

**DISTRICT OF COLUMBIA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS  
OF LAW IN BOARD OF ZONING ADJUSTMENT APPEAL NO. 17747**

Appeal of Stephanie Wallace

Appeal No. 17747 of Stephanie Wallace, pursuant to 11 DCMR §3100.2, from the administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs. On September 28, 2007, the Zoning Administrator denied the building permit application, which would allow Ms. Wallace to reconstruct a single family house with nonconforming side yards at 5013 Belt Road, NW (R-1-B Zone District; Lot 64, Square 1166). The Zoning Administrator determined that he no longer had authority to approve construction of the structure with nonconforming side yards under 11 DCMR §405.8 because the original 1933 house was impermissibly demolished by Ms. Wallace and reconstruction of it was not permitted, absent a casualty or act of God pursuant to 11 DCMR §2001.6.

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HEARING DATES: July 15, 2008 and August 1, 2008

DECISION DATE: \_\_\_\_\_

**DECISION AND ORDER**

**INTRODUCTION**

In April of 2004, Stephanie Wallace ("Appellant") purchased a 1933 wood-frame house with nonconforming side, intending to build a nonconforming addition upon it. During the course of the project, Appellant revised her plans five times and applied for a total of five construction permits. On April 17, 2008, Appellant applied for the fifth building permit to "revis[e] B468280 to reflect new footer and new (2) story structure replacing existing." Prior to submitting the fifth building permit application, the Appellant's house was demolished. On September 28, 2007, the Zoning Administrator ("ZA") for the Department of Consumer and Regulatory Affairs ("DCRA") denied the application, stating that he no longer had authority to approve the application under 11 DCMR §405.8<sup>1</sup> once the pre-existing house, which formed the basis for the exception, was demolished. The ZA also concluded that no casualty or act of God permitted the structure to be rebuilt under 11 DCMR §2001.6<sup>2</sup>. Thereafter, Appellant filed this appeal with the Board of Zoning Adjustment challenging the ZA's decision.

<sup>1</sup> 11 DCMR §405.8. states that "[i]n the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building; provided, that the width of the existing side yard shall not be decreased; and provided further, that the width of the existing side yard shall be a minimum of five feet (5 ft.)."

<sup>2</sup> 11 DCMR §2001.6 states that "[i]f a casualty or act of God results in damage to an extent of seventy-five percent (75%) or less of the cost of reconstructing the entire structure, the structure may be restored or reconstructed to its previous condition or to a more conforming condition; provided, that the reconstruction or restoration shall be started within twenty-four (24) months of the date of the destruction and continued diligently to completion."

BOARD OF ZONING ADJUSTMENT

District of Columbia

-1-

CASE NO. 17747

EXHIBIT NO. 59

Board of Zoning Adjustment  
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Specifically, Appellant contends that the ZA erred by: (1) failing to approve the nonconforming addition under §405.8 and (2) failing to find that termite damage or prolonged exposure to ground water. The Appellant further contends that the prolonged exposure to ground water caused severe structural damage to the original house that constituted a casualty under 11 DCMR §2001.6. See Appellant's Statement of Appeal page 6. The Appellant also argues that her reliance upon on previously issued building permits estops DCRA from denying her fifth building permit application, and DCRA is further prevented by laches from denying her application because it 'slept on its rights.'

For the reasons set forth below, the Board finds Appellant's contentions regarding the ZA's decision are without merit and accordingly denies the appeal.

The Board held public hearings on July 15, 2008 and August 1, 2008. At the close of the hearings, the Board set a decision date of \_\_\_\_\_, 2008. At the decision meeting, the Board voted \_\_\_\_ - \_\_\_\_ to deny the appeal and uphold the decision of the ZA.

## **PRELIMINARY MATTERS**

Request for Party Status. The subject property is located within the area served by Advisory Neighborhood Commission 3E (ANC 3E), which is automatically a party to this Appeal. Upon proper motion, the Board granted party status as an intervener to Mary Grumbine, Jack Simmons, and John Lemoine, neighbors whose properties abut the Appellant's property and who also have personal knowledge of the construction that occurred at the property.

