

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

Appeal of Ms. Stephanie Wallace

BZA Appeal No. 17747
ANC 3E
Public Hearing: July 15, 2008

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**STEPHANIE WALLACE'S REPLY STATEMENT ON "CASUALTY" AND NOTICE OF
DIRECTLY RELATED APPEAL**

The Appellant, Ms. Stephanie Wallace, by and through undersigned counsel, respectfully submits this Reply Statement on "Casualty" and Notice of Directly Related Appeal ("Reply Statement").

In additional support of this Reply Statement, Ms. Wallace specifically incorporates by reference, her Appeal filed on October 19, 2007, Pre-Hearing Statement and Motion for Summary Judgment, Opposition to Intervener's Motion to Dismiss, Notice of Related Appeal and Motion to Amend Appeal to Incorporate Directly Related Denial By Zoning Administrator Under 11 DCMR § 401.1, Supplemental Statement on Casualty, and Supplemental Pre-hearing Statement as if fully set forth herein.

Ms. Wallace expressly reserves the right to supplement this Reply Statement in her hearing presentation on July 15, 2008.

I. BACKGROUND

Ms. Wallace purchased 5013 Belt Road NW (Square 1756, Lot 64) ("Property") in "as-is" condition in April 2004. At that time, the Property was improved with a single-family detached dwelling dating back to at least 1933. In the Sales Contract, the Seller affirmatively (mis)represented to Ms. Wallace that the Property had no history of: 1) termite infestation; and 2) foundation or structural defects. Prior to the closing, Mr. Allen Premo, Ms. Wallace's general contractor, made a visual or walk-thru inspection of the Property and saw no evidence of termite infestation or damage,

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other structural defects or groundwater or soil problems. During this inspection, the existing walls were closed in and the structural elements were not visible or accessible. No penetration of the closed in walls was permitted.

On December 9, 2004, the Department of Consumer and Regulatory Affairs (“DCRA”) issued the original Building Permit authorizing Ms. Wallace to construct “ADDITION TO SINGLE-FAMILY HOUSE TO INCLUDE NEW KITCHEN, FAMILY ROOM, MASTER SUITE BATHS, ATTIC & BASEMENT. SEPARATE ELEC., PLUMB., & MECH. INSTALLATION PERMITS ARE REQUIRED” (the “Original Permit”).

The catastrophic structural damage to the Property was not first discovered until March 2005, when interior demolition began as authorized by the Original Permit. At that time, no live termites or termite infestation was discovered, but it was clear that the prior owner had treated and exterminated the termite infestation. Based on Mr. Premo’s 42 years construction experience, the catastrophic structural damage that was caused substantially by termites had occurred long before Ms. Wallace purchased the Property. Additionally, termites were not the sole cause of the structural damage, but also prolonged exposure to moisture from the ground below the building contributed to the structure failure which occurred.

From October 23 to November 1, 2006, the addition to the existing single-family house was framed. Mr. Premo prepared to lift the front of the existing single-family house and discovered the front to be rotten with termite and other structural damage. Ms. Wallace’s engineer determined that lifting the existing single-family house was unsafe and would cause the structure to collapse.

On or about November 2, 2006, Mr. Premo met with DCRA to determine if the front of the existing single-family house could be removed and replaced. DCRA advised Mr. Premo that removal and replacement were acceptable under the circumstances. As directed by DCRA, Mr. Premo drafted

revised plans and submitted for a building permit. As instructed, the building permit application included the following: 1) a structural engineering report detailing the structural failure that had occurred and likelihood of collapse, 2) a detailed demolition sequence, including all elements of the original 1933 structure, including footers if required, and 3) detailed plans showing the demolition authorized and existing structure that would remain.

On February 14, 2007, a fourth building permit, Building Permit No. B103710 (the “Fourth Building Permit”), was issued to “DEMOLISH A PORTION OF AND [sic] EXISTING SFD DUE TO THE STRUCTURAL INTEGRITY AND POSSIBLE COLLAPSE OF THE HOUSE WHICH IS DANGEROUSLY UNSOUND. REBUILD STRUCTURE TO CURRENT BUILDING CODE SPECIFICATIONS PER PER [sic] EXISTING PERMITS AND PLANS.” The Fourth Building Permit allowed the demolishing and rebuilding of the front portion of the existing single-family house which at that time included the original 1933 structure and the closed in and under roof rear addition authorized by the Original Permit.

