



ADVISORY NEIGHBORHOOD COMMISSION 3E

TENLEYTOWN AMERICAN UNIVERSITY PARK FRIENDSHIP HEIGHTS

c/o Lisner Home 5425 Western Avenue, NW Washington, DC 20015

September 9, 2008

VIA HAND-DELIVERY

Ms. Ruthanne G. Miller
Chairperson
Board of Zoning Adjustment
441 Fourth St. NW
Room 210
Washington, DC 20001

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Re: Appeal of Stephanie Wallace, BZA Appeal No. 17747

Dear Chairperson Miller:

Enclosed please find copies of the ANC 3E'S Proposed Findings of Fact and Conclusions of Law in the above-captioned matter.

Respectfully submitted,

Matthew Frumin
ANC 3E Commissioner

Enclosures

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17747

EXHIBIT NO. 60

Board of Zoning Adjustment
District of Columbia
CASE NO.17747
EXHIBIT NO.60

DISTRICT OF COLUMBIA GOVERNMENT
BOARD OF ZONING ADJUSTMENT

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Appeal of:)
)
Stephanie Wallace)
)
Re: 5013 Belt Rd., NW)
_____)

Appeal No. 17477

ANC 3E'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appeal No. 17747 of Ms. Stephanie Wallace, from the Zoning Administrator's September 28, 2007 decision to deny an April 17, 2007 building permit application where the Zoning Administrator found (i) that a pre-existing structure had been intentionally destroyed and non-conforming side yards for the resulting proposed new single family house were no longer authorized under 11 DCMR § 405.8 and (ii) that the damage which made the pre-existing single family house structurally unsound did not comply with the provisions of 11 DCMR § 2001.6

In this submission, the ANC provides support and elaboration, drawing on evidence from the record, including from the various hearings, for the findings made in its resolutions submitted on April 18, 2008 (BZA Exhibit 21) and July 11, 2008 (BZA Exhibit 48). In its resolutions, the ANC recited the relevant background to the dispute and found that (1) the destruction at issue did not qualify as a "casualty" or "act of God" under 11 DCMR § 2001.6, (2) Appellant was not entitled to defenses of estoppel or laches, and (3) Appellant had no basis to amend her appeal.

HEARING DATES: April 29, 2008, May 20, 2008, June 3, 2008, July 15, 2008
and August 1, 2008

DECISION DATE: September 16, 2008

PROPOSED DECISION AND ORDER

INTRODUCTION

On October 19, 2007, Stephanie Wallace (“Appellant”) filed this appeal of the Zoning Administrator’s decision to deny approval of a Fifth Building Permit for 5013 Belt Road, NW (the “Property”). The Zoning Administrator had found that, because no portion of a pre-1958 single family dwelling (“SFD”) existed on the Property, the resulting structure could not benefit from the grandfather provision of 11 DCMR § 405.8 and that the destruction of the pre-existing SFD did not qualify as a “casualty” or “act of God” under 11 DCMR § 2001.6. Appellant argues that the destruction should qualify under 11 DCMR § 2001.6 and/or that DCRA is barred by estoppel or laches from denying the Fifth Building Permit.

The ANC argues that Appellant may not benefit from the doctrines of estoppel or laches given her conduct in the construction and permitting process – arguing that she knew or willfully chose not to know that her plans required preserving a significant portion of the pre-existing structure and that she took no care to preserve pre-existing house and was at best unclear about whether any portion of the pre-existing house would remain when she secured the Fourth Building Permit. Moreover, by the time of the Fourth Building Permit Appellant had no choice but to demolish the remaining portion of the pre-existing house and should have known and likely did know she would have to demolish the entire pre-existing structure before she expended any significant construction financing on the project. The ANC also argues that authorization to rebuild under 11 DCMR § 2001.6 does not apply given the facts of this case. Thus, Appellant is not entitled, under applicable law, to proceed with the construction of a brand new house with non-conforming side yards.

6. The plans called for the new structure to have a 25 foot high wall five feet from Intervenor John Lemoine's ("Intervenor Lemoine's") property at 5011 Belt Road, NW and extend 14 feet past the back of his house.
7. In March 2005, Appellant demolished the back half of the Original House without authorization. With the back half of the Original House removed, the catastrophic flaws to the front half of the Original House were obvious and Appellant acknowledges being aware of those catastrophic flaws at that time.
8. In October 2005, Appellant secured her Second Building Permit calling for underpinning a portion of the foundation of the Original House and rebuilding the demolished back half of the Original House but retaining the front half of the Original House.
9. Appellant chose not to conduct any termite or structural inspection of the front half of the Original House prior to securing her Second Building Permit.
10. In the process of securing the Second Building Permit, Appellant was informed by DCRA that she had a "side yard issue."
11. Appellant did not underpin any portion of the foundation of the Original House as required by the Second Building Permit, but rather, without authorization, removed the foundation for the back half of the Original House.
12. In 2005, Appellant was warned by neighbors that excavation on the site would be perilous.
13. In November 2005, Appellant commenced excavation for the New Addition. The sides of the excavation caved in causing damage to the neighboring properties including \$50,000 of as yet uncompensated damage to Intervenor Lemoine's and uncompensated damages to the three properties adjoining to the north. The excavation then flooded.

14. The excavation damage is the most egregious, but not the only, damage to the neighbors caused by the Appellant's approach to construction on the Property.
15. On April 21, 2006, Appellant secured her Third Building Permit authorizing her to raise the front half of the Original House, the proposed replacement to the back half of the Original House and the proposed New Addition four feet.
16. Appellant admits that she conducted no termite or structural reviews of the front half of the Original House to determine if it could survive such a lifting process before seeking and securing the Third Building Permit.
17. A Stop Work Order was issued on March 10, 2006.
18. In May 2006, the Property was cited for a Standing Water violation.
19. In 2006, Appellant had four structural engineers look at the front half of the Original House. All concluded it could not be lifted as required under the Third Building Permit.
20. In the Summer of 2006, Appellant poured the foundation for the New Addition and replacement for the back half of the Original House. These represented her first major construction expenditures in executing her plan to build the new SFD.
21. In June 2006, DCRA posted a warning that the front half of the Original House was unsafe.
22. In November 2006, Appellant framed and enclosed the replacement for the back half of Original House and the New Addition and placed the New Addition under roof.
23. In January 2007, Appellant approached DCRA, meeting with representatives of the Structural Division, to inform them that the front half of the Original House could not be lifted, and seeking a Fourth Building Permit.

