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Appeal of:

Stephanie Wallace

Appeal No. 17747

Re: 5013 Belt Road, NW

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RESPONSE TO THE B.Z.A.'S REQUEST FOR SUPPLEMENTAL BRIEFING ON
(1) THE MEANING OF THE TERM "CASUALTY,"
(2) APPELLANT'S ATTEMPT TO AMEND THE NOTICE OF APPEAL, AND
(3) RELATED MATTERS

Intervenors Mary Grumbine and Jack Simmons submit this supplemental statement in response to the request of the Board of Zoning Adjustment ("BZA") for supplemental briefing (1) on the question of the definition of "casualty" in the context of whether the long-standing termite damage / water damage¹ to 5013 Belt Road may be deemed a casualty and (2) on the question of whether Appellant may be permitted to amend her notice of appeal. It also briefly addresses several related matters.

A. The Meaning of the Term Casualty.

In this matter, Appellant has asserted that the termite damage to the pre-1933 farm house at 5013 Belt Road was a either an Act of God or casualty, giving her certain reconstruction rights under 11 DCMR § 2001.6. Appellant has conceded that the termite damage to 5013 Belt Road

¹ It should be noted that the Notice of Appeal in this matter raises only the issue of whether the termite damage is a casualty or an Act of God. Thus, this Appeal does not raise the question of whether water damage (or any other form of damage for that matter) may be considered a casualty or Act of God. Even if it were proper to raise such an issue, Developer's contractor (who she has offered as an expert) has stated that the water damage itself was a long-standing issue.

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was the result of a long-standing process, predating her 2004 purchase of the property. As has been documented in prior submissions (and, therefore, not repeated here), Appellant either knew or, as a matter of law, should have known of the termite damage to the house at the time she purchased it.²

Like an Act of God,³ the hallmark of a casualty is that it is a sudden loss. It is not the culmination of a long process of deterioration as occurred from the termite damage in this case. “Casualty – liability or loss resulting from an accident.” Harvey W. Rubin, Ph.D, CLU, CPCU, Barron’s Dictionary of Insurance Terms, 4th Ed. (2000), page 77. Other sources concur: “Casualty – A serious or fatal accident. A person or thing injured, lost or destroyed. A disastrous occurrence due to sudden, unexpected or unusual cause. Accident; misfortune or mishap; that which comes by chance or without design. A loss from such an event or cause; as by fire, shipwreck, lightening, etc.” Black’s Law Dictionary, 6th Ed. (1990), page 218.

² As previously addressed, where there is actual or imputed knowledge of the condition that led to the damage far before the actual loss occurred, there can be no right to build a new structure relying on the grandfather provision because the loss was not a casualty or Act of God. In fact, Developer had actual knowledge from before she applied for the first building permit that the building was old and had numerous structural problems which needed to be fixed. Her expert certainly could have seen those, or should have retained an expert in those areas to examine the viability of the original farm house.

³ In District of Columbia law, an “Act of God” is the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence. *Rosasco v. Sowder*, 31 A.2d 687, 689 (D.C. Muni. App. 1943). In the case of automobile accidents, under the Act of God doctrine, a driver is not chargeable with negligence if stricken by a sudden illness which the driver had no reason to expect and which rendered it impossible for the driver to control his car. *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933); *Watts v. Smith*, 226 A.2d 160 (D.C. App. 1967); *Christensen v. Gammons*, 197 A.2d 450, 452 (D.C. App. 1964).

This is reflected in the law of the District of Columbia, in the statutes that set forth the types of insurance that may be written in the District, generally describes casualty insurance as follows:

(2)(A) *Casualty*. – Upon the health of persons, or against injury, disablement, or death of persons resulting from traveling or general accidents by land or water, and against liability of the assured for injuries to employees or other persons;

(B) Against liability of the assured for the loss or destruction for loss of or damage to property;

(C) Upon the lives of domestic animals;

(D) Against loss of or damage to glass and its appurtenances;

(E) Against loss of or damage to any property resulting from the explosion of or any injury to any boiler, heater, unfired pressure vessel, pipes, or containers connected therewith, any engine, turbine, compressor, pump, or wheel or any apparatus generating, transmitting or using electricity, or any other machine or apparatus, connected with or operated by any of the previously named boilers, vessels, or machines; and including the incidental power to make inspections of and to issue certificates of inspection upon, any such boilers, apparatus, and machine, whether insured or otherwise:

* * *

D.C. Official Code § 31-2502.11 (2008). While the statutory language is antiquated, once again, the hallmark of casualty insurance is that it covers a sudden event, not a process.

The same is true in federal law. Under the Internal Revenue Code, certain losses are deductible for tax purpose. 26 U.S.C. § 165(c)(3). That provision, commonly referred to as the casualty loss provision, requires that such losses be characterized by suddenness and unforeseeability. *Appleman v. United States*, 338 F.2d 7299 (7th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Rosenberg v. Commissioner*, 198 F.2d 46 (8th Cir. 1952). Such losses are like fire, flood, storm, and shipwreck. *Buist v. United States*, 164 F. Supp. 218 (E.D. S.C. 1958); *W.F. Young, Inc. v. Commissioner*, 120 F.2d 159 (1st Cir. 1941). Anything else, as one court observed, renders the purported casualty loss hardly distinguishable from depreciation resulting from ordinary wear and tear. *Rosenberg v. Commissioner*, 198 F.2d at 46.

