

DISTRICT OF COLUMBIA GOVERNMENT
Board of Zoning Adjustment

Appeal of:)
Stephanie Wallace)
Re: 5013 Belt Road, NW)
_____)
Appeal No. 17747

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**POST-HEARING PROPOSED FINDINGS OF FACT,
PROPOSED CONCLUSIONS OF LAW, AND
POST-HEARING BRIEF
BY INTERVENORS MARY GRUMBINE AND JACK SIMMONS**

Intervenors Mary Grumbine and Jack Simmons (Intervenors) submit this Post-Hearing Proposed Findings of Fact, Proposed Conclusions of Law, and Post-Hearing Brief in support of the decision of the District of Columbia Zoning Administrator (ZA) to deny a fifth building permit to Appellant Stephanie Wallace (Wallace or Developer) for 5013 Belt Road, NW (the property). The ZA correctly determined that the Developer had no right to non-conforming side yard setbacks because the preexisting structure no longer existed and further determined that the destruction of the preexisting pre-1933 house was not the result of an Act of God or a casualty, but rather to lack of maintenance. The evidence adduced at the public hearing shows that the ZA's decision is correct. The evidence further shows that the District of Columbia is not estopped or barred by laches from denying the building permit to Developer.

Intervenors have previously filed extensive citations to the legal positions Intervenors are taking and they are not repeated here.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17747
EXHIBIT NO. 61

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Board of Zoning Adjustment
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PROPOSED FINDINGS OF FACT

Background - The Property

1. The property at issue in this appeal is 5013 Belt Road, NW (the property).
2. The property is owned by Developer Stephanie Wallace who acquired title in April 2004.
3. At that time, the property consisted of a wood-frame single family dwelling constructed no later than 1933.
4. The property had side yard setbacks of five feet.
5. The original structure and foundation was taken down, piece by piece.
6. By March 17, 2007, no part of the original structure or foundation remained on the property
7. Developer has constructed an unfinished structure on the property...

Background - Stephanie Wallace's Experience

8. Stephanie Wallace holds herself out to the public in her web site as an experienced real estate developer with more than 20 years of experience and mentions specific projects that she has worked on. Opposition's Presentation Exhibits, presented to the Board of Zoning Adjustment at the hearing on July 15, 2008 (Opp. Hearing Exh.) No. 14. See also Opposition to Developer's Motion for Summary by Applicants for Party Status dated April 24, 2008 (Int. Opp. to S.J.) at Exh. D.
9. Her web site states that she has experience with zoning in both New York and Washington, DC. Int. Opp. to S.J. at Exh. Dm page entitled "About Stephanie Wallace").
10. Developer's web site was generated before this litigation and was not generated to further her interests in this litigation.
11. Developer was introduced to the neighbors by Greg Gaddy, her real estate agent,

at a meeting in April 2005 as an “experienced” developer. Mr. Gaddy stated that neighbors of Developer’s previous projects had been very pleased with her work. Developer confirmed these statements.

12. The statements of Mr. Gaddy at that meeting and the Developer’s confirmation of them through her silence were made before this litigation and were not made to further her interests in this litigation.

13. Developer, by her own admission, had worked with the Department of Consumer and Regulatory Affairs (DCRA) on at least one prior project and had “friends” at DCRA who sympathized with her about about neighbors calling to complain about the Belt Road project.

14. Developer’s statements at the hearing that she had minimal experience were made for the purposes of this litigation and are contradicted by her prior public assertions and by those made on her behalf.

15. Developer is an experienced real estate developer.

Credibility of the Witnesses

16. In her notice of Appeal, Developer asserted that a portion of the original pre-1933 house remained standing on the property at the time the appeal was taken and as of the date of the first BZA hearing in this matter, April 29, 2008.

17. In the affidavit that accompanied her motion for summary judgment, Developer asserted, at paragraph 23, that a portion of the original pre-1933 house remained standing on the property as of the date of the affidavit, “A portion of the original and existing single-family dwelling was not demolished and remains in place.” Affidavit attached to Motion for Summary Judgment at Paragraph 23 (emphasis in original). See also Opp. Hearing Exh No. 20.

18. Developer read the affidavit before executing it.

19. Developer executed the affidavit under oath before a notary public.

20. At the April 29 hearing, developer conceded that NO portion of the original house remained standing; that all that was on the property was wholly new construction.

21. While Developer seeks to claim that this was a “mistake,” Developer did not tell the truth when she executed paragraph 23 of her affidavit under oath.

22. It is further clear that the truth would not have come out from Developer had she not been challenged on that statement by other parties to the case.

23. In her presentations to the BZA, Developer claimed that she was without funds, yet the record contradicts this because it shows that she owns and maintains horses and that she is taking a trip to Europe in September of this year. Developer, however, has acknowledged that she completed and sold another project while she was working on Belt Road and that she is involved working on another project. Affidavit of Mary Grumbine at paragraph 38. Developer further acknowledged a large amount of equity in hr own home.

24. At many critical junctures during her cross-examination, Developer stated “I don’t know” or “I don’t recall” when faced with factual matters that a reasonable and prudent developer would be well aware of.

25. Because of the many contradictions between what Developer says under oath and because of the contradictions between what she has previously stated in public and now claims before the Board, some of which are set forth above, Developer is not a credible witness.

26. At the hearing on cross-examination, Mr. Premo was evasive and sought to avoid giving direct answers to simple questions.

