

DISTRICT OF COLUMBIA GOVERNMENT
BOARD OF ZONING ADJUSTMENT

Appeal of:

Stephanie Wallace

Re: 5013 Belt Road, NW

Appeal No. 17747

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**INTERVENORS' REPLY BRIEF
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS
AND FOR RELATED RELIEF**

Intervenors Mary Grumbine and Jack Simmons ("Intervenors") submit this memorandum in reply to the Opposition of Appellant to Intervenors' Motion to Dismiss ("Developer's Opposition") and in reply to the District of Columbia's Response to Intervenors' Motion to Dismiss. The Developer opposes the motion to dismiss and the District supports Intervenors' position that the determination of the Zoning Administrator ("ZA") should be upheld as a matter of law.

Developer's Opposition and her statements to the Board of Zoning Adjustment ("BZA") on April 29, 2008, fully admit the basis for Intervenors' Motion to Dismiss:

First, Developer conceded on April 29, 2008, that the pre-1933 farm house at 5013 Belt Road no longer exists. All that stands on the property now is Developer's new construction.¹

Second, Developer concedes that the "structural damage caused by termites had occurred long before the Appellant had purchased the Property." Developer's Opposition at 3, citing

¹ Developer's Motion for Summary Judgment, filed before the hearing of April 29, 2008, had asserted that a portion of the pre-1933 farm house remained. Summary Judgment Motion at 2 ("Significantly, a portion of the existing original single family dwelling was not demolished. Exhibit D (site plan showing only portion of original structure demolished).") (emphasis in original).

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Premo Affidavit at ¶ 16 (the termite damage “was not of recent origin, but dated back many years before Ms. Wallace’s purchase of the property in April 2004.”). ²

Accordingly, there is no pre-existing structure under which to grandfather the non-conforming side yard setbacks under 11 DCMR § 405.8 and there is no casualty or Act of God under which to invoke 11 DCMR § 2001.6.

Finally, Developer does not satisfy, as a matter of law, the stringent requirements of either the doctrine of laches or the doctrine of equitable estoppel, as addressed by the District’s Opposition. That discussion is incorporated herein by reference, as are Intervenor’s prior submissions. Because of the admissions in Developer’s Opposition, the question of Developer’s lack of good faith reliance on the actions of the District is amplified below.

Intervenor’s submit, therefore, that there is no legal basis for this Appeal and it should be dismissed. Intervenor’s further submit that the ZA’s decision to deny Developer’s fifth building permit application should be affirmed by the BZA, 11 DCMR § 3100.4, and that the BZA should order that the current illegal structure on the property be razed immediately.

Discussion

Developer’s Opposition merely serves to more fully substantiate the legal bases for Intervenor’s Motion to Dismiss. First, although Developer opposes Intervenor’s Motion, she cites no legal precedent or other authority to support her position or to challenge the legal

² Developer’s Notice of Appeal alleges that the casualty or Act of God was termite damage. In Developer’s Opposition, including the Premo Affidavit, Developer now seeks to assert another basis, namely that the structural damage to the property was also due to “prolonged exposure to moisture from the ground below the building.” Developer’s Opposition at 3, citing Premo Affidavit at ¶ 17. Even if it were proper to indirectly amend the Notice of Appeal in this fashion, Developer’s argument fails for the same reason as her termite argument fails: She admits that the groundwater damage is a result of “prolonged exposure[,]” and, therefore, there is no sudden occurrence that could trigger application of either casualty or Act of God under 11 DCMR § 2001.6.

authority cited in Intervenor's Motion to Dismiss.³ Second, Developer's attempt to trivialize the bases for Intervenor's Motion, Developer's Opposition at 2, further shows a fundamental misunderstanding of both the factual and the legal issues involved in her own appeal.⁴

Third, and most importantly, Developer now unambiguously admits full and timely knowledge of structural defects by the beginning of March, 2005. Developer's Opposition at 2; Premo Affidavit at ¶¶ 13, 17, and 18.⁵ It is important to note that prior to the submission of Developer's Opposition, her case was focused on termites. E.g., Developer's oral presentation to the BZA on April 29, 2008. She admits that she purchased the property in "as is" condition, Developer's Opposition at 3, with all of the legal connotations of that term, including the absence of any warranties. She did not ask for any inspection (termite or otherwise) at any time prior to the real estate closing.⁶ Other than a pre-closing "visual" inspect[ion]" by Mr. Premo, Premo Affidavit at ¶ 8, there is no suggestion that Developer hired any engineer or other property inspector prior to even obtaining her first building permit. In fact, there was an inspection conducted by a construction supervisor, Mr. John Kraher, in February 2004 at the

³ Developer purports to reserve the right to make further submissions to the BZA. Of course, should Developer suddenly submit any legal authority or otherwise challenge the position of Intervenor, Intervenor likewise reserve the right of reply.

⁴ For example, the phrase "lack of maintenance" figures explicitly and prominently in the ZA's decision. The concept of negligence is implicit. The "Stop Work Orders" bear directly on the legal standards for reliance, one of the elements of Developer's claim of equitable estoppel, as they show Developer's repeated violations of her building permits rather than reliance on them to perform the work she did.