## **FINDINGS OF FACT:**

1. The property is located at 5013 Belt Road, NW (Lot 64, Square 1756) and it is zoned R-1-B.
2. The lot size is 30 feet wide and 150 feet deep and comprises an area of 4,500 square feet.
3. The original non-conforming structure was a two-story, wood-frame house with 5 foot side yards, and had a footprint of approximately 1,019 square feet.
4. DCRA issued permits to improve a two-story addition with 5 foot side yards, which would increase the total footprint to approximately 3,419 square feet.
5. On December 9, 2004, DCRA issued Building Permit #B468280 (the first permit), that authorized Appellant to construct the addition to the pre-existing single family home located on the property pursuant to 11 DCMR §405.8.
6. On March 17, 2005, DCRA issued a Stop Work Order at the property because Appellant was "Working beyond the scope. Razing of building. Need to resubmit plans and plat."
7. As a result of the issuance of the Stop Work Order, Appellant applied for a second building permit on October 4, 2005, Building Permit # B477334. The new permit allowed Appellant to "remove and replace an[y] damaged wood in accordance with the structural plans to preserve the integrity of the project. All other conditions of the original building permit were to remain the same...."
8. Subsequently, Appellant applied to DCRA for a third building permit, which would allow her to raise the pre-existing house up by approximately four feet, to address alleged

- structural concerns at the property. Accordingly, on April 21, 2006, the third building permit, Building Permit # B91338, was issued.
9. On January 9, 2007, DCRA was contacted by Professional Engineer Ismaik Hanieh, P.E., Appellant's structural engineer, concerning the property. In his letter to DCRA, Mr. Hanieh stated that "after inspecting the structure, it was determined that the structural elements of the house are not in any shape to be lifted without causing some major damage and possible collapse of the house. As a result, it would be safer to demolish the existing structure and rebuild it to match the existing plans and specifications per the current building code requirements." The Appellant testified in 2006 that she learned the rear of the house was damaged from termites, and in 2007, she learned that the front was also damaged from termites. The Appellant also testified that structural damage that was caused substantially by termites had occurred long before Ms. Wallace purchased the Property.
  10. On February 14, 2007, DCRA issued a fourth building permit, #B103710, to allow Appellant to "demolish a portion of an ...existing SFD due to structural integrity and possible collapse of the house which is dangerously unsound. Rebuild structure to current building code specifications per existing permits and plans."
  11. On March 12, 2007, neighbors reported to DCRA that the remaining portion of the pre-existing house was razed.
  12. On March 21, 2007, DCRA issued a second Stop Work Order on the property, for "exceeding scope of raze permit took down entire house. Exceed Scope of Building Permit. Building all new SFD. Ongoing work [does] not match approved plans on site!!!"
  13. Subsequently, Appellant applied for a fifth building permit on April 17, 2007, which was denied by the ZA in a zoning determination letter dated September 28, 2007, which gave rise to the subject appeal.
  14. On July 15 and August 1, 2008, hearings were held before this Board. During these hearing, the ANC testified and the Board found that the addition was out of character for the neighborhood.
  15. At the hearings, the Interveners also testified and the Board found that the Appellant took no precautions to halt the structural damage to the pre-existing house, to protect it from the elements, or to preserve whatever structural integrity remained. Furthermore, the Appellant testified that she had never had a termite inspection.
  16. The ZA denied approval of the fifth application because the addition, with nonconforming side yards, could not be approved in the absence of the pre-existing single family house upon which the 5' nonconforming side yards were permitted pursuant to 11 DCMR §405.8.
  17. Section 405.8 states that "[i]n the case of a building existing on or before May 12, 1958, with a side yard less than eight feet (8 ft.) wide, an extension or addition may be made to the building; provided, that the width of the existing side yard shall not be decreased; and provided further, that the width of the existing side yard shall be a minimum of five feet (5 ft)."
  18. ZA determined and the Board found that the structural damage to the pre-existing house, caused by termite infestation which was untreated and prolonged exposure to ground

- water, did not constitute a casualty under 11 DCMR §2001.6, which would permit Appellant to reconstruct the pre-existing structure on her property.
19. Section 2001.6 states “[i]f a casualty or act of God results in damage to an extent of seventy-five percent (75%) or less of the cost of reconstructing the entire structure, the structure may be restored or reconstructed to its previous condition or to a more conforming condition; provided, that the reconstruction or restoration shall be started within twenty-four (24) months of the date of the destruction and continued diligently to completion.”
  20. Pursuant to controlling law, an agency’s interpretation of its administrative regulations must be given great deference and such an interpretation is to be upheld unless clearly erroneous or inconsistent with the Zoning Regulations. See Bernstein v. District of Columbia Board of Zoning Adjustment, 376 A.2d 816, 819 (D.C. App. 1977), see also Kalorama Citizens Association v. District of Columbia Board of Zoning Adjustment, 640 A.2d 179 (D.C. App. 1994).
  21. Appellant did not provide any testimony that the ZA’s interpretation of the Zoning Regulations was erroneous or inconsistent. The Appellant could not rebut or contradict the ZA’s determination.
  22. Appellant’s reconstruction of the pre-existing house was not permitted in the absence of (1) a building permit authorizing the raze and reconstruction of the house, or (2) the occurrence of a casualty or Act of God that caused the structural damage complained of by the appellant.