27. Mr. Premo is not a credible, reliable witness.

28. The evidence presented at the hearing by John Lemoine was not cross-examined and is undisputed.

29. The evidence presented at the hearing by Jack Simmons was not cross-examined

and is undisputed.

30. The evidence presented in the affidavit of Mary Grumbine was not challenged by Developer or any other party and is undisputed.

31. John Lemoine, Mary Grumbine, and Jack Simmons are credible, reliable witnesses.

32. By April 2005, Intervenors had advised Developer and her contractor that they were not to come on to Intervenors' land for any purpose and could not use it for construction activities, to which they agreed. See Opp. Hearing Exh. No. 2.

33. Nevertheless, as documented in several photographs and in testimony, construction workers repeatedly trespassed on Intervenors' property.

34. Yet when, during the hearing, a picture was shown that had been taken by Mr. Lemoine, Developer angrily asked whether he had trespassed on her property.

April 2004 - The Purchase of the House

35. The former owner put the property on the market in early 2004.

36. The real estate disclosure document form prepared and signed by the seller stated that the property was being sold "as is." Opp. Hearing Exh. No. 15. That form stated "All clauses in the contract pertaining to termite and property condition are hereby deleted from the contract." Id. at paragraph 33, page 5 of 5. The "termite inspection" clause of the real estate disclosure document was crossed out. Id. at paragraph 13, page 3 of 5.

37. Developer purchased the property "as is."

38. Although Developer claims, in her pleadings, that she could not have a termite inspection prior to the purchase, Developer admitted in cross examination that did not seek permission from the seller to conduct a termite inspection. Developer did not conduct such an inspection.

39. Although Developer claims, in her pleadings, that she could not have a structural

inspection prior to the purchase, Developer admitted in cross examination that she did not seek permission from the seller to conduct a structural inspection. She did not conduct such an inspection.

40. Although Developer claims, in her pleadings, that she could not have a groundwater inspection prior to the purchase, Developer admitted in cross examination that she did not seek permission from the seller to conduct a groundwater or hydrologic inspection. She did not conduct such an inspection.

41. Prior to the purchase, Developer had entered the house only twice. One of those time, she entered the house with Mr. Premo.

42. On that occasion, neither she nor Mr. Premo went into the attic. Tr. Aug. 1 at 528.

43. Prior to the purchase, Mr. Alan Premo, Developer's contractor, did no more than a "walk through" of the property lasting only a few minutes.

44. After the purchase was concluded, Developer did not conduct a termite inspection prior to submitting her first building permit application.

45. After the purchase was concluded, Developer did not conduct a structural inspection prior to submitting her first building permit application.

46. After the purchase was concluded, Developer did not conduct a groundwater or hydrologic inspection prior to submitting her first building permit application.

47. Developer failed to exercise due diligence to determine whether there was termite damage prior to submitting her first building permit application.

48. Developer failed to exercise due diligence to determine whether the property was structurally sound prior to submitting her first building permit application.

49. Developer failed to exercise due diligence to determine whether there were any

groundwater problems at the property prior to submitting here first building permit application.

50. Developer's actions prior to the application for the first building permit eloquently contradict her stated intention of preserving and renovating the property.

51. Developer's intention was, from the outset, to retain no part of the original structure. Rather, she intended to construct - and to sell - a whole new structure.

52. Had she intended to retain any part of the property, she would have conducted those inspections and she would have subsequently, taken all prudent steps to protect and preserve the original structure throughout the construction project.

53. Developer's intention was, from the outset, to find a way to retain the preexisting five foot side yard setbacks rather than to have to conform to the eight foot side yard setbacks that would otherwise be required.

January-February 2005 - the Initial Construction Activities

54. On July 20, 2004, Developer filed a first building permit application, including a plat map, in which she asserted that she was applying for a permit for an addition. Opp. Hearing Exh. No. 1.

55. The first building permit was issued five months later, December 9, 2004. Dev. Hearing Exh. No. 1..

56. In January 2005, Developer commenced work, but not by preparing for or building the addition. Instead, Developer commenced by taking off the roof (shingles and tarpaper) from the original house, doing so on two successive Sundays.

57. Roofing material was thrown off the roof and some of it landed on the property of Intervenor. Opp. Hearing Exh. No. 19. Some of that material remains to this day.

58. Although Mr. Premo denied that the roof was removed, Developer conceded that removal of the original roof was part of "phase one" of the demolition under the first building

permit. Tr. Aug. 1 at 453.

59. Developer did not include the application for the first building permit in the record, although she claims that the application for the fourth permit is identical other than the handwritten notes.

March - April 2005

60. Developer demolished the back half of the original house in March 2005 and, at the same time, conducted the interior demolition of the remaining front portion of the original house.

61. Developer was issued a stop work order on March 15, 2005, for the demolition of the back half of the house for doing work beyond the scope of the first building permit. Opp. Hearing Exh. No. 4.

62. At a meeting at the house of neighbors on April 5, 2005, Developer was specifically advised of the groundwater problems at her construction site and that a spring ran through the property.

63. At a meeting with Mr. Premo in March 2005, Intervenor Lemoine stressed to him the history of severe ground water problems. Tr. Aug. 1 at 566-67.

64. After demolition of the back half of the house, Developer did not conduct a termite inspection prior to submitting her second building permit application.

65. After demolition of the back half of the house, Developer did not conduct a structural inspection prior to submitting her second building permit application.

66. After demolition of the back half of the house, Developer did not conduct a groundwater or hydrologic inspection prior to submitting her second building permit application.

