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May 10, 2004

By Hand Delivery

D.C. Board of Zoning Adjustment
Geoffrey Griffis, Chair
441 4th Street, N.W.
Room 210
Washington, D.C. 20001

2004 MAY 11 PM 12:55
D.C. BOARD OF ZONING ADJUSTMENT

Re: ***Case No. 17085***
Appeal of Larry and Louise Smith and Mary Ann Snow
206-210 D Street, S.E., Square 763, Lots 26-28
(the "Property")

Dear Chairman Griffis and Fellow Board Members:

Folger Park North, LLC, by counsel, hereby moves to dismiss this Appeal and requests that the Board hear this motion as a preliminary matter, set for hearing on May 18, 2004 at 1:00 p.m.

BACKGROUND

In BZA Appl. No. 17108 filed by Folger Park North, LLC, the Board voted to grant the variances from the required lot size and width for the Property requested by the Applicant; the vote to approve was taken on April 6, 2004.

The motion to consolidate that Application and this Appeal made by counsel for the Smiths and Snow (the "Neighbors") was denied by the Board. A separate hearing was then set for May 18, 2004 at 1:00 p.m. on the Appeal.

SUMMARY OF GROUNDS TO DISMISS

1. The Neighbors' Objections are based on the allegation that the construction of three (3) flats on the Property are not matter of right because they do not meet the lot area and width requirements under the Zoning Regulations. However, the Board's granting of these variances pursuant to Application No. 17108 moots these Objections.

2. Four (4) of the Neighbors' Objections are time barred under Sec. 3112.2 of the Board's rules.

BZA
Case No. 17085
Exhibit No. 48

Board of Zoning Adjustment
District of Columbia
CASE NO. 17085
EXHIBIT NO. 48

3. The Neighbors have already *sua sponte* dismissed three (3) of the ten (10) Objections they initially raised.

THE APPEAL IS MOOT

The Appeal by the Neighbors is taken from the decision of DCRA/BLRA and other D.C. agencies to allow the Applicant to commence construction of improvements to the Property (3 flats on 3 lots). Ten (10) separate approvals/issuances or failures to act by D.C. agencies, principally DCRA/BLRA, were cited in the initial Appeal and are attached hereto for reference (hereinafter the "Objections"), as Exhibit A.

The Neighbors subsequently withdrew Objection No. 2 (raze permit for Pepco substation on the Property), Objection No. 9 (failure of DCRA to compel Applicant to remove obstructions on alley) and Objection No. 10 (issuance of public space permit for dumpster). The withdrawals of the Objections were made by the Neighbors in a filing with the Board on February 10, 2004, attached hereto for reference as Exhibit B.

Objection Nos. 3, 4 and 5 (issuance of foundation permits for 206-208-210 D Street, S.E. (the "Property") premised on the Applicant's failure to meet the zoning regulations for minimum lot area and width for building on the Property are moot since the Board granted the variances sought by the Applicant in Case No. 17108.

Objection Nos. 6, 7, 8 (issuance of permits to construct improvements on the Property – flats on 206-208-210 D Street, S.E.) premised on the Applicant's failure to meet the zoning regulations for minimum lot area and width for building on the Property are moot since the Board granted the variances sought by the Applicant, in Case No. 17108.

Objection No. 1 relates to the approval by DCRA, Office of Tax and Revenue, Historic Preservation Division and Surveyor of the subdivision plat for the Property, creating record lots 26, 27 and 28 for permit purposes in September of 2002, a full year prior to the filing of that Objection. At the hearing on the Application, the Applicant contended and the Board accepted the fact that the Applicant reasonably relied on the subdivision approval by these agencies for obtaining building permits. In fact, the Neighbors' own expert witness agreed that the Applicant could reasonably rely upon the validity of the subdivision for pulling a building permit. See February 24, 2004 Tr. at 291-293.

Accordingly, the issue of whether the subdivision was properly approved by these agencies is moot since the Board found that the Applicant reasonably relied on that approval *inter alia* in commencing construction and granted the variances sought.

FOUR (4) OBJECTIONS ARE TIME BARRED

Section 3112.2 of the Board's Rules requires a person aggrieved by an agency decision in the administration or enforcement of the Zoning Regulations to appeal that decision within sixty (60) days of the date the person knew or should have known of the decision complained of.

Objection No. 1 is to the issuance of the subdivision plat approved by multiple agencies on September 23 and 30, 2002, almost one year prior to filing the objection on September 12, 2003.

Objections 3, 4, and 5 are to the issuance of foundation permits for 206 - 208 - 210 D Street, S.E., each issued on May 23, 2003, which in turn, are based on the subdivision plat. There is no dispute that work commenced under these permits shortly thereafter in June of 2003. See testimony of Mr. Marsh (one of the Neighbors), February 24, 2004 TR. at 239 ("When excavation of the site began in late June and early July **[2003]**, we watched obviously with careful interest . . . .) (Brackets in bold supplied.) However, the Appeal in this case raising these Objections was not filed until September 12, 2003, some 3 ½ months after the issuance of the permits and some 2 ½ months after construction started. Given that the Neighbors' property abuts the subject Property where construction took place, they knew or should have known of the decisions granting the foundation permits, including the subdivision plat, but failed to file the appeal within sixty (60) days of actual or constructive notice.