## **CONCLUSIONS OF LAW AND OPINION**

The Board is authorized under the Zoning Act of June 20, 1938 (52 Stat. 797, as amended, D.C. Code § 6-641.07(g)(1) (2001 ed.)) to hear and decide appeals where it is alleged that there is error in any order, requirement, decision, determination, or refusal made by the Zoning Administrator in the enforcement of the Zoning Regulations. This appeal is properly before the Board pursuant to 11 DCMR §3100.2.

This Board is required to determine if: (1) Appellant was able to construct the nonconforming addition in the absence of the original 1933 single family dwelling, pursuant to 11 DCMR §405, and (2) the Appellant was permitted to reconstruct the nonconforming original structure pursuant to §2001.6. First, 11 DCMR §405 is explicit by its terms, in applying only to cases in which there is “a building existing on or before May 12, 1958.” In this instance, the Appellant razed the pre-1958 original structure prior to submitting the fifth building permit application. Therefore, by its terms, 11 DCMR §405 is not applicable to the facts of Appellant’s case and cannot be used to permit the construction of a nonconforming addition. Second, Appellant’s reconstruction of the original structure was not permitted under 11 DCMR §2001.6 because the structural damage caused by termites or prolonged exposure to ground water was neither caused by a casualty nor by an act of God. By definition<sup>3</sup>, a casualty or act of God

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<sup>3</sup> Although, the term “casualty” is not expressly defined in the Zoning Regulations, pursuant to 11 §199(g), “words not defined *shall* have the meanings given in Webster’s. (*emphasis added*). See 11

requires that some degree of suddenness be present. In this case, Appellant complains of structural damage to the original house, which was caused by the progressive effects of termite infestation and prolonged exposure to surface ground water. As neither occurrence is a sudden, uncontrollable disaster of the type contemplated by 11 DCMR §2001.6 – thus, the regulation is not available to the Appellant as a basis upon which to reconstruct the original house.

Even so, Appellant maintains that she is entitled as a matter of right to enlarge the structure at the property because of the termite and water damage. However, the Appellant fails to recognize that the 5 foot side yard exception upon which she relies is premised on the continued non-conforming existence of the original 1933 single family home on the property as the express intent of the Zoning Regulations in §405 was to require post 1958 housing construction to have 8 foot side yards. Furthermore, Appellant's strict reliance and interpretation that she is not subject to §405 because of a casualty that occurred under §2001.6 is misplaced because the type of "casualty" contemplated by §2001.6 does not include structural damage caused by the progressive effects of termite infestation or prolonged exposure to surface ground water, as complained of by the Appellant in this case.

The ZA's interpretation of the Zoning Regulations is entitled to deference. It is well settled in the law that an agency's interpretation of its administrative regulations must be given great deference and that such an interpretation is to be upheld unless clearly erroneous or inconsistent with the Zoning Regulations. *See Bernstein v. District of Columbia Board of Zoning Adjustment*, 376 A.2d 816, 819 (D.C. 1977), see also *Kalorama Citizens Association v. District of Columbia Board of Zoning Adjustment*, 640 A.2d 179 (D.C. 1994). Accordingly, this Board must defer to an agency's interpretation of statutes, which the agency administers, unless that interpretation is unreasonable in light of the prevailing law, inconsistent with the statute, or plainly erroneous. *See Public Defender Service v. Saint-Preux*, 691 A.2d 1160 (D.C. 1997). In the instant case, the ZA reasonably determined that the structural damage caused by termites was not a "casualty" under the Zoning Regulations. The ZA's determination was reasonable in view of the "casualty" definition found in relevant case law, it was consistent with the dictionary definition that controls under 11 D.C.M.R. §199(g), and it was clearly correct by the standard of review established by the D.C. Court of Appeals. Therefore, this Board must follow controlling legal authority and uphold the agency's decision as a reasonable interpretation of its regulations.