67. Developer failed to exercise due diligence to determine whether there was termite damage prior to submitting her second building permit application.

68. Developer failed to exercise due diligence to determine whether the property was structurally sound prior to submitting her second building permit application.

69. Developer failed to exercise due diligence to determine whether there were any groundwater problems at the property prior to submitting here second building permit application.

70. Developer's actions prior to the application for the second building permit contradict her stated intention of preserving and renovating the property.

71. Developer failed to advise DCRA of the very damaged condition of the front half of the original house in her second building permit application or at any time thereafter.

72. By no later than the time of the demolition of the back half of the house in March 2005, Developer and Mr. Premo were on actual or inputed notice of the condition of the remaining front half of the house.

73. At that time, they were on notice of the need to seriously investigate the structure of the front half of the house, including inspections for groundwater damage and for termite damage.

74. Neither at that time nor at any later time did the inform DCRA about the nature and/or the extent of the damage to the front half of the house.

75. Developer went out of her way to be sure that the nature and extent of the damage to the front of the house did not come to the attention of DCRA.

76. After the back half of the original house was demolished, Mr. Premo conceded that the remaining portion of the original structure was never fully enclosed.

77. He admitted that the reason that plywood was placed over the open east end of the remaining structure was that he had been instructed to do so by the District to keep people out of the structure. He did not install plywood or anything else to protect the remaining original

structure from deterioration from the elements (wind, rain, etc.). “The plywood was applied because DCRA wanted us to cover it up s people couldn’t get in. It wasn’t put there to prevent water from getting in.” Tr. Aug. 1 at 550.

77. At the Aug. 1 hearing, however, Mr. Premo changed his story and said that protection was not necessary. This statement is incredible, just as it would not be ‘necessary’ to close car windows to protect the interior of the car from rain.

October - December 2005

78. Developer applied for a second building permit and it was issued on October 25, 2005.

79. As admitted by the actions and inactions of Developer and Mr. Premo, they violated the second building permit’s requirement to preserve and protect the remaining part of the original house and further violated the second building permit by failing to work entirely on her own property. E.g., Opp. Hearing Exh. No. 13 and other photographs of record.

80. Developer acknowledged that, at the time she applied for her second building permit, that she was made that there was a side yard issue. Tr. July 15 at 267. When asked by Board Member Dettman when she had become aware that her project was “dependent upon compliance with 405.8, she replied: “I found out in the process of building permit number two that we had a side yard issue.” Id.

81. Even if Developer is correct that she did not know what the side yard problem was, she admits that she made no effort to determine what the issue was or its impact on her project.

82. A prudent person would have used due diligence to determine what the issue was.

83. Developer had a duty to determine what that problem might be and how it would impact her project. She did not fulfill that duty and may not rely on the results of her failure to

do so.

84. Before Developer excavated for the basement and foundation of the addition, she failed to give the neighbors any notice of the upcoming excavation. Tr. Aug. 1 at 570.

85. When excavation actually occurred, the sides of the excavation caved in. Id. The cave in extended into and damaged the Grumbine/Simmons property. Id. The damage has yet to be fully repaired.

86. The property of John Lemoine and Martha Maiden was damaged by Developer's excavation activities. Id. That damage has not been repaired.

87. Following the excavation and cave in, the excavation flooded and water remained in the excavation for many months, until at least the summer of 2006.

April - December 2006

88. On April 21, 2006, Developer was issued a third building permit that allowed her to raise the structure by about four feet.

89. The third building permit was needed, according to Developer, because of the groundwater issues. Those groundwater issues, of course, were matters that she had previously failed to investigate and for which she had been put on notice by the neighbors.

90. In May 2006, Developer was issued a notice of violation for standing water.

91. As if to underscore her failure to maintain and preserve the front half of the original house after the back half was demolished, Developer was issued a notice by DCRA that the structure was unsafe on June 30, 2006, . Opp. Hearing Exh. 12. No one was to go into the structure for any purpose other than to render it safe.

92. Developer ignored this order until after she had laid a foundation and framed in the large addition.

93. Developer's statement that she was not aware of the notice is both contrary to

was a wholly new structure.

April 2007- September 2008

103. Developer did not appeal or protest the stop work order of March 21, 2007.

104. Mr. Premo paid the fine associated with the stop work order.

105. On April 17, 2007, Developer applied for a fifth building permit.

106. On July 17, the District issued a notice of violation for overgrown vegetation and for lack of a barrier.

107. In July 2007, Developer attended a meeting that she had requested with the ZA to discuss the zoning concerns associated with her fifth building permit application.

108. In September 2007, the ZA issued a decision denying the request for a fifth building permit finding, among other things, that no part of the original structure remained so that the grandfather provision of section 405.8 was inapplicable and further finding that the destruction of the original house was due to lack of maintenance, not a casualty or Act of God.

109. Developer filed the present appeal to the BZA.

110. At public meetings in 2008, Advisory Neighborhood Commission 3E considered the question of the construction project on the property and the present appeal. The neighbors and the Developer had an opportunity to fully present their views.

111. The ANC issued a detailed, strongly worded, and cogently reasoned resolution opposing the appeal. The views of the ANC are entitled to great weight.

Final Considerations

112. Developer violated each of the four building permits that she was issued, in each case for performing work outside of that authorized by the permit.

113. In each case, a stop work order was issued.

114. Developer never relied on the DCRA permits. Instead, she exceeded the scope of

the work authorized under each of her four permits. Developer did what she wanted to do when she wanted to do it.

