought:

1) Judgment against Owner and co-Defendants in total amount of \$855,285.00, plus taxable costs.

7. Name of Entity Whose Estate Intended to Be Affected:

1117 Allison Street, LLC

8. Legal Description of Property:

Parcel of property located at 1117 Allison Street, NW, Washington, DC 20011, described as Lot 0059, Square 2918.



Jeremy D. Rachlin, Esq.
JDKATZ, P.C.
Attorney for Plaintiff

STATE OF MARYLAND

:

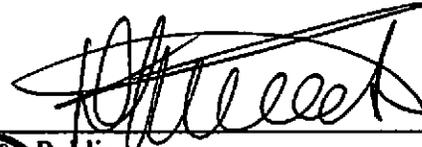
: ss

COUNTY OF MONTGOMERY

:

I hereby certify that on July 29, 2015 before me, a notary public of the State of Maryland, personally appeared JEREMY RACHLIN, known to me, or satisfactorily proven, to be the person whose name is subscribed to the written instrument and who acknowledges that she executed the same for the purposes therein contained.

Witness my hand and Notarial Seal.





Public
DOROTHY L. GOTTFRIED
Notary Public, State of Maryland
County of Montgomery
My Commission Expires March 12, 2017

My commission expires: _____

Exhibit A – Legal Description

Lot numbered Fifty-nine (59) in Jacob S. Gruver's subdivision of lots in square numbered Twenty-Nine Hundred and Eighteen (2918), "FOURTEENTH STREET HEIGHTS", as per plat recorded in the office of the Surveyor for the District of Columbia in Liber 52 at folio 89.

The aforementioned property is located at 1117 Allison Street NW, Washington, DC 20011.

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, a copy of Appellant's and Intervenor's Response to DCRA's Motion to Strike was provided by electronic mail to the following:

Maximilian Tondro
Assistant General Counsel
Office of the General Counsel
Department of Consumer & Regulatory Affairs
1100 4th Street, SW, 5th Floor
Washington, DC 20024
maximilian.tondro@dc.gov

Martin P. Sullivan
Sullivan & Barros, LLP
1990 M Street, NW, Suite 200
Washington, DC 20036
msullivan@sullivanbarros.com



Lyn Abrams
Representative for ANC 4C
lynster3@gmail.com