In the instant case, the ZA accurately interpreted the Zoning Regulations. First, the structural damage complained of by the Appellant was foreseeable. The termite infestation that caused the structural damage to Appellant's original 1933 house was an occurrence<sup>4</sup> (Webster's dictionary definition is controlling language for this Board when terms are not defined in the Zoning Regulations) that was foreseeable and to be expected because the condition was left untreated. Therefore, in determining whether the structural damage at issue was or was not

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DCMR §199(g). Accordingly, Webster's Unabridged Dictionary (3<sup>rd</sup> Edition) defines the term "casualty" as "an unfortunate occurrence,"<sup>3</sup> "serious or fatal accident: disaster,"<sup>3</sup>, or "a person or thing that has failed, been injured, lost or destroyed as a result of uncontrollable<sup>3</sup> circumstance or some action: victim."

<sup>4</sup> Webster's Unabridged Dictionary defines the term "occurrence" as "something that takes place, esp. something that *happens unexpectedly* and without design." (*emphasis added*).

foreseeable, this Board must consider the fact that the Appellant purchased the property without a termite inspection. This action was at Appellant's peril and her situation cannot be rectified by alleging that a "casualty" occurred under the law. The termite infestation at issue could have been detected and the structural damage foreseen by Appellant at numerous points in time. Before purchasing the property, Appellant could have had the property inspected for termites. As a seasoned real estate developer, with over 20 years of industry experience (*See Biography of Developer Stephanie Wallace at <http://stephaniewallace.com/stephaniewallace.html>*), Appellant should have been aware of the importance of performing such an inspection on the 70-year old wooden house. She also should have been aware of the risks she would assume by foregoing such a precaution. More importantly, because termite infestations are routinely treatable, it Appellant's own failure to inspect that prolonged the infestation and caused the structural damage of which she now complains. Accordingly, the ZA was correct in concluding that Appellant's structural damage was not a "casualty" under the law.

Second, structural damage from termites is not a "disaster." Webster's Unabridged Dictionary defines "disaster" as "a *sudden* calamitous *event* producing great material damage, loss and distress". The word "disaster" is also synonymous with "catastrophe" and "cataclysm", which also "connote the *sudden* and unexpected, with attendant notions of lack of foresight". (*emphasis added*). *See*, Merriam-Webster's Unabridged Dictionary. Moreover, the termite damage that occurred to the 70-year old wooden structure at issue was not sudden. How quickly damage occurs depends, of course, on the size and the maturity of the colony or colonies in the structure and the integrity of the structure itself. In the instant case, the amount of time the property remained infested by termites is unknown. However, in March 2005, Appellant noted structural damage to the rear of the structure from termites, and in 2007, she noted additional structural damage to the front of the house from termites. As termite infestations take years to cause structural damage of the type complained of by Appellant, it can be estimated that such damage occurred at some point before April 2004, when Appellant purchased the property through March 2007, when the last standing portion of the house was razed. As a result, the shortest known period of time the infestation existed, according to dates provided by Appellant, is approximately two years and eleven months. Damage from termites occurring within this amount of time is neither "sudden" nor "unexpected. Accordingly, the ZA was correct in concluding that Appellant's structural damage was not a casualty under the law because it was not sudden.

Third, structural damage from termites is a condition that is controllable<sup>5</sup>. Moreover, such conditions are routinely controlled and managed by an entire industry of pest control professionals. Accordingly, damage from a termite infestation is not a casualty. Moreover, in the instant case, the Appellant failed to assess the condition of her property adequately with respect to termites. This Board finds as a result, she also failed to control any possible infestations once it was within her power to do so - by failing to have the property treated for termites by a professional pest control company even after she found evidence of an infestation in 2005. Accordingly, this Board finds the structural damage that resulted from the untreated

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<sup>5</sup> Webster's Unabridged Dictionary defines the term "uncontrollable" as "incapable of being controlled: unmanageable".

termite infestation was controllable, had Appellant attempted to control it. Accordingly, the ZA was correct in concluding that Appellant's structural damage was not a casualty under the law.

Finally, by Appellant's own admission, the structural damage to her property was due in part to "prolonged exposure" to moisture from the ground below the building. See Appellant's Supplemental Statement on Casualty, Page Two, Paragraph two, lines 6-7. However, the definition of "casualty" by its terms is incongruent with any type of prolonged activity. "Casualty" is defined in the law and by the regulations with definitions that reveal one common denominator -- a degree of "suddenness." Clearly, structural damage that is caused by "prolonged exposure" to moisture from the ground below the building is a progressive deterioration and not a sudden, unexpected or uncontrollable event. Therefore, the facts surrounding Appellant's structural damage, again, do not rise to the legal standard of a "casualty."