On March 12 to March 15, 2007, the front portion of the existing single-family house was demolished pursuant to the Fourth Building Permit.

The Fourth Building Permit Application was prepared in direct consultation with and upon the advice of DCRA, including the Chief Structural Engineer, Mr. Robert Chen. In reviewing the Fourth Building Permit Application, Mr. Chen specifically required Ms. Wallace to provide a detailed, step-by-step description of the sequence of demolition to be undertaken. Specifically, the “Demo Sequence” prepared and submitted by Ms. Wallace, described the piece-by-piece removal or demolition of the original 1933 portion of the structure, and then “once the existing wood structure has been removed, examine and replace [the existing footer foundation] if necessary.”

Prior to the approved demolition, the existing structure was comprised of the original 1933 structure and the approved three-story rear addition which was closed in and under roof. Ms. Wallace completed the authorized demolition under the Fourth Building Permit of only a portion of then existing structure. By definition, and as reviewed and approved in advance by DCRA, the work performed was a “demolition” not a razing of the entire existing structure. The Building Code defines a raze as a removal of the “entire building down to the ground.” 12A DCMR §§ 105.1.5, 105.1.7. It is undisputed that the closed in an under roof rear addition remains intact and in place which is consistent with the definition of “demolition,” the Fourth Permit and approved plans for that permit.

II. ARGUMENT

A. “CASUALTY”

1. Definition of Casualty

Although the Zoning Regulations treat both a “casualty or act of God” interchangeably and in the same manner, neither term is specifically defined. However, the Zoning Regulations are clear that “words not defined in [§ 199.1] shall have the meanings given in Webster’s Unabridged Dictionary.” 11 DCMR § 199.2(g). Webster’s Unabridged Dictionary defines “casualty” as:

As a person or thing that has failed, been injured, lost, or destroyed as the result of an uncontrollable circumstance or some action.

Webster’s Third New International Dictionary (Unabridged) (2002) (*Emphasis added*).

Although the Zoning Regulations do not provide a specific definition of casualty, the Zoning Commission, has in several instances provided valuable guidance to the Board. First, the Zoning Regulations must be read and interpreted as a whole, rather than as a series of unrelated provisions. Specifically, § 2001 (Nonconforming Structures Devoted to Conforming Uses) starts with a more expansive listing of the casualty events that warrant special treatment for nonconforming structures. Section 2001.4 states:

If a nonconforming structure is **destroyed by fire, collapse, explosion, or act of God** to an extent of more than seventy-five percent (75%) of the cost of reconstructing the entire structure, the nonconforming structure shall not be restored or reconstructed except in conformity with all provisions of this title, except as provided otherwise in §§ 2001.5 through 2001.10.

11 DCMR § 2001.4 (*Emphasis added*).

Significantly, subsequent subsections under 2001 (§§ 2001.5 and 2001.6) have incorporated the immediately prior reference to “destroyed by fire, collapse, explosion” into the single word “casualty.” Common sense, the sequence of these provisions and the common purpose of each subsection strongly indicates that the Zoning Commission intended “destroyed by fire, collapse, explosion” to be synonymous with “casualty” when used in §§ 2001.5 and 2001.6. Any other interpretation would result in different results for the three directly related and complimentary provisions.

In 1982-1983, the Zoning Commission, with the assistance of the Office of Planning, completed a “comprehensive study and review” of all the provisions for nonconformation uses and structures. Zoning Commission Order No. 403 (Case No. 81-17: Non-conformity Provisions of the Regulations) (July 18, 1983). In doing so, the Zoning Commission specifically retained unchanged the original 1958 “destroyed by fire, collapse, explosion” and “casualty” language. In completing Order No. 403, the Zoning Commission also provided importance instructions to the Board governing its interpretation and application of the “casualty or act of God” provisions. Specifically, the Zoning Commission concluded that “[t]he determination of the cause or origin of a [casualty] is beyond the scope of the Commission’s [and Board’s] authority.” As a result, the Zoning Commission has defined casualty based on the result, not the cause or origin or any concept of fault or blame.