115. Developer was issued two notices of overgrown vegetation and for trash and debris. Opp. Hearing Exh. No. 16. She did not correct the violation the first time and only partially corrected it the second time.

116. Developer was issued a citation for a standing water violation for water that accumulated in the excavation site for the basement. Opp. Hearing Exh. 17.

117. Developer failed to put a fence or other construction barrier around the property until May 2008.

118. The frame that Developer has constructed (regardless of current condition) is far larger than the original structure. It is not merely replacement of “old” wood with “new” wood.

119. The original house, on the south side, had a five yard set back on the first floor, but the second floor was farther away from the lot line. In other words, there was not a simple vertical wall,, two stories tall, five feet from the lot line on the south side.

120. This setback is also reflected in the plans submitted with the fourth building permit application. Dev. Hearing Exh. No. 10, see pages RA-4 and RA-5.

121. Nevertheless, as constructed, there is no second floor set back. Rather the second floor exterior wall on the ‘rebuilt’ portion of the original house is, like the first floor exterior wall, five feet from the lot line.

122. This has expanded the size and footprint of the second floor of the ‘rebuilt’ original house.

122A. Developer has substantially increased the square footage of the back half of the house, both in terms of height and in terms of the extension of the prior first floor window jut out up through the second floor.

Effects on the Neighborhood

123. Developer's new construction is out of character with the neighborhood.

Developer's new construction is far larger than the prior house in terms of height and footprint.

124. Developer's construction project has caused physical damage to neighboring properties.

125. The construction project has had an adverse effect on property values of the nearby properties.

126. The construction project has been an attractive nuisance. The police have had to run unauthorized people out of the construction site and neighbors have had to be particularly vigilant because children are attracted to the site. This problem was exacerbated by the lack of any fence or barricade prior to May 2008.

127. The standing water in the excavation was a breeding ground of mosquitoes and other insects.

128. The property has been allowed to become overgrown with vegetation and the construction is generally unkempt.

PROPOSED CONCLUSIONS OF LAW

1. Developer may not avail herself of the grandfather provisions of section 405.8 of the zoning regulations because no part of the original structure remains on the property. E.g., 1231 Morse St.

2. Developer had a duty of due diligence to make full and proper inquiry about the state of her property and breached this duty at each stage of this project.

3. Developer had a duty to inform DCRA of all pertinent and material facts at all

stages of the project, including in her building permit applications, and breached this duty.

4. Developer may not prevail where the injury that she allegedly suffered was self-inflicted .

5. The injury allegedly suffered here by the Developer was the result of her own failure to take reasonable steps to preserve the original structure.

6. The loss in this case is not an Act of God.

7. A casualty requires a sudden loss, not a loss resulting from long-standing problems at the property and/or the result of long-developing problems, such as termite or water damage.

8. The loss in this case is not a casualty.

9. Developer had a duty to take all reasonable steps to preserve the original structure and breached this duty.

10. Developer did not act in reliance on the building permits she was issued because, at least, she violated each of them by working beyond their scope and because she failed to provide all material and pertinent information to DCRA relevant to each of those building permits.

11. Developer did not act in good faith because, at least, she failed to bring all pertinent and material information to the attention of DCRA, because she violated each of her building permits by performing work beyond their scope, because she caused physical damage to the property of her neighbors but has not repaired that damage, and because she handled her project in such a way as to gather numerous other, serious violations (standing water, unsafe structure, etc.).

12. There was not an undue delay in responding to Developer's fifth building permit application and, therefore the District is not precluded from withholding a fifth building permit

because of laches.

POST-HEARING BRIEF

In this appeal, Appellant asserts that she is entitled to construct a wholly new single family dwelling at 5013 Belt Road, notwithstanding the fact that she razed the entirety or the pre-1933 farm house on the property. She claims, first, that she is entitled to do this under the grandfather provision, section 405.8. As shown in prior filings, however, invocation of the grandfather provision requires, at the very least, that some portion of the original structure remain. As this Board has determined in 1231 Morse St. and as courts have repeatedly held, once that structure is gone, there is no right to grandfather unless some other provision of law allows for it.

Here, Developer claims such a right under section 2001.6 of the zoning regulations, asserting that the destruction of that house was due to a casualty or Act of God. She further claims, in the event that it is not found to be a casualty or Act of God, that the District is esteemed from denying her a permit or that it is barred from doing so because of laches. To the extent necessary, these questions are addressed seriatim.

A. ACT OF GOD.

The question of whether the loss in this instance was due to an Act of God has been extensively briefed. As shown in Intervenor's prior submissions, the loss in this case was not the result of an Act of God, such as a hurricane or earthquake.

B. CASUALTY.

The question of what constitutes a casualty and whether the loss in this case was the result of a casualty has also been extensively briefed. Because of Developer's most recent filing on the subject, three additional comments are required.

First, the evidence overwhelmingly supports the determination of the ZA that the loss resulted from Developer's failure to maintain the preexisting structure, not from a casualty loss. Appellant makes no claim that, after she removed the roof in January 2005, she ever replaced the roof or that she covered the roof with a tarp. It was left open to the elements. Moreover, after the back half of the original house was demolished, Developer did not seal up the remainder of the house or otherwise protect it from the wind and rain; neither she nor her contractor could identify even a single step taken to preserve or protect the remainder of the original structure. Indeed, her contractor conceded that the only reason that some plywood was placed over the open rear of the house was that the government had directed him to do so to keep people from getting in. The photographs of record confirm not only Developer's failure to maintain the property, but they also provide an undisputed pictorial sequence of the deterioration of the house since January 2005 as a result of the lack of maintenance. Finally, when the government posted a notice that the structure was "unsafe" in July 2006, Mr. Premo conceded that nothing was done to rectify the situation in any fashion.