24. Appellant's presentation to DCRA regarding the Fourth Building Permit created the strong impression that a portion of the Original House would remain once the demolition of the front half of the Original House was completed and Appellant persisted in giving that impression as late as April 2008. Appellant's approach to the Fourth Building Permit otherwise minimized the likelihood that a zoning review would be triggered.
25. On February 14, 2007, Appellant secured her Fourth Building Permit instructing her to demolish the front half of the Original House and authorizing her to rebuild that structure according to code specifications.
26. By 2007, Appellant had no alternative other than razing the front portion of the Original House and was required to do so, given the dangerous condition of the structure.
27. In early March 2007, Appellant razed the remaining portion of the Original House.
28. On March 21, 2007, DCRA issued a Stop Work Order noting that the entire Original House – which had been the basis for reliance on the grandfather provision of 11 DCMR § 405.8 – was gone and an entirely new SFD was now under construction.
29. In April 2007, Appellant applied for a Fifth Building Permit to replace the footers for the front half of the Original House and complete construction of the all new SFD.
30. In July 2007, Appellant was cited for Trash and Debris Violations.
31. Appellant contends that the cost of reconstructing the entire Original House would not exceed \$135,068 and that the assessed value of the improvements in 2007 was \$163,190 and the proposed assessed value for 2008 was \$180,090.
32. In September 2007, the Zoning Administrator denied the Fifth Building Permit application finding that his authorization to approve construction of the house with non-

conforming 5 foot side yards ended with the demolition of the Original House. The Zoning Administrator also rejected Appellant's claim that she could rebuild the demolished structure under 11 DCMR § 2001.6 covering "casualty" or "act of God." The Zoning Administrator noted that Appellant had two options: (1) appeal his decision to the BZA or (2) file a variance with that same body.

33. On October 17, 2007, Appellant filed this appeal.
34. On April 5, 2008, ANC 3E Commissioner Lucy Eldridge conducted a meeting at the Property that included the neighbors and Appellant. At that meeting, Appellant confirmed that she would make no specific proposal to modify her development plans, but would instead await the decision of this Board.
35. On April 18, 2008 and July 11, 2008, ANC 3E passed resolutions opposing this appeal.
36. On June 2, 2008, Appellant sought to amend her appeal to challenge the Zoning Administrator's failure to approve within one day, two general, alternative proposals.
37. DCRA, the neighbors and the ANC have consistently invited Appellant to put forward specific alternative development proposals. To date, Appellant has declined to do so.

SUMMARY CONCLUSIONS OF LAW

1. At the time she sought approval for each of her building permits, Appellant had an affirmative duty to investigate whether her proposal to preserve a significant portion of the Original House and secure the benefit of the grandfather provision of 11 DCMR § 405.8 was viable. Appellant repeatedly breached that duty.
2. The facts of this case do not justify application of the doctrine of estoppel.
3. The facts of this case do not justify application of the doctrine of laches.

4. The destruction at issue here does not qualify as a “casualty” or “act of God” allowing for reconstruction under the relevant regulations.

DETAILED CONCLUSIONS OF LAW

I. APPELLANT BREACHED HER DUTY TO INVESTIGATE

The law of the District of Columbia is clear, a developer may not profit from his or her own failure to take reasonable steps to ascertain the condition of a property and plan a construction project accordingly. *Clay Properties, Inc., v. Washington Post*, 604 A.2d 890, 895 (D.C. 1992); *Rosenthal v. J. Leo Kolb, Inc.*, 97 A.2d 925, 927 (D.C. Muni. App. 1953) (“The knowledge of facts or circumstances reasonably sufficient to put a person of ordinary prudence upon inquiry which, if pursued with proper diligence, would lead to the discovery of the actual condition . . . is equivalent to knowledge direct and certain). *See also Rafferty v. D.C. Zoning Commission*, 583 A.2d 169, 176 (D.C. 1990).

In 2004, Appellant was put on notice by the facts and circumstances that she should investigate to determine her realistic development options. Appellant had purchased an old house on a very slender – 30 foot wide – lot and she contemplated making a significant investment to develop the Property. A person of ordinary prudence would have investigated in such circumstances and learned that their options were limited.

Indeed, in February 2004, Intervenor Lemoine took an interest in purchasing the Property and did investigate. Intervenor Lemoine asked John Kreher, a construction supervisor with 30 years of experience, to inspect the Original House. Mr. Kreher found that:

“It was obvious 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. I advised Mr. Lemoine that, because of this damage, renovating the house would be extremely problematic and that it really should be torn down and replaced with something new.”

Opposition Presentation Exhibits, (BZA Exhibit 54) at Tab 9.

Appellant does not contest these facts, and in support of her casualty claim in which she argued the Original House had effectively collapsed, a point she deemed important in support of a finding of casualty, she argued that the Original House was “structurally unsound, at risk of collapse and dangerously unsound” before she purchased it and asserted that “[e]ven Mr. Lemoine . . . claims to have known the structure was in ‘bad shape structurally’ and ‘should be torn down’ as early as February 2004 which is before Ms. Wallace purchased the Property.” Stephanie Wallace’s Reply Statement on “Casualty” and Notice of Directly Related Appeal filed July 13, 2008 (BZA Exhibit 47) at 6. Indeed, Appellant insists that as of the time of purchase “the structure failure had occurred and was beyond repair. There was nothing Ms. Wallace, or anyone else . . . could do under the circumstances.” *Id.* at 7.

As Mr. Lemoine’s request and Mr. Kreher’s report show, at a minimum, at the time Appellant purchased the Property and before she sought her First Building Permit, a person of ordinary prudence would have been on notice of the need to investigate and that even a cursory investigation in 2004 would have made clear to the Appellant that the preserving the Original House was at best an “extremely problematic” option and that the more realistic course was to tear it down and build something new. In breach of her duty, however, Appellant chose not to undertake such an investigation but assured DCRA in the First Building Permit process that she would preserve the Original House.

By mid-2005, given the facts and circumstances, it required an act of will for Appellant not to know (if in fact she did not know) that her plan to retain a significant portion of the Original House was not viable. In March 2005, while Appellant's Contractor Alan Premo ("Contractor Premo") was doing internal demolition, he testified that the back half of the Original House fell six inches. Contractor Premo ran for safety. Once assured that the back half of the Original House would not collapse, instead of getting an expert opinion or notifying DCRA, he returned and within days demolished it down to the crumbling foundation. August 1, 2008 Tr. at 229–232.

With the back half of the Original House removed, the severely damaged structural members and shallow, crumbling foundation of the front half of the Original House were exposed. Opposition's Presentation Exhibits (BZA Exhibit 54) at Tabs 10-11. At this point, Contractor Premo acknowledges that the "catastrophic structural damage" to the front half of the Original House was apparent. August 1, 2008 Tr. at 241. He noted that termite and water damage to the front half of the Original House was visible and that "some portions [of the front half of the Original House] you could visibly see were falling apart" and "the structural members [were] just totally rotting away." August 1, 2008 Tr. at 239-241.¹

Implicitly acknowledging that the circumstances had put him on notice that there might be an issue with the front half of the Original House after the collapse and exposure of the catastrophic flaws, Contractor Premo, in lieu of performing a formal inspection or structural review, claims to have chosen "to go up the second floor . . . and run from one side of the [20

¹ In her April 2008 Affidavit, Ms. Wallace asserts that termite damage to the front half of the Original House was not discovered until November 2006. Appellant's Pre-Hearing Statement and Motion for Summary Judgment (BZA Exhibit 18) at Exhibit J, para. 6). Testimony at the August and July Hearing clearly indicate that that is an inaccuracy in Ms. Wallace's affidavit.

foot wide] building to the other and stop real quick” to see what would happen. August 1, 2008 Tr. at 242-243. Contractor Premo claimed, however, that it was not important to further investigate the structural soundness of the front half of the Original House “until we’re ready to work on it.” August 1, 2008 Tr. at 242. Appellant, however, had a duty at this point to determine if in fact she could work with the front half of the Original House, not simply to ignore the increasingly obvious fact that she could not.