2. DCRA Specifically Acknowledged The Casualty With Fourth Permit

The Fourth Building Permit was sought and approved in consultation with and on the advice of DCRA. The Fourth Building Permit is clear on its face in acknowledging and validating that the structural integrity of the original 1933 single-family dwelling has “failed, been injured, lost or destroyed as a result of an uncontrollable circumstance”. The Fourth Permit unequivocally states:

“DEMOLISH A PORTION OF AND [sic] EXISTING SFD DUE TO THE STRUCTURAL INTEGRITY AND POSSIBLE COLLAPSE OF THE HOUSE WHICH IS DANGEROUSLY UNSOUND. REBUILD STRUCTURE TO CURRENT BUILDING CODE SPECIFICATIONS PER PER [sic] EXISTING PERMITS AND PLANS.” *Emphasis Added.*

The fact that the original 1933 structure was structurally unsound, at risk of collapse and “dangerously unsound” is undisputed by DCRA and the Interveners. Ms. Wallace’s engineer has fully documented the structural failure and risk of collapse and DCRA has reviewed and fully endorsed that conclusion in issuing the Fourth Building Permit. Even Mr. Lemoine, one of the Intervener’s, claims to have known that the original structure was in “bad shape structurally” and “should be torn down”¹ as early as February 2004 which is before Ms. Wallace purchased the Property. Based on the definition of “casualty,” it is clearly established that the structural integrity of the original house “has failed, been injured, lost or destroyed” and would have collapsed if Ms. Wallace and Mr. Premo had not acted responsibly and as is required by law to obtain permission to demolish the dangerous structure. If the Board adopted DCRA’s and the Intervener’s concept of casualty, Ms. Wallace and other property owners in similar circumstances would be encouraged to do nothing and allow a “collapse” to occur which could not be challenged as a casualty.

¹ Mr. Lemoine’s construction advisor reported: “Upon inspection it was obvious that the house was in bad shape structurally. It was an old, wood frame house with very low, crumbling concrete footings. The wood structural members were basically sitting on the ground in a wet location and there were obvious signs of severe deterioration.”

For purposes of establishing the casualty that occurred, it is entirely irrelevant whether at the time she purchased the Property, Ms. Wallace knew or should have known of the catastrophic structural damage that existed or the cause of that damage. However, it is critical that for Ms. Wallace or any other potential purchaser of the Property, the catastrophic structural failure had already occurred and was a result of an “uncontrollable circumstance.” The structure failure had occurred and was beyond repair. There was nothing Ms. Wallace or anyone else, including Mr. Lemoine, could do under the circumstances. Repeated attempts by DCRA and the Interveners to blame Ms. Wallace for the termite infestation and structural failure that occurred long before she purchased the Property are factually incorrect and, more importantly, irrelevant.

Although the Zoning Commission has made it clear that the “cause or origin” of the casualty is not relevant to the Board’s inquiry, it should be noted one of the contributing causes of the casualty, termite infestation,² occurred long before Ms. Wallace purchased the Property. The termite infestation had been successfully treated by the prior owner and no termites were present, but the damage had already been done. Again, there is nothing that Ms. Wallace or any other purchaser could have done to control or prevent the catastrophic structural damage that existed or risk of collapse.

3. Suddenness Not Required

DCRA and the Interveners have attempted to interject a suddenness requirement to the established definition of “casualty.” Clearly, no such suddenness provision is included in the definition which focuses on the failure, injury, loss or destruction that has occurred (specifically referenced in the past tense to indicate an event that has occurred). The “uncontrollable” element is not addressed to timing or suddenness, but to the ability to prevent the casualty. Reliance on the

² Removal of side porch because of termite infestation constituted a practical difficulty. BZA Application No. 11386 (1973).

suddenness element created in the Internal Revenue Code and/or insurance liability cases is not relevant or appropriate to the casualty discussion for the specific and limited purposes of zoning or construction. In both the tax code and insurance liability cases, the suddenness of the casualty is not for determining whether the failure, injury, loss or destruction has occurred, but only for the purpose of determining culpability, insurance liability or deductibility of the loss.