Second, Developer has most recently contended, Stephanie Wallace's Reply Statement on Casualty and Notice of Directly Related Appeal, dated July 7, 2008, that, because other regulatory provisions, such as section 2001.4, speak to the situation where "a nonconforming structure is destroyed by fire, collapse, explosion, or Act of God," then 'casualty' in section 2001.6 means "fire, collapse, [or] explosion." *Id.* at 5. The argument is misplaced. It is black-letter law that where two provisions in the same regulatory or statutory scheme use different words, the words have different meanings. Thus, 'casualty' is not synonymous with "fire, collapse, [or] explosion." Had section 2001.6 been intended to be limited to "fire, collapse, or explosion," the drafters would have used those same words, just as the did in section 2001.4.

Third, in that same document, Developer asserts that Zoning Commission, in Order No.

403, July 18, 1983, “concluded that ‘[t]he determination of the cause or origin of a [casualty] is beyond the scope of the Commission’s [and Board’s] authority.’ As a result, the Zoning Commission has defined casualty based on the result, not on the cause or origin or any concept of fault or blame.” Stephanie Wallace’s Reply Statement on Casualty and Notice of Directly Related Appeal, dated July 7, 2008, at 5. When the actual quotation is read and when it is placed in context, it is apparent that the Commission made no such conclusion as to either the Board’s authority or as to the meaning of ‘casualty.’

In fact, in the portion of Order No. 403 addressed by Appellant, the Zoning Commission was addressing and replying to concerns raised by several ANCs:

Advisory Neighborhood Commissions 2A, 2B, and 3E supported the concept of the proposal [regarding changes to the definition of non-conforming structures and uses] but expressed the following concerns:

* * *

4. That the destruction of non-conforming structures by **fire** require public hearing before reconstruction was permitted, that the reconstruction of non-conforming structures that were damaged by arson, or the owner or the agent of the owner [sic], be prohibited, and that the restoration after damages to a non-conforming use be permitted, subject to the cause of the damage,

* * *

In response to the specific issues and concerns of the ANC’s, the Zoning Commission notes the following:

* * *

4. The new regulations specify procedures for computing costs and values regarding the destruction of non-conforming structures or structures devoted to non-conforming uses, [sic] The procedures are sufficiently specific that no public hearing will ordinarily be required, [sic] An aggrieved party still has the right to appeal any decision of the Zoning Administrator to the BZA. **The**

**determination of the cause or origin or a fire is
beyond the scope of the Commission's authority.**

*** * ***

Order No. 403 (emphasis supplied).

Thus, Appellant has not only misquoted and misrepresented the language of Order 403. She also has ascribed to it a meaning that it plainly does not have.

The relevant language in Order No. 403 has nothing whatsoever to do with the definition of a casualty. Similarly, it does not make a casualty depend on result rather than cause, as Appellant would have the Board believe. It does not preclude the BZA from determining whether the cause of the destruction was a casualty; in fact, section 2001.6 requires the Board to do exactly that so as to determine whether section 2001.6 is applicable. Even in the case of a fire, the BZA could well determine that a fire was the cause of a casualty loss; the only restriction is that the BZA simply could not, for itself, determine the underlying cause of that fire (the determination of the cause of a fire is entrusted to the Fire Marshal.)

The facts of this case are clear. Whether the casualty is the termite damage as alleged in the Appeal itself or water damage - as Appellant has tried to argue subsequently - it is not a sudden loss but rather it is the result of processes that took place over long periods of time. Such damage - even if Appellant had taken reasonable steps to determine the condition of the property when she was on notice of problems - cannot be the result of a casualty.

C. ESTOPPEL.

Appellant claims, that even if she is not entitled to a fifth building permit under section 2001.6, the government is estopped from denying her a permit under the doctrine of estoppel. It is well-settled that estoppel is rarely granted against the government and it is further well-settled that the party seeking to invoke estoppel against the government in a zoning situation must

prove each of the elements of such an estoppel. E.g., Bannum. In this case, Developer has not made such a showing. At the very least, there is simply no good faith reliance by the Developer on the actions of the government. In the first place, Developer has not acted in good faith and, in the second place, any purported reliance on actions by the government is tainted by the fact that the government's actions, on which she claims to rely, were the direct result of what information Developer chose to give to the government and to withhold from the government, particularly in regard to the second building permit and, to a lesser extent, in regard to the fourth building permit.

Even before they began this construction of this project, Developer and Mr. Premo had not made an effort to determine the condition of the property and they have conceded this fact in their testimony. Developer visited the property only twice prior to the "as is" purchase and neither before nor after the purchase did she make any effort to determine the physical condition of the structure (including whether there was termite damage). Indeed, in the visit with Mr. Premo prior to the purchase, he conducted only a brief "walkthrough" and neither Mr. Premo nor Developer went into the attic. From the time of the purchase until the first building permit and, indeed, until the time of the second building permit, critical structural (including termite and water damage) was not sought by Developer.

