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D.C. OFFICE OF ZONING
**APPELLANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**
2008 SEP -9 PM 4: 58
**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal No. 17747 of Stephanie Wallace, pursuant to 11 DCMR §§ 3100 and 3101, from a September 28, 2007, decision of the Zoning Administrator ("ZA"), to deny the issuance of a building permit allowing the reconstruction of a portion of a pre-existing one-family dwelling the R-1-B district at premises 5013 Belt Road, N.W. (Square 1756, Lot 64).

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

DECISION DATE: September 16, 2008

DECISION AND ORDER

INTRODUCTION

Ms. Stephanie Wallace ("Appellant") filed the original appeal with the Board of Zoning Adjustment ("BZA" or "Board") on October 19, 2007, pursuant to 11 DCMR § 3112, challenging the September 28, 2007 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to deny a April 17, 2007 building permit application for "Revision To [Building Permit] B468280 [December 9, 2004; "Addition To Single Family House To Include New Kitchen, Family Room, Master Suite, Baths, Attic & Basement" ("Original Permit")] To Reflect New Footer And New (2) Story Structure Replacing Existing" to reconstruct a pre-existing portion of single family house that was demolished pursuant to a building permit issued by DCRA which at the same time fully authorized the reconstruction. The Zoning Administrator alleges (i) that the previously existing structure had been intentionally destroyed and as a result the non-conforming side yard cannot be restored and does not comply with the provisions of 11 DCMR § 405.8 and (ii) that the unforeseen catastrophic structural damage which made the pre-existing single family house structurally unsound does not comply with the casualty provisions of 11 DCMR § 2001.6.

In support of her Appeal, the Appellant alleged:

1. In denying the permit, the Zoning Administrator has attempted to retract DCRA's previous approval which permitted Appellant to demolish and rebuild a portion of an existing structurally unstable single-family house per the existing permits and plans. Building Permit No. B103710, issued to "DEMOLISH A PORTION OF AND [sic] EXISTING SFD DUE TO THE STRUCTURAL INTEGRITY AND POSSIBLE COLLAPSE OF THE HOUSE WHICH IS DANGEROUSLY UNSOUND. **REBUILD STRUCTURE TO CURRENT BUILDING CODE SPECIFICATIONS PER PER (sic) EXISTING PERMITS AND PLANS,**" ("Fourth Permit") (*Emphasis added*), clearly authorized Appellant to demolish that portion of the then existing single-family structure, which was dangerously unstable, and rebuild in accordance with project plans as was originally intended – i.e., rebuilding exactly that which had to be torn down. Significantly, a portion of the existing single-family dwelling was not demolished.

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2. Under the circumstances of this case, the Zoning Administrator and/or DCRA are estopped from denying the application to revise the Original Building Permit and such action is also legally barred by the doctrine of Laches.

3. The Zoning Regulations, §§ 405.8 and 2001.6 authorize rebuilding of the portion of the structure destroyed by casualty and/or Act of God.

A public hearing on the Appeal was duly noticed and held on April 29, May 20, June 3, July 15 and August 1, 2008.

Upon hearing from the parties to the matter, the Board rendered its decision at its September 16, 2008, public meeting, voting to GRANT the appeal.

An explanation of the facts and law that support that conclusion follows:

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing.

The Notice of Appeal was filed on October 19, 2007 by Ms. Stephanie Wallace. The Office of Zoning scheduled a public hearing for April 29, 2008. In accordance with 11 DCMR § 3112.4, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 3E, and DCRA. The Office of Zoning advertised the hearing notice in the D.C Register at ___ *D.C. Reg.* ___ (_____, 2008).

DCRA's Motion for Continuance.

On April 17, 2008, DCRA filed a Motion for Continuance of the April 29, 2008 public hearing based on the Zoning Administrator, Mr. Matthew LeGrant's unavailability as a result of out-of-town travel for a conference. Appellant opposed, and the Intervenors supported the Motion. After hearing arguments, the Board granted a continuance of the public hearing until July 15, 2008.

Parties.

Advisory Neighborhood Commission 3E was automatically a party to this Appeal and, submitted a written report and testimony at the hearing by Commissioner Matthew Frumin. The Zoning Administrator's Office at DCRA appeared as Appellee and was represented by four attorneys from DCRA's Office of General Counsel.