4. The Toggas Standard

Although the Board has had few occasions to interpret and apply the “casualty or act of God” provision, the Toggas case is factually and legally controlling. In BZA Order No. 17270 (Application of Thomas and Kathryn Toggas), the Board of Zoning Adjustment approved the reconstruction of a den with a non-conforming side yard under § 405.8 as a matter-of-right. Specifically, the property in BZA Order No. 17270 was improved with a pre-1958 structure, including a den that created a non-conforming side yard. The side yard was less than eight feet, but greater than five feet as permitted under § 405.8. As a result of Hurricane Isabel, the den suffered "severe water and structural damage" and was "deemed unsafe." As a result of the unsafe condition, the den was removed by the Toggas' with the intention of re-building a new structure on the same footprint, but without consulting with DCRA or obtaining a demolition permit. Substantively, Ms. Wallace's situation is no different than Toggas. In both cases, structural damage had occurred and the buildings were unsafe. The Zoning Commission has made it clear that the cause or origin or fault for the unsafe condition (casualty) is not relevant or within the scope of the Board's authority.

The Board concluded “that the exception to the side yard requirement granted by § 405.8 for the southwestern non-conforming side yard was not lost with the emergency removal (without a permit or prior DCRA authorization) of the den as a result of the damage from Hurricane Isabel, which constitutes a casualty or an Act of God.” BZA Order No. 17270, Paragraph 12. Although Toggas

involved a Hurricane which is readily considered an “act of God,” the outcome would not have changed if the Board had determined that the damage that occurred was a “casualty” or other structural damage. Thus, the Board's decision in BZA Order No. 17270 directly supports the Fourth Permit and the approval of the Fifth Permit Application to reconstruct part of the original non-conforming structure that suffered a "casualty," was deemed unsafe, and demolished in accordance with the advice and Fourth Building Permit provided by DCRA. The Fourth Permit also clearly authorized reconstruction of the structure to be demolished.

B. NOTICE OF DIRECTLY RELATED APPEAL

The Directly Related and Amended Appeal is the product of ongoing good faith discussions between Mr. Wallace and DCRA about continuing construction as a matter-of-right at the Property. These discussions have been ongoing for several months. While reserving her rights under the pending and amended Appeal, Ms. Wallace has made several proposals to DCRA based on the existing rear addition, including reconstruction of the original 1933 structure, but with eight (8) foot side yards, and otherwise in compliance with the applicable area restrictions (height, lot occupancy and rear yard). Similarly, Ms. Wallace has proposed to replace the existing rear addition and demolished original 1933 structure with an entirely new structure meeting all the applicable requirements, including 8 foot side yards. Ms. Wallace maintains that both the enlargement or replacement proposals are permitted as a matter-of-right under § 401.1, which states:

Except as provided in chapters 20 through 25 of this title and in the second sentence of this subsection, **in the case of a building located, on May 12, 1958, on a lot with a lot area or width of lot, or both, less than that prescribed in § 401.3 for the district in which it is located, the building may not be enlarged or replaced by a new building unless it complies with all other provisions of this title.** Notwithstanding the above, the lot area requirements of § 401.3 must be met when the building is being converted to a use or replaced by a building intended to house a use that would require more lot area or lot width than is on the building's lot.

Emphasis Added.

Obviously, the original 1933 structure and the lot it was located on predated the adoption of the Zoning Regulations on May 12, 1958. Also, the Property with a lot area of 4,500 square feet and lot width of 30 feet does not meet the minimum requirements in the R-1-B zone under § 401.3 for lot area of 5,000 square feet and lot width of 50 feet. However, Ms. Wallace has proposed to “enlarge or replace” the original building with the New Addition that “complies with all other provisions of this title,” including lot occupancy, height, side yard, and rear yard.

None of the enumerated exceptions to § 401.1 are applicable. The New Addition does not convert or change the existing single-family use and, therefore, the lot area and lot width requirements under § 401.3 remain unchanged. Finally, Chapters 20 (Nonconforming Uses and Structures), 21 (Off-Street Parking), 22 (Off-Street Loading), 23 (Garages, Carports, Parking Lots), 24 (Planned Unit Developments) and 25 (Miscellaneous Zoning Requirements) are each not applicable under these circumstances. In fact, Chapter 20, including Sections 2001.5 (allowing complete reconstruction of a structure with nonconforming lot occupancy, lot area and lot width) and 2001.3 (enlargements or additions) are entirely consistent with the letter, spirit and purpose of § 401.1.