Each step that they took thereafter shows their complete disregard for the condition of the original house and their complete failure to take even the most basic steps to preserve it. Indeed, this confirms that Developer's intention all along was to raze the existing pre-1933 house and replace it with wholly new construction (one completely out of character with the neighborhood). Thus, after the alleged structural problems after the demolition of the interior plumbing stack, they did not immediately notify DCRA or take any steps to preserve the structure or to even determine whether and how it could be saved. Instead, by their own admission, they decided on the "spur of the moment" to demolish the back half of the house

because it was “wobbly.” By their own admissions, they did not advise DCRA before the demolition and did not call in a structural engineer before the demolition. In fact, the undisputed testimony from the Intervenor John Lemoine and Mary Grumbine is that the interior demolition was carried out while the back half of the house was taken down in a matter of several days. Tr. Aug. 1 at 545. There is simply no excuse for the failure to notify DCRA, at the time of the 2005 demolition and thereafter, of material information regarding the project.

The failure to advise DCRA of critical, material facts extended throughout the process and can be most vividly seen in the information that she provided and, more importantly, the information that she withheld from DCRA. Thus, Developer’s attempt to focus exclusively on the application for the fourth building permit is, at best, a red herring and, moreover, is based solely on the unreliable and evasive testimony of Mr. Premo, matters that are addressed more fully below.

The time of the second building permit, which followed that demolition, is central to this case because it is at that point, when the back portion of the original house had been demolished (outside the scope of the first building permit and resulting in the first stop work order) and before the second permit was sought, that Developer and Mr. Premo claims they discovered the termite damage and the structural damage and they were well aware of the potential nature and extent of that damage. Opp. Hearing Exh. No. 20 (Wallace Affidavit) at paragraph 14, and No. 21 (Premo Affidavit) at paragraph 17 (“the structural failure . . . was contributed to and worsened by rotting of the structural elements by prolonged exposure to moisture from the ground beneath the building.”). See Tr. Aug. 1 at 550.

While Mr. Premo and Developer are on notice that there were, to say the very least, potentially very serious structural problems with the original house, they made no documented attempt to to determine the seriousness of that damage. They did not bring in Orkin or Terminix.

There is no record of any structural engineering inspection. Even if it is true, as they claim, that they sought the views of several structural engineers, they made sure that there was no written record of those views that might have to be disclosed to DCRA. The result is simple and straightforward. Developer was on notice of very serious - and perhaps fatal - structural issues, neither she nor Mr. Premo did nothing to determine the extent and consequences of that damage. Alternatively, aware of that damage and its impact on the building project, she and Mr. Premo sought to keep that information to themselves.

Either way, the result is the same. Critical, material information regarding the structure - information that would have had an impact on the second permit - was withheld from DCRA. The impact on DCRA is even more egregious than in the subsequent third building permit because the second permit required Developer to “remove and replace and [sic] damaged wood in accordance with the structural plans to preserve the integrity of the project.” Appellant’s Hearing Exhi. No. 4. And the project, according to the first building permit, was for the construction of an addition to the property. *Id.* at No. 1. Developer clearly wanted DCRA to believe that the “integrity” of that project, maintenance of the original house with a new addition, could be preserved and failed to disclose that there was now a very serious question of whether that was even possible. The permit was issued by DCRA in obvious contemplation that the original house could be preserved. Developer cannot benefit from her own inaction or from her failure to disclose material facts. She cannot claim any good faith reliance on a building permit issued where material underlying facts had not been disclosed to DCRA. (Of course, she could make no such claim in any event as she was issued a stop work order for exceeding the scope of that second permit.)

This very same problem pervades the third building permit application, which was ostensibly to deal with the groundwater situation by raising the structure by four feet. Again,

just as in the case of the second building permit application and notwithstanding that there had now been additional time in which to assess the damage to the front part of the original house, Developer, once again, chose not to bring the situation to the attention of DCRA in the application for that third permit. Of course, she proposed no solution to the problem. By her silence on this matter, Developer led DCRA to believe that the remaining portion of the original house could be maintained, even though she and Mr. Premo clearly believed that it could not. Developer may not rely, for estoppel purposes or any other purposes, on the third building permit when she failed to make full and proper disclosure of all of the pertinent facts to DCRA.

At the hearing, Developer sought to portray building permit five as the logical successor to building permit four on the theory that building permit four authorized the installation of new footers and building permit five was needed simply to provide the specifications for them. The assertion is, at best, disingenuous.

Mr. Premo knew, from his demolition of the back half of the house that there was no foundation and he stated that houses of this age had brick and mortar footings. Those, of course, would not be in any shape to be retained or to be reused for the new construction. Thus, there was simply no construction reason to withhold any structural plans for a new foundation from DCRA at the time of the fourth building permit. The only apparent reason to do so, of course, as indicated by testimony from Mr. LeGrant, was that submission of foundation or footer plans with the fourth would have triggered zoning review, something that neither Mr. Premo nor Developer wanted.