Intervenors.

Mr. Jack Simmons and Ms. Mary Grumbine, husband and wife ("Simmons/Grumbine"), as the owner/occupants of 3952 Garrison Street, N.W., requested and were granted Intervenor status by the Board. Ms. Grumbine was unable to appear at the Board's hearings as a result of her medical condition. As an alternative, the Board allowed her to submit her testimony by sworn affidavit with the Appellant and other parties allowed to respond in writing. Mr. John Lemoine and Ms.

Martha Maiden, husband and wife (“Lemoine/Maiden”), as the owner/occupants of 5011 Belt road, N.W. requested and were granted Intervenor status by the Board.

Appellant’s Motion for Summary Judgment.

On April 14, 2008, the Appellant simultaneously filed a Pre-Hearing Statement and Motion for Summary Judgment claiming that the Appellant was entitled to Judgment as a matter of law because: a) DCRA’s issuance of the Fourth Permit fully authorized demolition and reconstruction of the structurally damaged front of the original 1933 structure; b) the reconstruction was authorized under §§ 405.8 and 2001.6; and c) DCRA was legally prohibited from denying the Fifth Permit Application based on the equitable doctrines of Estoppel and Laches.

Intervenors’ Motion to Dismiss.

On April 24, 2008, one of the Intervenors, Simmons/Grumbine, filed a Motion to Dismiss alleging that the Appeal failed to state a claim.

Denial of Motions for Summary Judgment and to Dismiss.

The Board allowed the parties and Intervenors to submit additional written submissions on the cross motions and held oral arguments on May 20, 2008. Based on the extensive written record and oral arguments, the Board found substantial disputed facts and unresolved legal issues and denied the motions at a Special Public Meeting on June 3, 2008.

Notice to Amend Appeal.

On June 2, 2008, the Appellant filed a Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate Directly Related Denial by Zoning Administrator under 11 DCMR § 401.1 to allow the Appellant to “enlarge or replace” the original 1933 structure as a matter-of-right, including a structure of greater lot occupancy and height than previously approved under the Original Permit. After briefing by the Parties and Intervenors, the Motion was heard on July 15, 2008. The Board denied the Motion to Amend the Pending Appeal finding that an appealable decision had not taken place.

Appellant’s Expert Witness

The Appellant offered Mr. Vincent L. Ford, the retired Chief Building Inspector for DCRA, as an expert witness in the D.C. Construction Code and the DCRA building permit process and procedures. The Board recognized Mr. Ford as an expert witness based on his more than thirty (30) years of experience, including eighteen (18) years as DCRA’s Chief Building Inspector, his current profession as a Building Code and Building Permit consultant in the District of Columbia, and past testimony as an expert witness in other cases before the Board.

FINDINGS OF FACT

1. The Appellant purchased 5013 Belt Road NW (Square 1756, Lot 64) ("Property") in "as-is" condition in April 2004 during the height of the local real estate boom when inspection contingencies were not accepted by Sellers with multiple bidders.
2. The Property was improved with a single-family detached dwelling dating back to at least 1933.
3. In the Sales Contract, the Seller affirmatively represented to the Appellant that the Property had no history of: 1) termite infestation; and 2) foundation or structural defects. The Appellant relied on the Seller's representations.
4. Prior to the closing, Mr. Allen Premo, the Appellant's general contractor, made a visual or walk-thru inspection of the Property and saw no evidence of termite infestation or damage, other structural defects or groundwater or soil problems. During this inspection, the existing walls were closed in and the structural elements were not visible or accessible. No penetration of the closed in walls was permitted.
5. On December 9, 2004, the Department of Consumer and Regulatory Affairs ("DCRA") issued the original Building Permit authorizing the Appellant to construct "ADDITION TO SINGLE-FAMILY HOUSE TO INCLUDE NEW KITCHEN, FAMILY ROOM, MASTER SUITE BATHS, ATTIC & BASEMENT. SEPARATE ELEC., PLUMB., & MECH. INSTALLATION PERMITS ARE REQUIRED" (the "Original Permit").
6. The catastrophic structural damage to the Property was not first discovered at the rear of the existing 1933 structure until March 2005, when interior demolition began as authorized by the Original Permit. At that time, no live termites or termite infestation was discovered, but it was clear that the prior owner had treated and exterminated the termite infestation.
7. Based on Mr. Premo's 42 years construction experience, the catastrophic structural damage that existed occurred long before the Appellant purchased the Property.
8. Termites were not the sole cause of the structural damage, but also prolonged exposure to moisture from the ground below the building contributed to the structural failure which occurred.
9. From March 5 – 8, 2005, the Appellant removed the remainder of rear in an effort to prevent failure of the entire original structure.
10. On October 4, 2005, DCRA issued the second building permit, B477334 revising the Original Permit to allow for removal and replacement of damaged wood at rear of original single-family house and revise plans to address wall failure ("Second Permit").
11. On November 29, 2005, excavation for the approved rear addition commenced. The excavation caved in due to high water table making the ground unstable.