Throughout the ongoing discussions, DCRA and the Zoning Administrator have consistently denied that Ms. Wallace had any matter-of-right options for continuing construction at the Property either as an enlargement or replacement. Specifically, any actions on her part would require variance relief.

The May 29, 2008 letter from the undersigned counsel to the Zoning Administrator was simply intended to confirm DCRA’s long-standing position in the discussions, (“§ 401.1 Denial”), but to do so in a timely fashion without having to wait five (5) months for a reply. As the Board is aware, Ms. Wallace was forced to wait from April 17, 2007 until September 28, 2007 for the Zoning Administrator to deny the Fifth Permit Application.

1. Jurisdiction

The Board has jurisdiction to hear this appeal of the § 401.1 Denial. Pursuant to 11 DCMR § 3100.2, the Board is authorized to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations, Title 11 DCMR.” The § 401.1 Denial specifically relies on the Zoning Regulations as the alleged basis for denial or refusal of the Appellant’s request to “enlarge or replace” the existing rear addition on the Property.

2. Timeliness of Appeal

Under 11 DCMR § 3112.2, the appeal of the § 401.1 Denial must be filed within sixty (60) days of that decision. The § 401.1 Denial became effective on May 30, 2008. The Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate an Appeal of the § 401.1 Denial was filed on June 2, 2008 and clearly within sixty (60) days of the decision, denial and/or refusal appealed. The Appeal is timely, whether consolidated with the Pending Appeal or, in the unlikely event, the Board decides to docket and hear this directly related matter separately. DCRA, the affected Advisory Neighborhood Commission, and the Interveners’ are fully and directly on notice of this Related Appeal of the § 401.1 Denial having received electronic copies of the filing on June 2, 2008 – five weeks ago.

In the interim, DCRA, the Interveners and ANC 3E have all had an opportunity to respond and prepare for the July 15, 2008 hearing. Also, ANC 3E will have had two opportunities to review The Notice of Directly Related Appeal at its June 12 and July 10 regularly scheduled meetings.

3. Responds Directly to DCRA and Interveners

Ms. Wallace's § 401.1 proposal to "enlarge or replace" is a direct response to the positions offered by DCRA, Interveners and ANC 3E. DCRA claims that the existing rear addition was illegally constructed and there is no basis for reconstructing the original 1933 structure. The Interveners and ANC 3E demand that the existing rear addition be removed. The § 401.1 Appeal to enlarge or replace responds to and provides a matter-of-right method for achieving zoning compliance which is the stated objectives of the parties in opposition.

4. Judicial Economy and Fundamental Fairness

It cannot be disputed that it is in the interest of judicial economy and fundamental fairness to Appellant and the other interested parties that the pending Appeal and the newly established § 401.1 Denial be litigated at the same time. It is clearly in every ones interest that a full, complete and fair resolution of this situation be reached as soon as possible. DCRA, ANC 3E, and the Interveners will not be prejudiced and should welcome the opportunity to resolve all of the outstanding claims in a single consolidated proceeding. The Appellant will continue to be substantially prejudiced by the delay and burden of pursuing separate Appeals of what is the same matter. *See*, Appeal No. 17468-A (Nov. 15, 2006) (accepting "cross-appeal" on the same facts and circumstances as original appeal (which was dismissed as untimely) provided sufficient time for ANC to participate fully); Appeal No. 17657 of 1231 Morse Street, Inc. (decision not issued) (allowing Notice of Related Appeal and Motion to Amend based on new action by DCRA, but based on same facts and circumstances); and Appeal No. 17698 of Fifth Street, LLC (dismissed by agreement of parties) (allowing Notice of Related

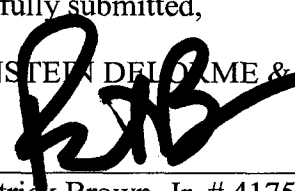
Appeal and Motion to Amend based on a new action by DCRA, but based on same facts and circumstances).

IV. CONCLUSION

For the foregoing reasons, Ms. Wallace's Appeal, amended, must be GRANTED.

Respectfully submitted,

GREENSTEIN DELOACH & LUCHS, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Supplemental Pre-Hearing Statement was served as noted below, this 7th day of July 2008, upon the following:

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* A courtesy copy is being provided separately by electronic mail (teddyg1973a@yahoo.com) to Ms. Grumbine, Mr Simmons' wife and co-Intervener.