Mr. Premo attempted to justify the failure to include specifications for footers on the basis that the footers could not be seen until demolition of the structure. Thus, at the July 15, 2008, hearing, Mr. Premo stated that engineers had come out to look at the footers "at the beginning of the demo" of the last remaining part of the front of the original house. Tr. Aug. 1 at

594. See also Tr. July 15 at 262.

The statement is not correct. First, since the footers were underneath the remaining portion of the house, they simply could not be seen (even if that had been necessary) until the demolition of that part had taken place. Second, the razing took place very quickly, over a matter of no more than several days so that as soon as the structure was removed, the footers were removed immediately thereafter. Ms. Grumbine was at home the days that the razing of the front part of the house occurred and observed that there were only two persons and some sort of machine, see Opp. Hearing Exh. No. 6 and No. 7 (taken at the time of the stop work order and showing no remaining foundation of any kind), ever on the site those days. There was no opportunity for an engineer to make any detailed examination of what was there and offer a reasoned opinion. Of course, Developer did not present any such engineer - or a letter or report from any such engineer - at any point during this hearing to substantiate this. Moreover, Developer did not ask anyone from DCRA to visit the site and to determine whether or not the footers could be maintained. As at each and every step along the way, Developer simply went ahead and removed a piece of the original house, claiming it was unsound, and asks this Board to simply take her word for it. This is, clearly, just another step in Developer's plan to, piecemeal, take down the entirety of the original structure and replace it with a wholly new building.

Of course, Developer and Mr. Premo knew full well at the time of the application for the fourth building permit that any footers or foundation underlying that final remaining portion of the original house could not be saved and used. Developer, after all, had applied for her third building permit (to raise the house by four feet) because of the water table problems. Mr. Premo admitted that the structure, including the remaining portion of the original house would have to be above the water table. Tr. Aug. 1 at 464. Because of those water table problems, no part of the foundation of the back portion of the original house could be retained and a new - and, Developer

claimed, very expensive - foundation had to be built for the back portion of the original house. The same would clearly be required of the front portion in order to lift it those four feet.

In sum, at the time of the fourth building permit application, Developer knew that a new foundation would be required if she lifted the front of the house.¹ However, she elected to withhold this information from DCRA and lead it to believe that the original foundation would have to be inspected before such a determination was made. Clearly, Developer was aware that providing specifications for the new foundation would trigger zoning review and she elected to try to stave off zoning review by not including any such specifications in that permit application. Moreover, since she knew what the specifications would need to because she had already submitted plans for the replacement front of the structure.

This conclusion is amply confirmed by her course of conduct in applying for that permit. Mr. Premo went in to talk to DCRA and claims to have taken the plans with him. While there is a set of plans that seems to be those approved with the fourth building permit, there is no stamped copy of the more critical document, the demolition sequence and Mr. LeGrant testified that he understands that other DCRA disciplines stamp their approval on plans. Tr. Aug. 1 at 492.. Mr. Premo acknowledges that he spoke only with individuals who handle structural matters and that he did not raise the topic of zoning with them. In his re-counting of that conversation, he never once mentions asking to speak with zoning officials or even whether he should speak with zoning officials. There is no evidence that the two individuals with whom he spoke had any

¹ Of course, it must be remembered that Developer's engineer did not say that the front part of the house had to be razed or demolished. His report said only that "the structural elements of the house are not in any shape to be lifted without causing some major structural damage and possible collapse of the house." See Tr. July 15 at 462 (emphasis supplied). He did not say that the front was beyond repair and, significantly, he did not say that the front part of the original house, assuming it was repaired, could not be used as part of the ultimate structure. even if the articulation with the new construction had to be changed. To do so, of course, would have preserved some part of the original house and may well have had significant implications for this appeal.

knowledge of zoning, something clearly outside their area of expertise. Of course, since they were not authorized zoning officials, there is nothing that they could have done or said to bind the District on the question of zoning. Coffin v. District of Columbia, 320 A.2d 301 (DC 1974); District of Columbia v. MacGregor Properties, Inc., 479 A.2d 1270 (DC ____); Perpetual Building Limited Partnership v. District of Columbia, 618 F. Supp. 614 (D. D.C. 1985); Orange v. District of Columbia, 59 F.3d 1267, 1271 (D.D.C. 1995). As if this were not enough, it is no surprise that the permit application used the word ‘demolish,’ not the word ‘raze.’ At most, Mr. Premo claims to have showed them a photograph of the construction from which he expected them to deduce that the ‘demolition’ permit would take down all of the remaining portion of the original house. At best, Mr. Premo addressed structural and construction issues with the District structural employees and he did not raise or seek to raise any zoning issues with them. Far more likely, he designed his presentation to sidestep the zoning issues entirely.

Finally, the plans themselves were designed to give the impression that a part of the original house was going to remain on site. It was demonstrated at the hearing that the plans contained the word “existing 2-story frame” and it was demonstrated that in the plans for the first building permit those words unambiguously referred to the original structure. In the plans for the fourth building permit, those words were not changed, even though Mr. Premo was forced to acknowledge that only the portion of the drawing in the hand-drawn box, which was the portion to be torn down, was the original house. Although Mr. Premo squirmed and tried to evade the questions, he could provide no answer as to how the word “existing” had magically changed its meaning from the time of the first building permit to the time of the fourth building permit application.

At the end of the day, all of these facts indicate an intent on the part of Developer to keep DCRA from knowing that there was a zoning issue with the property and to keep the

property from undergoing zoning review in the course of the fourth building permit application.

This intent was not limited to presentations to DCRA. In her motion for summary judgment in this appeal, Wallace asserted that a part of the original structure remained in place on the property. (By filing this as a motion for summary judgment, Developer claimed that this was both a material fact and that it was not in dispute) Her affidavit, paragraph 23, signed and sworn to under oath, asserted that, as of the time of that affidavit, a part of the original structure remained on the property.

Developer cannot claim to rely on the fourth building permit when, even more clearly that in prior instances, it was the Developer who not only kept critical information from DCRA but also packaged the information she did present in a fashion to keep DCRA from undertaking a zoning review of the application.