12. On or about November 30, 2005, Mr. Premo met with DCRA to discuss how to stabilize the site. Emergency action was taken to stabilize excavation site and shoring for addition installed.
13. On April 21, 2006, DCRA issued a third building permit No. B91338 revising the Original Permit to update foundation, basement and structural drawings to respond to the unforeseen ground water problems ("Third Permit").
14. From October 23 to November 1, 2006, the addition to the existing single-family house was framed and under roof as authorized by the Original Permit.
15. When Mr. Premo prepared to lift the front of the existing single-family house, he discovered the front was rotten and structurally unsound.
16. The Appellant's engineer determined that lifting the existing single-family house was unsafe and would cause the structure to collapse.
17. Mr. Premo met with DCRA on several occasions to determine if the front of the existing single-family house could be removed and replaced. DCRA advised Mr. Premo that removal and replacement were acceptable under the circumstances.
18. As directed by DCRA, Mr. Premo drafted revised plans and submitted for a fourth building permit.
19. As instructed by DCRA, the fourth building permit application included the following: 1) a structural engineering report detailing the structural failure that had occurred and likelihood of collapse, 2) a detailed demolition sequence, including all elements of the original 1933 structure, including footers, if required, and 3) detailed plans showing the demolition authorized and existing structure (the framed and under roof addition approved by the Original Permit) that would remain. The permit application submitted also included and relied upon the Original, Second and Third Permits and the DCRA approved plans for those permits.
20. Based on the expert testimony of Mr. Ford, the inclusion of the previously approved plans from the first three permits in the application for the Fourth Permit was standard procedure in such circumstances and intended to provide DCRA with a complete background of the project.
21. On February 14, 2007, a fourth building permit, Building Permit No. B103710 (the "Fourth Permit"), was issued to "DEMOLISH A PORTION OF AND [sic] EXISTING SFD DUE TO THE STRUCTURAL INTEGRITY AND POSSIBLE COLLAPSE OF THE HOUSE WHICH IS DANGEROUSLY UNSOUND. REBUILD STRUCTURE TO CURRENT BUILDING CODE SPECIFICATIONS PER PER [sic] EXISTING PERMITS AND PLANS."
22. The Fourth Building Permit allowed the demolishing and rebuilding of the front portion of the existing single-family house which at that time included the original 1933 structure and the closed in and under roof rear addition authorized by the Original Permit.

