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**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

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Appeal of Ms. Stephanie Wallace

BZA Appeal No. 17747
ANC 3E
Public Hearing: July 15, 2008

APPELLANT'S SUPPLEMENTAL STATEMENT ON CASUALTY

The Appellant, Ms. Stephanie Wallace, by and through undersigned counsel, respectfully submits this Supplemental Statement on Casualty ("Supplemental Statement").

In additional support of this Supplemental Statement, Ms. Wallace specifically incorporates by reference, her Appeal filed on October 19, 2007, Pre-Hearing Statement and Motion for Summary Judgment, Opposition to Intervenor's Motion to Dismiss, and Notice of Related Appeal and Motion to Amend Appeal to Incorporate Directly Related Denial By Zoning Administrator Under 11 DCMR § 401.1 as if fully set forth herein.

The Appellant expressly reserves the right to supplement this Supplemental Statement in her other Board-authorized pre-hearing submissions and in her hearing presentation on July 15, 2008.

I. BACKGROUND

Ms. Wallace purchased 5013 Belt Road, N.W. (Square 1756, Lot 64) ("Property") in "as-is" condition in April 2004. At that time, the Property was improved with a single-family detached dwelling dating back to at least 1933. In the Sales Contract, the Seller affirmatively (mis)represented to Ms. Wallace that the Property had no history of: 1) termite infestation; and 2) foundation or structural defects. Prior to the closing, Mr. Allen Premo, Ms. Wallace'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.

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17747
EXHIBIT NO. 41

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Board of Zoning Adjustment
District of Columbia
CASE NO. 17747
EXHIBIT NO. 41

On December 9, 2004, the Department of Consumer and Regulatory Affairs (“DCRA”) issued the original Building Permit authorizing Ms. Wallace 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”).

The catastrophic structural damage to the property was not discovered 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. Based on Mr. Premo’s 42 years construction experience, the catastrophic structural damage that was caused substantially by termites had occurred long before Ms. Wallace purchased the Property. Additionally, 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 structure failure which occurred.

From October 23 to November 1, 2006, the addition to the existing single-family house was framed. Mr. Premo prepared to lift the front of the existing single-family house and discovered the front to be rotten with termite and other structural damage. Ms. Wallace’s engineer determined that lifting the existing single-family house was unsafe and would cause the structure to collapse.

On or about November 2, 2006, Mr. Premo met with DCRA 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. As directed by DCRA, Mr. Premo drafted revised plans and submitted for a building permit. As instructed, the 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 that would remain.

On February 14, 2007, a fourth building permit, Building Permit No. B103710 (the "Fourth Building 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." 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.

On March 12 to March 15, 2007, the front portion of the existing single-family house was demolished pursuant to the Fourth Building Permit.

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 Ms. Wallace to provide a detailed, step-by-step description of the sequence of demolition to be undertaken. Specifically, the "Demo Sequence" prepared and submitted by Ms. Wallace, 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 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.

II. BASIS FOR APPEAL

A. DCRA Authorized Reconstruction of Structurally – Damaged Structure

The Zoning Administrator has attempted to retract DCRA’s previous approval to allow Ms. Wallace to demolish and rebuild only a portion of an existing structurally unstable single-family house per the existing permits and plans. Building Permit No. B103710, 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,**” (“Fourth Building Permit”) Exhibit C (*Emphasis added*), and clearly authorized Ms. Wallace 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.

B. Reconstruction Authorized by § 2001.6

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

C. DCRA’s Action is Estopped and Barred by Laches

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.

D. § 401.1 Authorizes Enlargement or Replacement

The Zoning Administrator has denied Ms. Wallace's request to "enlarge or replace" the existing rear addition as a matter-of-right. Under § 401.1, Ms. Wallace is authorized to "enlarge or replace" the existing structure on the Property which does not meet the applicable lot area and lot width restrictions.

III. ARGUMENT

The Fourth Building Permit fully authorized Ms. Wallace 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. Only after submission of the Fifth Building Permit application, did DCRA direct Ms. Wallace 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.

In addition to acting beyond the scope of the Zoning Administrator's authority, denial of the Fifth Building Permit application violates 11 DCMR § 2001.6, which provides:

If a **casualty or act of God** results in damage to an extent of seventy-five percent (75%) or less of the cost of reconstructing the entire structure, the structure may be restored or reconstructed to its previous condition or to a more conforming condition; provided, that the reconstruction or restoration shall be started within twenty-four (24) months of the date of the destruction and continued diligently to completion.

A. 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).

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.

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 nonconformation 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.

B. A “Casualty” Occurred

The fact that the original 1933 structure was structurally unsound, at risk of collapse and “dangerously unsound” is undisputed. Ms. Wallace’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’s, 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 Ms. Wallace 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 Ms. Wallace and Mr. Premo had not acted responsibly and as is required by law to obtain permission to demolish the dangerous structure.

For purposes of establishing the casualty that occurred, it is entirely irrelevant whether at the time she purchased the Property, Ms. Wallace knew or should have known of the catastrophic structural damage that existed or the cause of that damage. However, it is critical that for Ms. Wallace 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 Ms. Wallace or anyone else, including Mr. Lemoine, could do under the circumstances. Although 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,² occurred long before Ms. Wallace 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 Ms. Wallace or any other purchaser could have done to control or prevent the catastrophic structural damage that existed or risk of collapse.

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.”

² Removal of side porch because of termite infestation constituted a practical difficulty. BZA Application No. 11386 (1973).

C. 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.

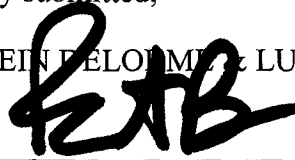
The Board concluded “that the exception to the side yard requirement granted by § 405.8 for the southwestern non-conforming side yard was not lost with the emergency removal of the den as a result of the damage from Hurricane Isabel, which constitutes a casualty or an Act of God.” BZA Order No. 17270, 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.” Thus, the Board's decision in BZA Order No. 17270 directly supports 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 Forth Building Permit provided by DCRA.

IV. CONCLUSION

For the foregoing reasons, Ms. Wallace has suffered a “casualty or act of God.” 11 DCMR § 2001.6.

Respectfully submitted,

GREENSTEIN DELOACH & LUCHS, P.C.



John Patrick Brown, Jr, # 417566

Stephanie A. Baldwin, # 463370

1620 L Street, N.W.

Suite 900

Washington, D.C. 20036

(202) 452-1400

Counsel for Appellant – Ms. Stephanie Wallace

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant's Supplemental Statement on Casualty was served as noted below, this 13th day of June, 2008, upon the following:

Electronically and By Hand

Matthew J. Green, Jr., Esq.
Melinda Bolling, Esq.
T. Gail Maddox-Levine, Esq.
Charles Thomas, Esq.
Office of General Counsel
Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Room 9400
Washington, D.C. 20002

Electronically and By First-Class Mail

Ms. Amy McVey
Chairperson
Advisory Neighborhood Commission 3E
4600 Albemarle St., NW
Washington, DC 20016

Electronically and By First-Class Mail

Ms. Lucy Eldridge
Advisory Neighborhood Commission 3E04
4104 Legation St., NW
Washington, DC 20015

Electronically and By First-Class Mail

Mr. John Lemoine
5011 Belt Road, NW
Washington, DC 20016

Electronically and By Messenger

Jack Simmons, Esq.
Assistant Attorney General
One Judiciary Square
441 4th Street, N.W., Suite 600 South
Washington, DC 20001



John Patrick Brown, Jr.