And, in fact, what Developer wanted - avoidance of review of her application by the ZA - is exactly what happened. When the application was formally presented, intake did not identify it for zoning review and did not go through zoning review. As Mr. LeGrant cogently explained, there was nothing on the permit application that made it appear that zoning review might be necessary, which is exactly what developer intended. Of course, there is absolutely no indication in the record that the intake individual had any authority to determine that the permit passed zoning muster or, which is the same thing, that the intake person had any authority to determine that the application was permissible under zoning regulations. Thus, when Developer asked whether it was a mistake not to submit the matter for zoning review, the question must be viewed in this context. Mr. LeGrant, however, even when pushed by Developer, did not concede that it was a mistake not to submit it for zoning review. He simply said that Developer might characterize it as that. He never said that he would characterize it as that. It is to be expected that Developer will seek to characterize this tidbit of testimony as a fatal admission of error by

DCRA. At the end of the day, however, is not the characterization given to it by Developer; what matters is what happened to the application at the time it was submitted and in light of the facts disclosed to DCRA, not what DCRA might have done had it had all of the facts that have come to light in this proceeding before it. There was simply no administrative error committed.

Moreover, Developer did not act in good faith reliance on the building permits that she was issued for many reasons beyond those discussed above. Nowhere can this be seen more clearly than in the fact that Developer was issued four building permits, each one of which was followed by a stop work order for performing work outside the scope of her permit. Developer did not administratively challenge any one of those stop work orders or otherwise seek to have them revoked. In fact, and most significantly here, Developer admitted the violation of building permit No. 4 when Mr. Premo paid the fine of \$500 without protest. There can be no claim or reliance - much less good faith reliance - when Developer acted outside the scope of the building permits that she claims to have relied upon. This is especially important in the case of the fourth permit; if Developer believed that the work she did in March 2007 was within the scope of the permit, she had the option of challenging it. She did not, instead paying the fine and admitting guilt.

Developer's assertion that she acted in good faith is disproved by her many actions and inactions; a few examples are cited here. Although required by law to have some sort of fence or barricade around the property, Developer failed to install one from January 2005 until May 2008, and did so only in the face of a notice of violation by DCRA. She ignored requests by neighbors to install one and disregarded her own promise of April 5, 2008, to the ANC to install one. Indeed, she only installed one in May 2008 that DCRA would install such a fence, presumably a Developer's expense, if she failed to do so herself. She failed to maintain the property and was issued at least two notices of violation for overgrown vegetation. Although

she was on notice that she could not use the neighbor's property for any purpose and Mr. Premo so acknowledged, Opp. Hearing Exh. No. 2, Developer's work crews repeatedly trespassed. She conducted excavation for the new foundation without providing the required notice of excavation to the neighbors. Her excavation caved in, causing damage to neighboring properties, damage that to this day has only been partially repaired. The excavation was allowed to stand open for many months, filling with water, providing a breeding ground for mosquitos and a hazard for neighborhood children, especially serious since at the time there still was no barricade. (When she testified about this, Developer dissimulated and said that the next thing that happened after the excavation was the filling in with water, sidestepping the cave in.) The standing water garnered Developer yet another notice of violation.

D. LACHES.

Developer's final assertion is that she is entitled to her fifth building permit under the doctrine of laches. In her view, DCRA may not deny her the fifth building permit because of undue delay in informing her that she is not entitled to the five foot setbacks. She measures the undue delay as commencing at the time of her first building permit. Her argument is meritless.

In the first place, from the first through the fourth building permits, DCRA gave Developer everything she asked for. Moreover, there was nothing presented to DCRA, as discussed above, that in any way indicated that she would not preserve a sufficient portion of the original structure to be able to avail herself of the five foot grandfathered side yard setbacks until her fifth building permit application in April 17, 2007. Dev. Hearing Exh. No. 11. Thus, any laches period must begin only on the date of that final building permit application.

The building permit was denied on September 28, 2007, five months after the application was made for it. It must be noted that an almost identical period elapsed from the time of each of Developer's earlier building permit applications until the time of action by DCRA. For example,

the first permit was applied for in July 2004 and granted in December 2004, a period of fine months. Thus, the time period between application and decision is wholly consistent with DCRA practice.

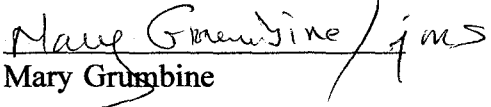
Moreover, at Developer's request, there was a meeting between the ZA and the Developer (including her counsel) in July 2007 to discuss the zoning issues present in the application. Several months after the application was filed, the Developer and Mr. Premo met with the ZA, at Developer's request to discuss the application. The ZA made his decision on the application in September, only several months after that meeting. Several months, in the context of other concerns within the office of the ZA, to review, analyze, and issue a thoughtful, carefully reasoned decision on the application, in not in any sense an undue delay.

In sum, there was simply no undue delay in responding to her fifth building permit application.

Conclusion

On the basis of the evidence in this case and for the reasons set forth herein and the reasons set forth in Intervenor's previous filings, the appeal should be denied and the decision of the Zoning Administrator to deny the application for a fifth building permit should be affirmed.

Respectfully submitted,


Mary Grumbine


Jack Simmons

Certificste of Service

This is to certify that the foregoing POST-HEARING PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND POST-HEARING BRIEF BY INTERVENORS MARY GRUMBINE AND JACK SIMMONS was served by first class mail, postage pre-paid, on September 9, on the following:

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