⁵ A number of the statements in the Premo Affidavit are incorrect and will be addressed in the event that this matter proceeds to a hearing.

⁶ See letter of prior owner, to be provided, confirming that no inspection request was made of her.

request of Intervenor John Lemoine. Mr. Kraher opined that, because of the severe damage he observed, the existing house “should be torn down and replaced with something new.”⁷

Developer, nevertheless, submitted an application for a building permit to construct an addition to the existing pre-1933 farm house.⁸ She admits discovery in early March 2005 of severe structural damage to the property. Developer’s Opposition at 2-3 and Premo Affidavit, ¶¶ 14-18 particularly 18. However, Developer went ahead and dismantled the back half of the existing pre-1933 house without a demolition permit. When the District became aware of this, it issued a Stop Work Order for exceeding the scope of the building permit for an addition. Intervenor’s Opposition to Appellant’s Motion for Summary Judgment at Exhibit M.

Because Developer knew at that point that the pre-1933 house was unsound, she could no longer rely on it as the basis for grandfathering nonconforming side-yard setbacks. She therefore had an affirmative duty to notify the District of the lack of structural integrity of the pre-1933 house and, if she wished to construct a new structure that was not fully conforming to present zoning regulations, to apply for a variance based on the knowledge that the original house was so severely structurally damaged that it could not be used. She did not do so.

Instead, Developer applied for a revision to her building permit that, when issued, required her to take steps to *preserve* the original farm house, even though she knew that she could not preserve the pre-1933 farm house and that she had taken no steps to preserve it. Intervenor’s Opposition to Appellant’s Motion for Summary Judgment at Exhibit I. In fact, all

⁷ Intervenor Lemoine is submitting Mr. Kraher’s statement in his own submission.

⁸ “Addition” doesn’t fit the customary usage of the word when describing the wooden frame McMansion constructed by Developer. The pre-1933 farm house was 953 square feet and the addition is more than *three* (3) times larger. The term “McMansion,” which developer takes exception to, perfectly fits the very large wood frame which developer built in a week.

three of Developer's three permit applications filed after her admitted March 2005 knowledge of the structural unsoundness, were premised *directly* on the continued existence of that structure.⁹ In sum, Developer did not submit an engineering report until January 2007 (by which point she had left what remained of the pre-1933 house open to the elements for twenty-four months).

Developer's reliance on her construction contractor, Mr. Allen Premo, as an expert¹⁰ merely underscores the fact that Developer had actual notice of the condition of the property as of the time when he first toured the property before purchase, but certainly as of the time he saw the extensive structural deterioration in March, 2005. See Premo Affidavit at ¶¶ 14-18. Yet, there is absolutely no indication that Mr. Premo, any more than the Developer brought the true condition of the original house to the attention of the District or acknowledged the consequences of the fact that the original structure, in his view as confirmed by the engineering report, could not be saved.¹¹

As the nonconforming side-yard setbacks of the addition were premised on the continued existence of the pre-1933 farm house, once it became clear in March 2005 that the original house could not be saved, the legal basis for the first building permit ceased to exist. Under her duty to conduct all construction in accordance with the applicable regulations, Developer was obligated

⁹ Developer violated each of those permits by conducting work that was not authorized by her building permits and, in each instance, she was issued a stop work order by the District.

¹⁰ Developer fails to disclose sufficient credentials to qualify Mr. Premo as an expert. In fact, his expertise is highly questionable since it was the activities of his firm that garnered four successive stop work orders on this project, other health and safety violations posted over the years, and substantial damage to neighboring properties.

¹¹ Mr. Premo reads the engineering report as confirming that "the existing structural damage and resulting lack of structural integrity would have resulted in the catastrophic collapse of the original 1933 single-family dwelling." Premo Affidavit at ¶ 18.

to bring this fact to the attention of the District, at the very least when she applied for the second building permit.

In sum, rather than reasonable, good faith reliance on the District's actions, there was a calculated pattern of repeated omissions or misrepresentations about the condition of the pre-1933 farm house in order to gain the advantages of the grandfather provision. The grandfather provision, 11 DCMR § 405.8, is the only way that the Developer could have built the far larger nonconforming structure now on the property.

Relief

Because the Notice of Appeal fails to set out a claim upon which relief may be granted, the decision of the ZA must be upheld and this appeal must be dismissed as a matter of law. Nevertheless, this does not fully dispose of this case because the illegal structure remains on the site and the BZA has the authority, under 11 DCMR § 3100.4 to fashion an appropriate remedy.

The facts here clearly require that Developer's structure be razed. In the first place, this is an illegal building in that it does not conform to the zoning regulations.¹² It has no right to remain in existence. Town of Front Royal v. Martin Media, 542 S.E.2d 373, 261 Va. 287 (Va. 2001). In Town of Front Royal, a billboard was not lawful when erected and there was no evidence of a variance. Holding that the grandfather provision of a subsequent zoning ordinance could not make the billboard legal because it was not legal when constructed, the Virginia Court held that "the Town may require Martin Media to remove the billboard." Id., 542 S.E.2d at 377, 261 Va. at 295. See Wright v. County of Du Page, 736 N.E.1d 650, 659, 316 Ill. App. 3d 28, 38 (Ill. App., 2d Dist. 2001) ("A use that was nonconforming at its inception does not constitute a

¹² That wholly new property has been rightly characterized by the District as an "illegal structure," District's Opposition at 6, "construction that Appellant erected is illegal," Id. at 10 (twice), and "illegal addition." Id. at 13.

legal nonconforming use and therefore cannot be protected from elimination for violation of present zoning ordinances.”).