Notwithstanding the collapse of the back half of the Original House and the obviously seriously compromised state of the front half of the Original House, in clear breach of her duty to investigate, Appellant chose not to undertake any sort of systematic inspection or structural review of the front half of the Original House in March 2005 or at any time in 2005 to determine if it would survive the construction process. If she had conducted such an inspection, she would have learned (or had confirmed) that her proposed plan, reflected again her plans for the Second Building Permit, to preserve a significant portion of the Original House, was not viable.

Appellant and Contractor Premo have claimed at various times that they were unaware of the relevant zoning requirements and claim to have been surprised to learn that when no portion of the Original House remained that their rights to rely on the grandfather provisions regarding non-conforming side yards were extinguished. Setting aside the question of whether such ignorance of the law based on claims of inexperience with D.C. zoning regulations could be relied upon as an excuse, Appellant acknowledged in response to a question regarding when she realized that her ability to build her addition as designed was dependent on compliance the 11 DCMR § 405.8 grandfather provision on side yards stated: “Okay. I knew – I found out in the process of building permit two [issued in October 2005] that we had a side yard issue.” July 15,

2008 Tr. at 267. Appellant claims that her architect did not alert her to that issue and “nobody at the Building Department told me that until permit number two.” *Id.*

Appellant contends that she did not understand the full significance of that notice at the time of the application for the Second Building Permit, but she clearly was put on notice by DCRA by October 2005 that she had a side yard issue and if she did not come to understand the issue at that point or after, it is because she chose not to investigate. *See e.g. Rafferty v. D.C. Zoning Comm.*, 662 A.2d 191, 193 (D.C. 1995) (holding a developer to an obligation to inquire regarding zoning requirements before they relied on a building permit and went ahead with construction when information in their possession created enough uncertainty about their rights).

Under the circumstances, by late 2005, before Appellant had expended any significant construction funds – at this point all she had done was demolish the back half of the Original House, Appellant had a clear duty to investigate whether her plan was viable and what adjustments she might need to make if it was not, given D.C. zoning regulations. Appellant chose not to undertake any such investigation. If she had, she would have learned (or had confirmed) that her plan was not viable before making any significant construction expenditures.

The circumstances would only make Appellant’s duty more acute in the months to follow and her failure to comply with that duty that much more egregious. Between the time of purchase and April 2006, the time when Appellant applied for the Third Building Permit, Appellant took few if any steps to preserve any portion of the Original House. In November 2005, ignoring the warnings from the neighbors that any excavation on the Property would be perilous, Appellant attempted her flawed excavation that resulted first in a cave in and second in flooding and the discovery that the entire proposed structure would need to be raised four feet.

In April 2006, Appellant applied for a Third Building Permit pursuant to which the front half of the Original House was to be raised four feet by adding concrete extensions onto the shallow, existing foundation. Appellant's Hearing Presentation Exhibits (BZA Exhibit 51) at Tab 4.

Contractor Premo had recently deemed that the foundation for the back half of the Original House was unsalvageable and razed it instead of underpinning it as required in the Second Building Permit (Opposition Presentation Exhibit (BZA Exhibit 54) at Tab 11) so the idea of salvaging and building on the foundation for the front half of the Original House would appear to have been implausible. Furthermore, the plan to lift the decrepit front half of the Original House presented a new formidable challenge to the project. Appellant, nevertheless, either chose to conduct no investigation at this time or ignored the results of such investigations to determine if in fact that front half of the Original House could be lifted or would otherwise survive the construction process.

Again, before any significant construction funds were expended – at this point Appellant had merely demolished the back half of the Original House and done her flawed excavation, in April 2006, Appellant either knew or chose not to know that her plan to preserve the front half of the Original House could not succeed. Appellant nevertheless represented to DCRA in April 2006 that the front half of the Original House would be lifted and retained which, in turn, would allow the project to enjoy the benefit of the grandfather provision of 11 DCMR § 405.8.

In January 2007, only after the foundation for the New Addition and for the replacement of the back portion of the Original House had been poured and those structures had been framed and the New Addition had been put under in November 2006 did Appellant inform DCRA that

the front half of the Original House could not be lifted and retained as contemplated in the Third Building Permit issued in April 2006.

Meanwhile, Contractor Premo, when asked whether “at any time prior to November 2006 [he had] a structural engineer look at the property to determine whether or not the front half of the house could survive [the] construction process,” claimed he “had people look at it,” but “most of them didn’t want to have anything to do with it.” August 1, 2008 Tr. at 299-300. Appellant acknowledged that four structural engineers came “to the site. And they all said this house can’t be lifted. It’s going to fall apart.” July 15, 2008 Tr. at 233. To the extent those reports were made prior to November 2006, Appellant had actual knowledge that her plan was doomed before she chose to undertake the expense of framing and enclosing the back half of the Original House and framing, enclosing and placing under roof the New Addition. To the extent Appellant chose to wait until after she made such substantial construction expenditures to learn the bad news, she acted in clear breach of her duty to investigate and plan her project based on the discernible facts and circumstances and her duty to notify DCRA.

Indeed, the unanimous findings of the four structural engineers unambiguously demonstrate that if Appellant had conducted a timely investigation, she would have learned that her plan was not viable before she made such significant construction expenditures. Appellant’s choice to remain in the dark (or ignore what she had learned) in 2004, 2005 and 2006 is not just regrettable from her perspective, it represents a clear breach of her duty to investigate under the law of the District of Columbia.

II. ESTOPPEL DOES NOT APPLY TO THE FACTS OF THIS CASE

Appellant contends that given the course of conduct preceding the denial of the Fifth Building Permit, the District is estopped from enforcing any zoning regulations that would prohibit reconstruction of the Original House and completion of the proposed new SFD on the footprint originally proposed. At the outset, it should be noted that “the defenses of estoppel and laches are judicially disfavored in the zoning context because of the public interest in enforcement of the zoning laws. *Beins v. D.C. Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (DC 1990) citing *Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 925 (DC 1980); *Wieck v. D.C. Bd. of Zoning Adjustment*, 383 A.2d 7, 10 (DC 1978). See also *Sisson v. D.C. Bd. of Zoning Adjustment*, 805 A.2d 964, 971 (DC 2002). Moreover, as the D.C. Court of Appeals has stated, “it is not clear that estoppel will bar a case brought by a neighboring landowner; arguably that defense may be asserted only against the municipality.” See *Sisson*, 805 A.2d 964, 972, fn. 9 citing *Goto*, 423 A.2d at 925, fn. 15 and *Rafferty*, 583 A.2d at 176. Thus, whether estoppel is a valid defense against DCRA, and as described below it is not, estoppel cannot bar the claims of the intervening neighboring landowners arguing that the development may not go forward as Appellant seeks utilizing non-conforming 5 foot side yards.