23. On March 12 to March 15, 2007, the front portion of the existing single-family house was demolished pursuant to the Fourth Permit.
24. The Appellant reasonably, and to her subsequent extreme detriment, relied on the Fourth Permit to not only complete the approved demolition, but also to reconstruct the demolished portion of the structure to its pre-existing condition.
25. The reconstruction authorized by the Fourth Permit will result in completion of a single-family dwelling of the same size, including height, density and side yards as originally approved by the Original Permit.
26. The Appellant gained no zoning or other advantage as a result of the Fourth Permit.
27. As clearly demonstrated by this Appeal, the Appellant has been severely disadvantaged, prejudiced and harmed by DCRA's conduct in denying the Fifth Permit application for work that was previously approved by DCRA in the first four building permits – all of which remain valid and effective.
28. As a result of DCRA's conduct in this matter, the Appellant's project has been halted since April 2007 and she has been given a Notice of Default by her Lender.
29. The Fourth Building Permit Application was prepared in direct consultation with and upon the advice of DCRA, including the Chief Structural Engineer, Mr. Robert Chen.
30. In reviewing the Fourth Building Permit Application, Mr. Chen specifically required the Appellant to provide a detailed, step-by-step description of the sequence of demolition to be undertaken.
31. Specifically, the "Demo Sequence" prepared and submitted by the Appellant, described the piece-by-piece removal or demolition of the original 1933 portion of the structure, and then "once the existing wood structure has been removed, examine and replace [the existing footer foundation] if necessary."
32. Prior to the DCRA reviewed and approved demolition, the existing structure was comprised of the original 1933 structure and the approved three-story rear addition which was closed in and under roof.
33. Based on the expert testimony of Mr. Ford, the Appellant completed the authorized demolition under the Fourth Building Permit of only a portion of then existing structure as shown on the DCRA approved plans.
34. Based on the expert testimony of Mr. Ford, by definition, and as reviewed and approved in advance by DCRA, the work performed was a "demolition" not a razing of the entire existing structure. The Building Code defines a raze as a removal of the "entire building down to the ground." 12A DCMR §§ 105.1.5, 105.1.7.

35. It is undisputed that the closed in an under roof rear addition remains intact and in place which is consistent with the definition of “demolition,” the Fourth Permit and approved plans for that permit.
36. On April 17, 2007, the Appellant submitted application for fifth building permit to “Reflect New Footer”, but DCRA directed that the application be amended/expanded to cover “New (2) Story Structure Replacing Existing (Structural Only)” which had previously approved by the Fourth Permit.
37. On April 20, 2007, Former Zoning Administrator, Mr. Bill Crews, placed a hold on the fifth building permit application, but never responded to the Appellant before being terminated as Zoning Administrator on June 14, 2007.
38. On September 28, 2007, the then Acting Zoning Administrator, Mr. Matthew LeGrant, denied the fifth building permit application.
39. At the hearing, Mr. LeGrant testified that he denied the Fifth Permit application because the established structural damage caused in part by termites did not constitute a “casualty” under § 2001.6 as result of the damage lacking suddenness and unforeseeability.
40. Mr. LeGrant also claimed that the demolition which occurred under the Fourth Permit was an intentional “de facto” raze beyond the scope of that permit.
41. Mr. LeGrant testified that regardless of the clear language of the Fourth Permit authorizing reconstruction, once the original structure no longer existed, § 405.8 did not allow him to approve the Fifth Permit application.
42. Mr. LeGrant also testified that building permit applications are subject to review by the various disciplines based on a determination made by the DCRA intake personnel at the time the application is submitted.
43. Mr. LeGrant in his testimony concluded that the Fourth Permit was not reviewed for zoning compliance before being issued, although DCRA was unable to produce a copy of the Fourth Permit application which was approved by DCRA.
44. On cross-examination, Mr. LeGrant admitted that DCRA was responsible for determining if the Fourth Permit application was subject to zoning review and the failure to do so was a “mistake” by DCRA.
45. Mr. LeGrant on cross-examination also admitted that the Fifth Permit application was not identified for zoning review and had been approved by all the disciplines required by the DCRA intake personnel. The Fifth Permit application was approved and ready for issuance by DCRA when the former Zoning Administrator unilaterally put a hold on the application.

46. **On cross-examination, Mr. LeGrant freely acknowledged that the Appellant had the right to rely on the Fourth Permit for the demolition that occurred and more importantly the reconstruction authorized.**
47. **Mr. LeGrant also admitted on cross-examination that with the Fourth Permit, DCRA made the determination that replacement of the footers was fully authorized if necessary.**
48. Mr. LeGrant testified that DCRA had the authority to revoke any of the four building permits issued to the Appellant, but had not done so.
49. Mr. Ford, as an expert testified that a footer, structural only permit would not normally be subject to zoning review.
50. Advisory Neighborhood Commission 3E opposed this Appeal claiming that the original structure no longer existed, the Appellant acted unreasonably and with unclean hands.

CONCLUSIONS OF LAW.

An appeal may be taken by any person aggrieved by, or District agency affected by, any decision of a District official in the administration or enforcement of the Zoning Regulations. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799); D.C. Official Code § 6-641.07(f)(2001 ed.).