Additionally, the application of the term "casualty" was addressed by this Board previously. In the *Application of Thomas and Kathryn Toggas*, BZA Order No. 17270, this Board concluded that structural damage caused by Hurricane Isabel was a "casualty" under the law. See *Application of Thomas and Kathryn Toggas*, BZA Order No. 17270. However, *Toggas*, is distinguished from the instant case on the basis of causation. Appellant's damage was caused by a progressive infestation of termites, whereas in *Toggas*, the damage was caused by an unexpected, sudden, and uncontrollable event -- Hurricane Isabel. Therefore, *Toggas* is not applicable to Respondent's case and determinative in this matter.

Moreover, structural damage that is caused by termites has consistently and expressly been excluded from the definition of "casualty" in other areas of the law. For example, in *Craven v. United States*, Plaintiffs contended that the infestation of their home by termites, and the later damage, constituted a casualty for which they were entitled to take a deduction on their Income Tax Return. *Craven v. United States*, 69-1 U.S. Tax (CCH) P9244(1969). However, the Government argued that there had been no casualty loss because the damage was not due to a sudden, unexpected and unusual cause. Accordingly, the court dismissed the plaintiff's case on the merits, finding that the definition of a "casualty" as "an event that takes place without one's foresight or expectation; an un-designed, sudden, and unexpected event" was not satisfied by structural damage caused by termites. The court further concluded that "the characteristics of suddenness common to fires, storms and shipwrecks must exist in order for the occurrence causing the loss to be a casualty within the meaning of the law." *Id.* Likewise, in *Austra v. Commissioner*, the court outlined its precedence in construing "casualty" as "an accident, a mishap, some sudden invasion by a hostile agency; it excludes the progressive deterioration of property through a steadily operating cause." See *Austra v. Commissioner*, T.C. Memo 1966-28 (1966), citing *Rudolf Lewis Hoppe*, 42 T.C. 820, 823 (1964), *affd.* 354 F. 2d 988 (C.A. 9, 1965); *Leslie C. Dodge*, 25 T.C. 1022, 1026 (1956). The court further stated that "[t]he burden is on the taxpayer to show that the damage occurred with 'suddenness' rather than by 'progressive deterioration.'" *Id.*

Additionally the law is clear that the time at which such structural damage is discovered is not determinative of whether or not a casualty exists. For example, in *Meersman v. United*

*States*, the Court found that “[a] cause, operating throughout in the same manner, either constitutes a casualty force in its entire operation or else it does not do so at all. Time of discovery in such a situation may affect the scope of the injury done, but it does not give rise to any metamorphosis in the nature of the force, the mode of its operation, or the character of the result.” *See Meersman v. United States*, 370 F.2d 109(6<sup>th</sup> Cir. 1966). According to this standard, an event is either a casualty or not, regardless of when it is discovered. In the instant case, the discovery of termites prior to Appellant’s purchase or after is immaterial – in either case, the structural damage was foreseeable, expected, and progressive. Therefore, the condition complained of is not a “casualty.”

Therefore, the Board accepts the District’s, Intervener’s, and ANC 3E’s position that the 5 foot side yard allowance under §405 is no longer available to Appellant once the original 1933 house was taken razed. Additionally, pursuant to 11 DCMR §2001.6, Appellant has no legal authority to reconstruct the original house in the absence of a casualty or act of God.

In view of the foregoing, the Board concludes that the Zoning Administrator was correct in determining that the fifth building permit could not be approved and in directing the Appellant to seek special exception approval for its plans, on the grounds that the subject addition lacked sufficient side yard width to be constructed as a matter-of-right. Moreover, 11 DCMR §2001.6 does not apply because the original 1933 structure was demolished by the Appellant, and not by a casualty or act of God.

Accordingly, it is ORDERED that this appeal is DENIED:

**VOTE:** \_-\_-\_- ( \_\_\_\_\_, to deny the appeal;  
\_\_\_\_\_, to sustain the appeal)

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

Each concurring Board member approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

**FINAL DATE OF ORDER:** \_\_\_\_\_, 2008

PURSUANT TO 11 DCMR §3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR §3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.