In evaluating whether estoppel may be applied to DCRA, Appellant notes that the test for estoppel is whether Appellant 1) made expensive and permanent improvements; 2) acted in good faith; 3) acted in justifiable reliance upon; 4) affirmative acts of the District and/or DCRA; 5) without notice of any kind that the improvements violated the Zoning Regulations; and 6) the equities and fundamental fairness overwhelmingly favor the Appellant. Appellant’s Pre-Hearing Statement and Motion for Summary Judgment (BZA Exhibit 18) at 17 citing *Bannum, Inc., v.*

D.C. Bd. of Zoning Adjustment, 894 A. 2d 423, 431 (D.C. 2006). The Appellant bears the burden of establishing each of the outlined elements. As was the case in *Bannum*, the Appellant's estoppel claim fails "because at least one, and perhaps two or three, of these six elements is lacking." *Id.*

Up until the request for the Fourth Building Permit, Appellant's plans clearly indicated that she intended to preserve the Original House or a significant portion thereof. If the Original House was preserved, then Appellant could have built her proposed addition as a matter of right and DCRA had no basis to inhibit her from pursuing her proposed plan. To the extent that Appellant relied on any approvals up to the Fourth Building Permit, those approvals were predicated on her assertions (as described above, made in breach of her duty to investigate) that the Original House or a significant portion of it, would be preserved. Appellant cannot claim detrimental reliance on such approvals given her explicit representations in the process of seeking such permits. Appellant's representations in the Fourth Building Permit process, meanwhile, are discussed more fully below.

A. Appellant Did Not Make Expensive and Permanent Improvements Based on the Fourth Permit

Appellant's estoppel argument comes down to that DCRA is estopped from denying her Fifth Building Permit, because it granted her the Fourth Building Permit. Appellant alleges that based on the Fourth Building Permit, she tore down the remaining portion of the Original House in March of 2007, but does not claim to have otherwise made improvements to the Property. Appellant had made expensive improvements prior to the issuance of the Fourth Building Permit, but those improvements were not made in reliance on the Fourth Building Permit, but rather

based on permits issued by DCRA in reliance on Appellant's inaccurate assurances that the Original House or a significant portion of it could and would be preserved.

B. Appellant Did Not Act in Good Faith

As described above, in 2004, 2005 and 2006, Appellant had a duty to investigate to determine if her plan to preserve the Original House, or a significant portion of it, was viable. Despite all the warning signs, she chose not to investigate until after she had made significant construction expenditures in 2006. Moreover, Appellant took few if any steps to preserve the Original House to increase the possibility that it could be salvaged and used. Given such willful ignorance (assuming she in fact did not know her plan was not viable) and failure to take reasonable precautions and appropriate steps to preserve the Original House, the Board cannot find that Appellant acted in good faith.

Appellant attempts to explain the fact that she made no such investigations based on her assertion that she was unaware of the relevant zoning requirements and the significance of preserving a significant portion of the Original House. Appellant also claims that both she and Contractor Premo were unschooled in the requirements of D.C. zoning regulations. Such claims are not plausible. Appellant's initial plan coincidentally took full advantage of what could have been allowed under D.C. zoning regulations had the Original House been preserved – securing precisely the maximum benefit of the grandfather provision allowing non-conforming 5 foot side yards and falling 20 square feet (or 1%) shy of the maximum lot occupancy requirement. Clearly, somebody on Appellant's team was aware of the relevant rules.

Moreover, Appellant acknowledges that she was informed that there was a side yard issue as early as October 2005. Even if she were not aware of the requirements of the zoning

decision to retain it must have been driven by other reasons. The only plausible reason to preserve or to state an intention to preserve the front half of the Original House, at this point, was the zoning advantage gained by the grandfather provisions regarding non-conforming side yards.

Similarly, Appellant's approach to the Fourth Building Permit in 2007, suggests she was well aware of the zoning issues, or at a minimum, acted in a manner that minimized the likelihood of triggering a zoning review.

First, Appellant chose not to determine the viability of preserving the front half of the Original House until the back half had been replaced and the New Addition had been framed and under roof. Only then did she approach DCRA about demolishing the front. Proceeding in this way, allowed Appellant to claim that there was an "existing" structure prior to seeking permission to demolish the front half of the Original House. Had Appellant sought permission to demolish the front half of the Original House before there was another "existing" structure on the Property, the zoning issues raised by such a request would have been obvious and unavoidable.

Second, the Fourth Building Permit proposal included plans to reuse the original foundation at the front half of the Original House. Appellant's Presentation Exhibits (BZA Exhibit 18) at Tab 10, page 9 (RA-8). Appellant, however, was on clear notice that the footers for the front half of the Original House would need to be replaced. Those footers had been exposed since March 2005 and their deficiencies, which Contractor Premo eventually claimed were severe, were apparent at least since then. Moreover, Contractor Premo admitted that the footers for the back half of the Original House were unusable and the ones for the front were as old or older. The plan to preserve the existing foundation for the front half of the Original House – while recognizing the likelihood of the need for replacement, but placing the reference to it in a

demolition sequence that would be very unlikely to be subject to zoning scrutiny -- kept the project from being considered a “raze” at DCRA. As explained by the Zoning Administrator, the difference between a demolition and a raze is the difference between whether the application would be flagged for zoning review or not. August 1, 2008 Tr. at 455.

Third, the documents used and presentations made to DCRA for the Fourth Building Permit were unclear at best on the question of whether any portion of the Original House would remain after the proposed demolition. In early 2007, Contractor Premo claims to have had two meetings with DCRA: one with Dennis Ataboma and another with Robert Chen, both of the Structural Division of DCRA, in preparing the application for the Fourth Building Permit. August 1, 2008 Tr. at 348.² As representatives of the Structural Division at DCRA, Messrs. Chen and Ataboma did not have authority or expertise in zoning issues, but were the relevant officials to talk to regarding the need and/or propriety of demolishing an unsafe structure and the proper procedures to do so. August 1, 2008 Tr. at 450. The application for the Fourth Building Permit was submitted for approval by “Mr. Permit,” an agency used to expedite construction permit approvals. Under the circumstances, the two places the Appellant could have made clear to DCRA that no portion of the Original House would remain after the proposed demolition and the potential zoning implications of that fact were in the documents used for the application or in the meetings with Messrs. Chen and Ataboma.