Just as important, and while Developer may prefer to ignore it, the purpose of the zoning laws and regulations is to protect the health and safety of the public and, under the District’s police powers, to provide for enforcement of those laws for the benefit and protection of the District and its citizens. See Goto v. D.C. Board of Zoning Adjustment, 423 A.2d 917, 915 (D.C. 1980 (there is a public interest in the enforcement of the zoning laws). The zoning laws exist to protect the community as a whole. They do not exist to economically reward a Developer who constructed a McMansion in violation of each of her building permits and that is not in conformance with the zoning laws.

Developer’s activities here, including the illegal structure itself, have endangered the health and safety of the public and, in particular, this neighborhood since January 2005. As noted, the Developer has been repeatedly cited for violation not just of the zoning laws, but also for violation of health and safety provisions. As recently as May 10, 2008, the property was cited for trash accumulation, for overgrown vegetation, and, most important, for lack of barricading of the property (the lack of barricading has been a long-standing problem).¹³

This structure also violates the Comprehensive Plan as it is not in character with the neighborhood. See Intervenor’s Opposition to Appellant’s Motion for Summary Judgment at Exhibit F. It is too large for the small, narrow lot and it is too close to the property lines of the neighbors (whose properties have already been damaged). Given this fact and the three-year

¹³ Many of Developer’s violations have been addressed in previous briefs and, in the interest of brevity, they are not repeated here. A more complete list could be supplied upon request.

We note that, for the first time since Developer started this project by tearing off the roof of the pre-1933 farm house in January 2005, a chain link fence was erected on May 15, 2008.

construction history, it is hard to imagine how this structure could be completed without further incidents of trespass on the neighboring properties or how it could be completed without further damage to those properties. Even if it could be constructed, the very narrow side-yard setbacks of the addition (clearly less than the permissible five feet even under 11 DCMR § 405.8) will make the exterior of the house almost impossible to maintain.¹⁴ The District will suffer no ill effects if this illegal structure is razed, as a developer can certainly build a legal house which will improve the neighborhood, eliminate an unsafe structure, and increase the District's tax base.

Even if the question of the appropriate relief were viewed within the context of Developer's arguments regarding estoppel, such an argument would fail. Of the six estoppel elements, Developer might possibly be able to show only the first one: the expenditure of money. See Bannum v. D.C. Board of Zoning Adjustment, 894 A.2d 423, 431 (D.C. 2006). However, one of the prime considerations in the application of an equitable remedy – and equitable estoppel is, by definition, an equitable remedy – is not only fairness to the developer but also fairness to the District and the neighborhood. As noted above, the damage caused by this Developer's construction is extensive and encompasses both economic and non-economic matters – there is expensive physical damage to neighbors' property; there is the loss of more than three years of the right of the entire neighborhood to the peaceful enjoyment of their property, there are the serious safety and fire hazard concerns of the neighborhood continuing to this day.

Finally, the zoning regulations authorize the BZA to “make any order that may be necessary to carry out its decision or authorization; and to that end shall have all the powers of the officer or body from whom the appeal is taken.” 11 DCMR § 3001.4. DCRA clearly has the

¹⁴ A site visit by the BZA may be appropriate if this Motion to Dismiss and the relief requested are not granted.

authority and power to order that this building be razed. 12A DCMR § 104.3 (removal of illegal structures). Moreover, buildings constructed, *inter alia*, in violation of the zoning regulations, are “illegal construction” and DCRA may order the condition to be “corrected” within a reasonable time frame. If the condition is deemed to be a fire safety hazard or to otherwise constitute a hazard to the public, it may take corrective action immediately. 12A DCMR § 113.7. “A vacant building, unguarded or open at window or door, *shall be deemed a fire hazard and unsafe* within the meaning of the Construction Code. 12A DCMR § 115.1 (emphasis supplied). This structure – left open and unprotected for years – clearly falls within these provisions. The BZA should order that it be razed immediately.

Conclusion

For all of the foregoing reasons, the Notice of Appeal in this matter fails to set forth a claim upon which relief may be granted, the appeal should be dismissed, and the current structure on the property razed.

Respectfully submitted,



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Certificate of Service

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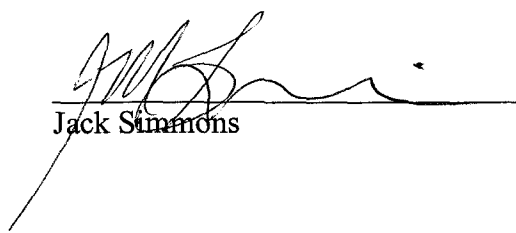
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