Indeed, the Applicant provided the Neighbors with plans for construction on the Property in February of 2003, after an ANC meeting. See February 24, 2004 Tr. 50-54, testimony of Mr. Stoneburner. See also TR. at 238, where Mr. Marsh testified that in February, 2003, after an ANC meeting, that Mr. Stoneburner gave the Neighbors a set of drawings for the Property. The Neighbors knew full well what construction was taking place next to their own property. It was the alleged trespass in their private alley which led to this Appeal, a matter beyond the Board's jurisdiction.

CONCLUSION

Since three (3) of the ten (10) Objections have been withdrawn, four (4) of the remaining seven (7) are time barred, and all seven (7) are moot in light of the Board's granting the variances requested by the Applicant in Case No. 17108 on April 6, 2004, the Appeal should be dismissed.

Sincerely,

Richard L. Aguglia

Richard L. Aguglia

cc: By Mail

ANC 6B
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A

Pursuant to Section(s) §3100 and §3101 of the Zoning Regulations of the District of Columbia, an appeal is hereby taken from the following administrative decisions on the dates and to the effects so indicated:

1. Approval by Department of Revenue and Finance (September 23, 2002), the Zoning Administrator of the Department of Consumer and Regulatory Affairs ("DCRA") (September 30, 2002) and the Historic Preservation Division (September 23, 2002) and the approval and issuance of S.O. 009755 by the D.C. Surveyor subdividing previous Lot 4 and part of Lot 6 in Square 763 into Lots 26, 27 & 28. Subdivision recorded at Book 196, Page 42 on September 30, 2002. (**Exhibit 1.**)

2. Issuance by DCRA, Building and Land Regulation Administration ("BLRA") of Permit No. 424724 on November 13, 2002, permitting the razing of the Pepco substation at 210 D Street, S.E., Lots 800, 801 and 802 in Square 763. (**Exhibit 2.**)

3. Issuance by BLRA of Permit No. B451616 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 206 D Street, S.E., Lot 26 in Square 763. (**Exhibit 3.**)

4. Issuance by BLRA of Permit No. B451615 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 208 D Street, S.E., Lot 27 in Square 763. (**Exhibit 4.**)

5. Issuance by BLRA of Permit No. B451617 on May 23, 2003, permitting the construction of a new foundation, with plumbing, for a two-family flat 210 D Street, S.E., Lot 28 in Square 763. (**Exhibit 5.**)

6. Issuance by BLRA of Permit No. B451260 on August 25, 2003, permitting the construction of a new two-family flat 206 D Street, S.E., Lot 26 in Square 763. (**Exhibit 6.**)

7. Issuance by BLRA of Permit No. B451262 on August 25, 2003, permitting the construction of a new two-family flat 208 D Street, S.E., Lot 27 in Square 763. (**Exhibit 7.**)

8. Issuance by BLRA of Permit No. B451261 on August 25, 2003, permitting the construction of a new two-family flat 210 D Street, S.E., Lot 28 in Square 763. (**Exhibit 8.**)

9. Failure of DCRA to take action to compel Owner to remove obstructions (fence closing and construction trailer on) from north-south alley to the immediate east of the Properties. July through August, 2003. The Owner has applied for, but was denied, an application to close the sidewalk in front of the Properties. Drawing attached to that application show fencing extending across the southern entrance to the alley along D Street, S.E. and across the alley adjacent to the northern boarder of the Properties. (**Exhibits 9.**) In the event that a public space permit has been granted for the closing of the alley, appellants appeal the issuance of such permit.

10. Issuance of Public Space Permit for dumpster. (*See* **Exhibit 9.**)[1]

Filed 9/12/03

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[1] Attempts have been made to obtain a copy of this permit but one has not been secured as of the filing of this application.

B

Filed 2/4/04

BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Appeal of Larry & Louise Smith and
Mary Ann Snow and James Marsh

BZA Appeal No. 17085

PREHEARING STATEMENT OF APPELLANTS IN SUPPORT OF APPEAL

AND

RESPONSE TO PROPERTY OWNER'S MOTION TO STRIKE APPEAL[1]

This Prehearing Statement is submitted on behalf of the appellants, Larry & Louise Smith and Mary Ann Snow and James Marsh (the "Neighbors"), the owners of properties adjoining the subject property, which is located at 206, 208 and 210 D street, S.E., Square 763, Lot 26, 27 and 28 (the "Properties").

I. WITHDRAWAL OF CERTAIN CLAIMS.

By this statement, the Neighbors hereby withdraw the following items from their appeal (numbers refer to the list included with the appeal form and statement of reasons in support of the appeal):

2. Issuance by DCRA, Building and Land Regulation Administration ("BLRA") of Permit No. 424724 on November 13, 2002, permitting the razing of the Pepco substation at 210 D Street, S.E., Lots 800, 801 and 802 in Square 763.

9. Failure of DCRA to take action to compel the Developer to remove obstructions (fence closing and construction trailer on) from north-south alley to the immediate east of the Properties. July through August, 2003. The Developer has applied for, but was denied, an application to close the sidewalk in front of the Properties. Drawing attached to that application show fencing extending across the southern entrance to the alley along D Street, S.E. and across the alley adjacent to the northern boarder of the Properties. In the event that a public space permit has been granted for the closing of the alley, appellants appeal the issuance of such permit.

10. Issuance of Public Space Permit for dumpster.

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[1] The Developer's Motion to Strike was filed in BZA Application No. 17108.