The documents used for the Fourth Building Permit strongly suggested a portion of the Original House would remain. Contractor Premo did not rely primarily on the latest drawings

² In her various pleadings, Appellant claimed that she contacted DCRA about the problems with the front half of the Original House on November 2, 2006. *See e.g.*, Appellant’s Pre-Hearing Statement and Motion for Summary Judgment (BZA Exhibit 18) at 4. At the Hearing, she corrected that basic fact and indicated that the first time she or her team contacted DCRA was 76 days later on January 17, 2007. August 1, 2008 Tr. at 80-81.

used for the Third Building Permit in preparing the documents for the Fourth Building Permit, but rather modified drawings for the First Building Permit. August 1, 2008 Tr. at 315-316.

Contractor Premo claims that all of the drawings for all the building permits were in the package presented to DCRA as well as a picture of the structure as it existed at the time. On their face, however, the drawings primarily relied upon in seeking the Fourth Building Permit strongly suggested that after the proposed demolition a portion of the Original House would remain.

As shown on Appellant's Hearing Presentation Exhibits (BZA Exhibit 5) at Tab 10, p. 1 (RCS-1), the circled "area to be demolished" was a portion of what is shown on the drawing as the "Existing 2 Story Frame." The clear implication of this drawing is that the uncircled portion of the Original House would remain. The drawing on page 2 (RA-1) creates the same impression. The drawing on page 3 (RA-2) also creates the same impression.

Appellant claims that the drawings make clear that no portion of the Original House would remain because of the use of the word "existing" to describe the structure up to the front portion of the Original House. August 1, 2008 Tr. at 291. However, the drawings on the first three pages create a strong impression that the back half of the Original House existed in its original form at the time. Thus, referring to that portion of the structure as "existing," given the descriptions on pages 1, 2 and 3 and given that the "existing" reference had been on these pages when they were used for the First Building Permit when the back half of the Original House did exist in its original form, would not imply that that portion of the Original House was no longer there in its original form. To the contrary, it conveyed the impression that the back half of the Original House still existed at that time in its original form.

Contractor Premo was closely questioned on the issue of whether and how the documents submitted and the presentations to Messrs. Ataboma and Chen made clear that no portion of the Original House would remain after the proposed demolition. In the course of that questioning, he was vague at best and appeared to “dodge the question” of a Board member. August 1, 2008 Tr. at 290. When pressed, Contractor Premo acknowledged: “I don’t know whether I made them aware [of the nonconforming side yard issue].” July 15, 2008 Tr. at 285. He also acknowledged that he presented the DCRA officials with all the documents associated with the project, including documents associated with all the permits as well as the marked up documents for the Fourth Building Permit “and whether they looked at them and how they referred to them or what they did with them, I don’t remember how much we got into that.” August 1, 2008 Tr. at 316. He acknowledged that he “bundled them up and they were all there. And, so [he] left it to DCRA sort of go through and figure this all out.” *Id.* at 318. In terms of whether Mr. Atoboma was aware that the only remaining part of the Original House was the portion slated to be torn down, Contractor Premo could only offer “[a]s far as I know, yes.” *Id.* at 324. In any case, as noted above, Messrs. Ataboma and Chen did not have authority over zoning issues and Contractor Premo was well aware that they represented the structural not zoning division.

In the end, Contractor Premo relied primarily on the fact that a picture was included in the package given to DCRA and that picture (Appellant’s Hearing Presentation Exhibits (BZA Exhibit 51) at Tab 5) made clear that the only remaining portion of the Original House was slated for demolition. *See e.g.*, August 1, 2008 Tr. at 324. It was not established whether that picture included in the package provided to DCRA was the size of the Exhibit or 4 by 6, or how clear it was, etc. August 1, 2008 Tr. at 361-362.

In a July 2008 filing, Appellant referred to the “picture” as a: “Photograph showing rear addition, framed closed and under roof and original 1933 structure.” Close review of the enlarged color version of the photograph shows the New Addition under roof, the front portion of the Original House in place and the replacement to the back portion of the Original House not under roof. Given the description of the photograph in July 2008, one could have concluded that the replacement of the back half of the Original House was referenced as part of the “original 1933 structure.” Such an interpretation would have been that much more natural if the photograph was smaller and/or provided in black and white format. Even in July 2008, Appellant’s description of the key piece of evidence relied on to show notice to DCRA that no portion of the Original House would remain, was confusing, at best.

At bottom, the documents used for the application for the Fourth Building Permit suggest that a portion of the Original House would remain after the demolition. It is not at all clear from Contractor Premo’s testimony that he made clear to any DCRA officials, but certainly not to DCRA officials with zoning authority, that no portion of the Original House would remain after the demolition. The fact that some version of the “picture” was included in the package provided to DCRA can not suffice to counter the confusion created by the drawings themselves.

Indeed, the kind of confusion created by the documents persisted well into 2008. As late as April 2008, in filings to this Board, Appellant and her counsel claimed that a portion of the Original House remained. In her April 2008 sworn affidavit, Appellant claimed that “[a] portion of the original and existing single family dwelling was not demolished and remains in place” Appellant’s Pre-Hearing Statement and Motion for Summary Judgment (BZA Exhibit 18) at Exhibit J, Affidavit of Stephanie Wallace at para. 23 (emphasis in the original). Similarly, in her

April 2008 Pre-Hearing Statement and Motion for Summary Judgment Appellant stated:

“[s]ignificantly, a portion of the existing original single family dwelling was not demolished” (emphasis in the original).³ *Id.* at 2. These statements relating to a key issue in the case, in April 2008, in sworn statements and formal pleadings, and made with emphasis through the use of underscoring, suggest Appellant was either confused or misleading on the subject and could equally have been so at the time of the application for the Fourth Building Permit.

Appellant makes much of the claim that DCRA made a mistake in failing to subject the Fourth Building Permit to zoning review. *See e.g.*, August 21, 2008 Letter from Counsel for Appellant to Chairperson Ruthanne G. Miller. However, as demonstrated above and as the Zoning Administrator testified, “based on the information given to [the DCRA permit review coordinator] and the plans and the application” he could understand why the “decision was made not to refer to [zoning].” August 1, 2008 Tr. at 504. At a minimum the evidence is that Appellant was unclear in the application process for the Fourth Building Permit on the question of whether any portion of the Original House and unclear on that subject as late as April 2008.

Under the circumstances, there are three independent bases for finding the Appellant did not act in good faith: (1) Appellant breached her duty to investigate the viability of her proposal in 2004, 2005 and 2006 and failed to take steps to preserve the Original House; (2) Appellant either was aware of the relevant zoning regulations by mid-2006 or willfully failed to educate herself as to those requirements despite notice from DCRA before seeking the Fourth Building

³ Appellant and her counsel acknowledge that these statements were made in error and “poorly worded.” April 29, 2008 Tr. at 283. The statements, however, go to a central issue in this case. If a portion of the Original House did in fact remain in place, the dispute would be quite different. Moreover, there is no ambiguity in the statement made for example in the sworn statement of the Appellant on April 18, 2008 – “a portion of the original and existing single family dwelling was not demolished and remains in place.” The use of the present tense “remains” clearly suggested it remained in place in April 2008 after the demolition.