The Fourth Building Permit Authorized the Partial Demolition and Reconstruction of the Structurally Damaged Original Portion of the Existing Structure

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

Prior to the approved demolition, the existing structure was comprised of the original 1933 structure and the approved three-story rear addition which was closed in and under roof. Ms. Wallace completed the authorized demolition under the Fourth Building Permit of only a portion of then existing structure. By definition, and as shown on the plans, reviewed and approved in advance by DCRA, the work performed was a “demolition” not a raising of the entire existing structure. It is undisputed that the closed in an under roof rear addition remains intact and in place.

The Appellant Acted in Good Faith Reliance on the Directions of DCRA and Fourth Building Permit

The Fourth Building Permit was sought and approved in consultation with and on the advice of DCRA. The Fourth Building Permit is clear on its face:

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

The Appellant specifically and in good faith relied on this very detailed permit application process and issued permit to complete the approved demolition with the express expectation and direction that reconstruction of the original 1933 portion of the existing single-family dwelling was authorized. Mr. LeGrant admitted that the Appellant had the reasonable right to rely on the plain meaning of the Fourth Permit. If the Appellant had known that DCRA and/or Mr. Crews would change its mind after the fact and prohibit the authorized reconstruction, the demolition would not have occurred. The Fifth Building Permit was initially sought for the limited purpose of replacing the footers that had been removed which replacement was contemplated and authorized by the Fourth Building Permit, but required only structural review of the specific footers to be installed. Only after the intervention of Mr. Crews was the scope expanded to improperly and without basis include issues purportedly subject to zoning review.

The Fifth Building Permit Application is not Subject to Zoning Review

The Fourth Building Permit fully authorized the Appellant to demolish and rebuild a portion of the Original Structure which was structurally unsound and in imminent risk of collapse. With the minor exception of the replacement footers, no further approval from DCRA was required or anticipated. The Fifth Building Permit application was originally submitted only for the replacement footers which at the time of the Fourth Permit it was specifically unknown whether the existing footers were usable or would have to be replaced. If the original footers had not required replacing, the Appellant would not have needed the Fifth Permit.

Only after submission of the Fifth Building Permit application, did DCRA direct the Appellant to revise/expand the application from a revision of the Fourth Permit “To Reflect New Footers” to include “And New (2) Story Structure Replacing Existing (Structural Only).” The

Fifth Building Permit application, as revised by and at the direction of DCRA, with the exception of the footers is unnecessary and attempts to encompass work previously and fully approved by the Fourth Building Permit. A below grade, footer (structural only) permit application is not properly subject to Zoning review and approval.

Mr. Crews in placing the original administrative hold, and his successor, have exceeded the authority of the Zoning Administrator.

DCRA is Estopped from Denying Appellant's Right to Reconstruction

The District, and specifically, the Zoning Administrator, is estopped from denying the validity and effectiveness of the Fourth Permit or the Fifth Permit Application. The record is clear that the Appellant; 1) made expensive and permanent improvements; 2) acted in good faith; 3) in justifiable reliance upon; 4) affirmative and repeated 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 overwhelming favor the Appellant. Bannum, Inc., v. District of Columbia Board of Zoning Adjustment, 894 A.2d 423, 431 (D.C. 2006).

Specifically, based on the undisputed record, the following facts are established:

1. The Appellant made expensive and permanent improvements valued at more than Eight-Hundred Sixteen Thousand Dollars (\$816,000), including construction of the rear addition and most significantly partial demolition of the original and existing single-family dwelling as specifically authorized by the Fourth Permit;
2. The Appellant acted consistently and repeatedly in good faith without achieving any advantage based on the direct guidance of DCRA and four building permits issued over a period of almost two (2) years. The Appellant fully and accurately informed DCRA of all the circumstances and actions and did exactly what she was told to do by DCRA.
3. The Appellant was entirely justified in relying upon the directions of DCRA and the four (4) issued and valid permits, including most recently the Fourth Permit;
4. DCRA acted repeatedly and consistently to advise, review and authorize The Appellant's actions at every stage of this ordeal;
5. The Original Permit and each of the three (3) subsequent permits were approved as in compliance with the applicable restrictions as identified by DCRA. Faced with DCRA's repeated and consistent approvals, the Appellant had no reason to believe or actual knowledge that her actions which were approved by DCRA at every step, were in any way in violation of the letter or spirit of the Zoning Regulations. Only in April 2007, without any notice, did the Appellant have the first inkling that DCRA had any claim to a violation of the Zoning Regulations. Then, it took DCRA from April 17 to September 28, 2007 – more than five (5) months to reveal the alleged zoning violations;