Permit; and (3) Appellant was at best unclear in her presentations relating to the Fourth Building Permit on the question of whether any portion of the Original House would remain and whether purposely or coincidentally pursued the process in such a way as to minimize the likelihood of triggering a zoning review. Each of these facts independently would make it impossible to find good faith in this case. Together they definitively disqualify making such a finding.

C. Appellant Did Not Rely on DCRA's Authorization to Rebuild the Front half of the Original House in Razing It

Appellant claims that “but for” the Fourth Building Permit, she would not have demolished the remaining portion of the Original House. Appellant’s Pre-Hearing Statement and Motion for Summary Judgment (BZA Exhibit 18) at Exhibit J, Affidavit of Stephanie Wallace at para. 24. In other places, she asserts that the remaining portion of the Original House was beyond repair and had to be demolished. The record evidence indicates that Appellant had no option other than to raze the remaining portion of the Original House in 2007.

On February 14, 2007, DCRA issued the Fourth Building Permit which provided:

“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.”

Appellant’s Hearing Presentation Exhibits (BZA Exhibit 51) at Tab 7. The Fourth Building Permit has two instructions (1) demolish an unsafe structure and (2) rebuild that structure to code specifications. The two instructions do not necessarily depend on each other. All of the evidence suggests that the first – to demolish the front half of the Original House – was required by the circumstances as suggested for the first time by the Appellant to DCRA in January 2007.

The structural engineers said that the front half of the Original House was dangerous and unsound and had to come down. DCRA said the same thing in the Fourth Building Permit. Appellant said the same thing in her filings. Nevertheless, Appellant contends that if she knew then what she knows now, she would not have brought it down, but might have let it fall or made it into a shed. The record evidence shows that the structural engineers, DCRA and her own pleadings were correct and the structure could not be salvaged as part of the proposed project and had to come down. That fact is made abundantly clear when the evidence regarding the various aspects of the front half of the Original House is reviewed systematically.

The foundation: Contractor Premo explained that the foundation for the front half of the Original House “was just bricks laying on top of bricks, hardly any mortar and the bricks are just sat on top of dirt. That doesn’t meet code.” July 15, 2008 Tr. at 262. Indeed, Contractor Premo stated that “[w]hen you have a foundation that is so close to the ground, just the moisture from the ground being so close to it, it was less than a foot away. And code calls for a minimum of 18 inches. There’s no vapor barrier. And it was trapped. So all the moisture emanating out of the ground just would go up and get into the wood.” August 1, 2008 Tr. at 269.

The wood on the bottom: In explaining the proposed process for lifting the front half of the Original House, Contractor Premo noted that “since the bottom was rotted out, the proposal was to lift it from the second floor.” August 1, 2008 Tr. at 247. He also noted that in March 2005 termite and water damage to the front half of the Original House was visible and that “some portions [of the front half of the Original House] you could visibly see were falling apart” and “the structural members [were] just totally rotting away.” August 1, 2008 Tr. at 239-241.

The wood generally: Appellant consistently claims that all she wanted to do was replace bad wood with good wood. July 15, 2008 Tr. at 287. Indeed, Contractor Premo stated that they “wanted to use the whole building . . . [b]ut at that point [by 2007], . . . the engineers all the people I talked to anyway said there just wasn’t enough wood left to be able to do it.” *Id.* at 273.

The lifting option: As the structural engineer’s report indicates, the structure could not be lifted. Indeed, Appellant claims four structural engineers in 2006 came “to the site. And they all said this house can’t be lifted. It’s going to fall apart.” *Id.* at 233.

Thus the situation in early 2007 was that there was a dangerous structure at risk of imminent collapse. The foundation was could not be used as a portion of modern structure subject to inspection since it did not adhere to code and was unusable. The structural members closest to the foundation were totally rotted away and some portions of the structure were visibly falling apart. They too could not be included in structure subject to inspection and approval. The wood in the rest of the structure was compromised by “catastrophic” termite damage and also could not be included in a building subject to inspection and approval. In any case, even if Appellant wanted to preserve the frame, certainly the foundation and structural members had to be replaced. To do that and preserve the other portions of the structure above them, the structure would have to be lifted to allow work beneath. But, lifting the structure was not possible because in the process of doing that it would fall apart.

Appellant can claim that she would not have demolished the front half of the Original House if she had known that she would lose her zoning advantage, but all of the evidence in the record, including many of her own claims and those of her contractor definitively show that she had no choice in 2007 but to tear down the remaining portion of the Original House.

Appellant's suggestion that the structure might have been used as a shed would not have saved her project since the New Addition would no longer have been part of an existing SFD with the benefit of the grandfather provision of 11 DCMR § 405.8 and she would have needed a new permit to complete the project without connection to any portion of the Original House. Such a permit application would have been rejected for the same reasons the Fifth Building Permit application was rejected.

Similarly, simply attaching the front half of the Original House as it stood would not have worked since doing so would also have required a new permit given the Third Building Permit posture requiring lifting the structure and inserting extenders on the foundation. But, by June 2006, DCRA had already concluded that the front half of the Original House was unsafe. Opposition Presentation Exhibits (BZA Exhibit 54) at Tab 12. In order to pass inspection for a new SFD, the front would have needed to sit on an adequate foundation and not included structural members that were rotting away and the wood used for the frame would have needed to pass inspection.

Obviously, if Appellant's other option – letting it fall down – had occurred, she could not have saved her project as she had proposed to pursue it, including enjoying the benefit of the grandfather provision of 11 DCMR § 405.8.

At bottom, Appellant's assertion that she would not have torn down the front half of the Original House "but for" the authorization in the Fourth Building Permit is just that, merely an assertion. Appellant bears the burden of showing the elements of estoppel, and here she cannot meet that burden by showing that she relied on the Fourth Building Permit to tear down the remaining portion of the Original House. The evidence (including her own claims in formal

pleadings to this Board) shows that she had no choice but to tear it down and, as described above, only a willful decision not to know could have kept her from knowing that in early 2006, before she made significant construction expenditures.

D. Appellant Had Notice That Her Proposed Improvements Violated the Zoning Regulations

Appellant claims to have been unaware in March 2007 that given the fact that no portion of the Original House remained, her right to complete her new SFD with non-conforming 5 foot side yards was extinguished. As described above, Appellant concedes that as of October 2005 she was made aware by DCRA that there was a “side yard issue” and Appellant’s behavior throughout strongly suggests she was aware of the relevant rules and requirements. In any case, as described above, she had an obligation to investigate those requirements, particularly after receiving notice of the “side yard issue” from DCRA in October 2005.

E. The Equities and Fundamental Fairness Do Not Favor Much Less Overwhelmingly Favor the Appellant

Appellant makes two appeals to equities and fundamental fairness. She claims: (1) DCRA made a mistake in the Fourth Building Permit process and she had merely followed DCRA guidance in the process from the outset and she should not be punished for DCRA’s alleged mistake and (2) she claims that if she is not allowed to complete her project as planned she will suffer a loss. Neither of the Appellant’s claims, however, properly capture the questions surrounding equities and fundamental fairness.

Whether or not DCRA should have subjected the Fourth Building Permit to a zoning review, it can hardly be claimed that Appellant bears no responsibility for the predicament she finds herself in. As described above, Appellant had had an ongoing obligation to investigate and

educate herself as to the viability and requirements surrounding her project and either chose to remain in the dark or ignored what she learned. Appellant's Fourth Building Permit presentation was at best unclear on the subject of whether or not a portion of the Original House would remain. Furthermore, as shown above, whether the Fourth Building Permit had authorized rebuilding it or not, it is clear that Appellant had no choice but to tear down the front half of the Original House in 2007 (and could have and should have known that by early 2006, at the latest, before she had expended any significant construction funds).

Under the circumstances, giving Appellant a green light to go forward with her proposed development because DCRA allegedly made a mistake would deliver a windfall to the Appellant – allowing her to develop the Property in excess of the zoning regulations and in a manner that would not have been possible if she had acted responsibly and consistent with her legal obligations and investigated (or acted based on what she learned of such investigations) the viability of her project. Even if DCRA made a mistake in the Fourth Building Permit process, equity and fundamental fairness do not require that such a mistake result in Appellant securing such a windfall, particularly given the questions surrounding the degree to which Appellant's presentation may have induced any DCRA mistake.

As to her claim that if she cannot complete her project as planned she will suffer a loss and that she has already suffered harm from the delay, any such "loss" or "harm" must be viewed in the context of her behavior, her lawful development rights and the relative adverse effects on the parties from an adverse outcome from their perspective.

Appellant has not, as she claims, been a model developer. To the contrary, she has damaged the neighboring properties – doing \$50,000 of uncompensated damage to Intervenor

Lemoine's property and damages to each of the three adjacent lots to the north – trespassed on the neighboring properties and created unclean and dangerous conditions on the construction site over a nearly four-year period. *See e.g.*, Statement of Intervenor John Lemoine (BZA Exhibit 24) at Tab L-3 (attaching letters from nine neighbors outlining the harms they have suffered from the construction). Intervenors Lemoine, Grumbine and Simmons have also each fully outlined the harms they have suffered in their various submissions.

In the event that Appellant were to prevail in this appeal, she would be granted the right to build a new SFD benefiting from the grandfather provisions of 11 DCMR § 405.8 without preserving any portion of the Original House. Given that the new SFD would have a 25 foot high wall just 5 feet from Intervenor Lemoine's property line and extending 14 feet beyond the back of his house, the new structure would significantly detract from Mr. Lemoine's enjoyment of his property and the value of that property. The new SFD would also be 5 feet from the property line for the three adjoining properties to the north.

Moreover, the ANC and the neighbors would be significantly prejudiced because Appellant would have won the right to build a non-conforming structure without being subject to a variance process through which views of the community and competing interests could be accommodated. Finally, and importantly, the public interest would be harmed since the letter and spirit of the zoning regulations would have been circumvented. Indeed, the harm to the public interest from circumventing the zoning regulations often, standing alone, is sufficient to outweigh competing claims from applicants seeking recourse to an estoppel defense.

On the other hand, if the Appellant does not prevail, she will suffer only a lost opportunity to build a structure in excess of the zoning regulations. That harm, however, need

not be that her Property loses all value as she suggests, but rather that the Property would enjoy its inherent value under the law – to be developed responsibly in accordance with the relevant zoning regulations. If Appellant had undertaken any sort of investigation, as was her duty, she would have learned, before expending significant construction funding, that preserving the Original House was not viable and that to develop the Property, she would either have to build a 14 foot wide house with 8 foot side yards or seek a variance to build wider. That was the value she had prior to the issuance of the Fourth Building Permit. It cannot be that the issuance of the Fourth Building Permit gave her a windfall.

The “harm” Appellant would suffer from not getting the protection of estoppel in this case is the difference between the value of the Property if it could be developed as she hopes and the value of the Property if it has to be developed consistent with the zoning regulations or subject to a variance process. There may be a difference in those two values, but it is not anywhere near the full value of the Property. Moreover, as described above, that difference more properly can and should be seen as a potential windfall to the Appellant, rewarding her for undertaking no investigation to determine if her plan was viable.

Appellant, however, also contends that part of the hardship on her arises from the expenditures she has already made. Appellant, however, made those expenditures based on permits issued in response to her clear indication that she would preserve a significant portion of the Original House. It is unfortunate that Appellant made those expenditures before investigating whether her plan was viable (or while ignoring the results of any such investigation) and at a time when she was representing to DCRA that it was viable, but

Appellant's reckless creation of "facts on the ground" should not weigh in her favor in the consideration of equities.

In any case, should the Board deny this appeal, Appellant could pursue a variance process through which she could seek to preserve as much of her current investment as possible while also addressing the interests of the neighbors and community. Appellant has always had the option of making a specific proposal and pursuing such a variance process. The Board certainly would entertain such a proposal (and could consider the history relating to the Property in analyzing such a proposal, *see Monaco v. D.C. Bd of Zoning Adjustment*, 407 A.2d 1091, 1103 (D.C. 1979). The Intervenor, the ANC and DCRA have also consistently expressed a willingness to entertain such a proposal. If recourse to such a variance process is what the law requires to preserve some portion of her current investment, Appellant cannot claim hardship for the delay in getting there arising from her decision to pursue relief to which she is not entitled through this appeal.

Under the circumstance, it can not be said that given her conduct to date and request to secure a more lucrative development opportunity than would ordinarily be lawfully available to her, that the equities or fundamental fairness favor -- much less "overwhelmingly favor" -- the Appellant when compared to the harm to Intervenor Lemoine's ability to enjoy his property and the reduction in the value of his property if the project is completed as proposed, the harm to others in the neighborhood from the construction of an SFD that is out of sync with the character of the neighborhood, the harm to the neighbors and ANC from being denied the opportunity to have input into the construction of a non-conforming structure through a variance process and the harm to the public interest from the circumvention of the requirements of the zoning rules.

III. LACHES DOES NOT APPLY TO THE FACTS OF THIS CASE

Laches will not provide a valid defense unless two elements are met: (1) the defendant (in this case the Appellant) has been prejudiced by the delay and (2) that delay is unreasonable.

American Univ. Park Citizen Ass'n v. Burka, 400 A.2d 737, 740 (D.C. 1979). Laches “is rarely applied” [in zoning matters] “except in the clearest and most compelling circumstances. *Wieck v. D.C. Bd. of Zoning Adjustment*, 383 A.2d 7, 10 (D.C. 1978).