6. The equities and fundamental fairness completely favor the Appellant who has been made a victim of her compliance with the directions and permits approved by DCRA, and in particular, the Fourth Permit which DCRA has attempted to ignore and use as the basis for denying the fifth building permit application and her previously right to rebuild the demolished portion of the 1933 structure.

“CASUALTY” Under 11 DCMR § 2001.6 Occurred

Definition of Casualty

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

11 DCMR § 199.2(g). Webster’s Unabridged Dictionary defines “casualty” as:

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

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

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

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

11 DCMR § 2001.4 (*Emphasis added*).

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

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

DCRA Specifically Acknowledged The Casualty With Fourth Permit

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

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

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

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

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

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

Suddenness Not Required

DCRA and the Intervenor have attempted to interject a suddenness requirement to the established definition of “casualty.” Clearly, no such suddenness provision is included in the definition which focuses on the failure, injury, loss or destruction that has occurred (specifically referenced in the past tense to indicate an event that has occurred). The “uncontrollable” element is not addressed to timing or suddenness, but to the ability to prevent the casualty. Reliance on the suddenness element created in the Internal Revenue Code and/or insurance liability cases is not relevant or appropriate to the casualty discussion for the specific and limited purposes of zoning or construction. In both the tax code and insurance liability cases, the suddenness of the casualty is not for determining whether the failure, injury, loss or destruction has occurred, but only for the purpose of determining culpability, insurance liability or deductibility of the loss which are all issues that the Zoning Commission has determined are not relevant to the Board.

The Toggas Standard

Although the Board has had few occasions to interpret and apply the “casualty or act of God” provision, the Toggas case is factually and legally controlling. In BZA Order No. 17270 (Application of Thomas and Kathryn Toggas), the Board of Zoning Adjustment approved the reconstruction of a den with a non-conforming side yard under § 405.8 as a matter-of-right. Specifically, the property in BZA Order No. 17270 was improved with a pre-1958 structure, including a den that created a non-conforming side yard. The side yard was less than eight feet, but greater than five feet as permitted under § 405.8. As a result of Hurricane Isabel, the den suffered “severe water and structural damage” and was “deemed unsafe.” As a result of the unsafe condition, the den was removed by the Toggas’ with the intention of re-building a new structure on the same footprint, but without consulting with DCRA or obtaining a demolition permit. Substantively, the Appellant’s situation is no different than Toggas. In both cases, structural damage had occurred and the buildings were unsafe. The Zoning Commission has

made it clear that the cause or origin or fault for the unsafe condition (casualty) is not relevant or within the scope of the Board's authority.

The Board concluded "that the exception to the side yard requirement granted by § 405.8 for the southwestern non-conforming side yard was not lost with the emergency removal (without a permit or prior DCRA authorization) of the den as a result of the damage from Hurricane Isabel, which constitutes a casualty or an Act of God." BZA Order No. 17270, Paragraph 12. Although Toggas involved a Hurricane which is readily considered an "Act of God," the outcome would not have changed if the Board had determined that the damage that occurred was a "casualty" or other structural damage. Thus, the Board's decision in BZA Order No. 17270 directly supports the Fourth Permit and the approval of the Fifth Permit Application to reconstruct part of the original non-conforming structure that suffered a "casualty," was deemed unsafe, and demolished in accordance with the advice and Fourth Building Permit provided by DCRA. The Fourth Permit also clearly authorized reconstruction of the structure to be demolished.

For the reasons discussed above, it is hereby **ORDERED** that:

The appeal of the denial of the Revised Permit Application is GRANTED.

Vote taken on _____.

VOTE: _____ - _____ - _____ (Ruthanne G. Miller, Marc D. Loud, Mary Oates Walker, Shane Dettman, and Gregory N. Jeffries to grant.

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

Five Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____

JERRILY R. KRESS, FAIA

Director, Office of Zoning

FINAL DATE OF ORDER: _____

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