Appellant attempts to start the laches clock at the beginning of the process in December 2004. However, as described above, until January 2007, Appellant unequivocally represented to DCRA that she intended to preserve a significant portion of the Original House. It was not until January 2007 that Appellant made her ambiguous presentation to DCRA and secured the Fourth Building Permit in February 2007. In March 2007, DCRA issued a Stop Work Order. In April 2007, Appellant applied for the Fifth Building Permit. In September 2007, DCRA issued its final decision rejecting the application for the Fifth Building Permit. Thus, the clock for determining whether laches applies cannot commence until April 2007 – when Appellant appealed the denial of the Fifth Building Permit.

There is simply no evidence for the proposition that Appellant was prejudiced by the five-month deliberations regarding the Fifth Building Permit application. Indeed, Appellant has come forward with no specific prejudice arising in the five-month period. Moreover, the five months between the application for the Fifth Building Permit and its denial, particularly given the changes in the Zoning Administrator’s office at the time and the fact that DCRA representatives met with representatives of the Appellant in that period to discuss the issues, does

not constitute the kind of “unreasonable delay” that could justify application of the doctrine of laches.

IV. THE DESTRUCTION AT ISSUE HERE DOES NOT QUALIFY AS A “CASUALTY OR ACT OF GOD” UNDER THE DCMR

There has been substantial briefing on the issues of “casualty” and “act of God.” As those briefs make clear, those doctrines require “suddenness” and “unavoidability” not present here. *See generally*, Motion to Dismiss by Applicants for Party Status and Related Relief (BZA Exhibit 25) at 8; Pre-Hearing Brief By Applicants for Party Status In Support of Decision of the Zoning Administrator to Deny Building Permit (BZA Exhibit 26) at 3-7; District of Columbia’s Response in Opposition to Appellant’s Supplemental Statement on Casualty (BZA Exhibit 42) at 5-12; Intervenor’s Statement on Casualty (BZA Exhibit 43) at 1-3; Response to BZA’s Request for Supplemental Briefing on (1) the Meaning of the Term “Casualty,” (2) Appellant’s Attempt to Amend Notice of Appeal, and (3) Related Matters (BZA Exhibit 44) at 1-4.

The absence of “suddenness” and “unavoidability” in this case require that the destruction at issue here not be deemed a “casualty” or “act of God” under the relevant regulation. Moreover, two arguments raised at the August 1, 2008 Hearing (August 1, 2008 Tr. at 540-544), make clear that even if the destruction did qualify as a “casualty” or “act of God,” the Appellant would not be entitled to reconstruct the Original House under the relevant regulation. That regulation provides:

“If 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 destruction* and continued diligently to completion”

Emphasis supplied.

Appellant claims that the cost of reconstructing the Original House would not exceed \$135,068.00. Statement of Appeal (BZA Exhibit 2) at 12 and Exhibit 10. The regulation provides that the cost must be less than 75% of the cost of reconstructing the entire structure, and makes no reference to the “assessed value.” Assuming Appellant’s \$135,068.00 is correct or using any other figure for the cost of reconstructing the entire Original House, if that cost was used in the numerator of the calculation – the cost of reconstructing the portion destroyed -- it must also be used for the denominator – the cost of reconstructing the entire structure – and would yield a proportion of 100% and not qualify under the regulation. The fact that the full reconstruction of a structure would not qualify under the regulation should not be surprising. The whole purpose of the 75% rule is to allow reconstruction when there is significant, but not total destruction. Here, as Appellant acknowledges, the entire Original House was destroyed.

Further, even if it were appropriate to use assessed value as opposed to cost of reconstructing the Original House in the denominator, the relevant assessed value is not the 2008 assessed value. Appellant applied for casualty status in 2007 and challenges the Zoning Administrator’s decision in 2007. Even if assessed value should be used in the denominator, the figure used should be the one that applied in 2007 -- \$163,190. Statement of Appeal (BZA Exhibit 2) at Exhibit 10. If that is used as the denominator and the Appellant’s proffered \$135,068 cost of reconstruction is used in the numerator, the resulting proportion is 82.77%, well in excess of the 75% threshold.

The regulations allow for a process where there is a dispute about whether the 75% test has been met. 11 DCMR § 2001.7. That process is designed, however, to secure competing

estimates of the cost of reconstruction. As described above, Appellant does not qualify under the 75% rule even accepting her estimated cost of reconstruction.

Moreover, Appellant does not qualify under the 24 month rule which requires that reconstruction commence within 24 months of the date of destruction. Appellant claims that the damage to the Original House was complete long before she purchased the property on April 9, 2004. The Third Building Permit authorizing reconstruction of the back portion of the Original House was issued on April 21, 2006. Appellant could not lawfully have begun reconstruction of any portion of the Original House until after April 21, 2006 or more than 24 months after the earliest possible estimate of the date of destruction according to Appellant's casualty arguments. Appellant tries to avoid this problem by pointing to the date of discovery. However, the regulation does not refer to "discovery," but rather to "the date of destruction," which Appellant claims was complete more than 24 months prior to the commencement of reconstruction efforts.

It is also worth noting that the reference to the "date of destruction" suggests destruction based on an event as opposed to a slowly progressing process and supports the DCRA, the ANC and the Intervenor's arguments relating to "suddenness" cited generally above.

CONCLUSION

For the foregoing reasons, the Board concludes that Zoning Administrator correctly found in 2007 that authorization to build a new SFD with non-conforming 5 foot side yards was extinguished when the last portion of the Original House was demolished and that the defenses of estoppel and laches do not apply in the facts of this case. The Board also finds that the Zoning Administrator correctly found that the destruction at issue in this case does not qualify for authorization to rebuild under 11 DCMR § 2001.6. The Board further finds, consistent with the

September 2007 finding of the Zoning Administrator that Appellant may continue to pursue development of the Property at issue either by building in conformity with zoning requirements or through recourse to a variance process.

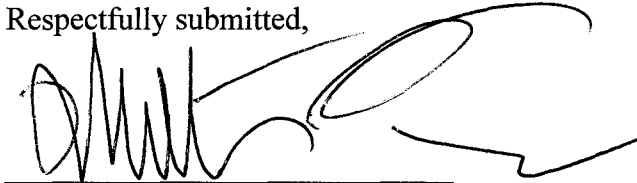
Accordingly, it is ORDERED that this appeal is DENIED.

VOTE: ____ - ____ - ____ to deny this appeal;
_____, to sustain the appeal.

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

Dated: September 9, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Matthew Frumin', written over a horizontal line.

Matthew Frumin
ANC 3E Commissioner

Certificate of Service

I hereby certify that copies of the foregoing findings of Fact and Conclusions of Law were served via first class postage this 9th day of September, 2008, to the following:

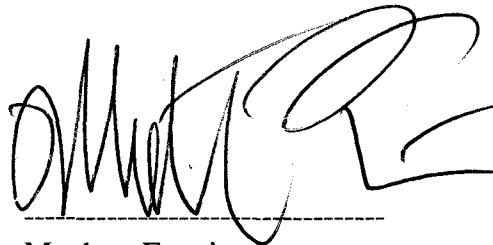
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A handwritten signature in black ink, appearing to read 'Matthew Frumin', written over a horizontal dashed line.

Matthew Frumin
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