Thus, a casualty is not simply any loss or injury whatsoever, as Appellant argues. In fact, other than cite to the sixth definition in Webster's Unabridged Dictionary (bypassing the first five definitions), Appellant provides no definition of casualty, much less any definition as something other than a sudden loss. She provides no case law for such a proposition. In fact, her position is illogical. If a casualty were any loss or damage to property, whether sudden or long-term, then any loss would give right to reconstruction under section 2001.6. Her reading would essentially make the word "casualty" meaningless and permit reconstruction under 2001.6 in virtually any circumstance.

Nor does the BZA's Toggas decision, which Appellant has repeatedly cited, support her position. In Toggas, the damage was the result of a hurricane. The BZA itself characterized the loss in Toggas as an Act of God or casualty and concluded that the nonconforming use could be reconstructed. Clearly central to the BZA's decision was the fact that the loss was a sudden, uncontrollable occurrence.

B. The New Notice of Appeal Should Not Be Permitted.

Developer has filed a new Notice of Appeal and seeks to bring it before the BZA as part of this pending case. She asserts that she has a right to repair or replace the addition that she has already constructed – an issue that she obviously forgot to raise in the original notice of appeal. She should not be permitted to do this for any number of reasons.

First, Developer submitted the appeal only *one day* after seeking a decision on the underlying issue from the Zoning Administrator (ZA), to whom the issue is entrusted in the first place. One day is simply not sufficient for the ZA to review, analyze, and make a decision on the Developer's newest claim. Unless and until the ZA has sufficient time to do so, this appeal is not ripe. Developer cannot simply disregard the administrative process in this fashion. The

request for a decision by the ZA is not a mere formality and Developer may not disregard the required steps of the administrative process.

Second, her new notice of appeal seeks to inject a wholly new issue – the alleged right to repair or replace the addition that she has constructed. Since this issue arises out of the same facts and the same building permit and construction process underlying the present appeal, it should have been raised in the notice of appeal underlying this case. That she failed to raise that issue and that she has failed to address it or brief it prior to the new notice of appeal is dispositive. The time has long passed for Developer to raise the issue and she is now barred from doing so.

Third, and perhaps most insidious, the new notice of appeal, by asserting a separate right to repair or rebuild the addition, tries to bypass the fundamental issue of whether Developer may even retain that addition with its non-conforming side yard set-backs. Her new notice of appeal simply assumes such a right.

Finally, of course, there will be substantial prejudice to parties, including the Advisory Neighborhood Commission. As this was first presented only several weeks ago, it is apparent that the ANC has not had the opportunity to schedule this matter and to meet and make a decision on it.

C. Other Considerations.

It is particularly troublesome that Appellant continues to improperly inject the topic of settlement into her submissions to the BZA. Such considerations are clearly not within the purview of the BZA. (They would only become indirectly pertinent if the parties were to reach a settlement and that settlement were to require BZA approval, *e.g.*, through a request for a consented to zoning variance.)

In any event, the statements of Appellant on settlement are not correct. The Developer, the neighbors, and the ANC have met to discuss possible resolutions. The Developer in the first such two meetings offered to do nothing but to wait for the BZA's ruling. Most recently, in response to a construction proposal from Developer, one of the parties sent a letter to Developer (on behalf of all the Intervenors) raising questions about the building project and offering to meet for settlement purposes when the questions were addressed. There has been no response to that letter.⁴ Thus, the ball is squarely in Developer's court and the assertion that Intervenors and neighbors have refused to meet is simply wrong.

Finally, the parties, including Intervenors, have already filed lengthy expositions of the facts of this matter, including developer's misstatements to the city, followed by the City issuing stop work orders when developer exceeded the scope of her building permits, as she marched forward to completely raze the pre-1933 farm house and replace it with the McMansion. For example, the Developer admitted in the April 29 hearing that her plans and plat filed for the fourth building permit (showing that a portion of the pre-1933 farm house remained on the lot at that time) were false when she was forced to acknowledge that, following the March 2007 razing of the very front portion of the house, nothing remained of the original farm house. Of course, there can be no right of reliance on a building permit issued where the City was not provided all of the material facts (and if for no reason other than this one, Developer's estoppel argument must fail). Developer, rather than trying to get the City to believe that some portion of the pre-1933 farm house remained (thus permitting grandfathering side-yard setbacks as a matter of right), should have forthrightly applied for a variance to build a nonconforming house on the lot.

⁴ This is not the first time that Intervenors have not heard from Developer. On several occasions, one of the Intervenors has not been served.

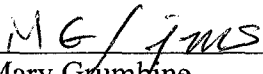
Of course, she should also have taken steps from the date of her purchase of the farm house to strengthen and preserve it and avoid the destruction of the pre-1933 farm house. Instead, the Developer did neither. She simply opted to destroy the original farm house while attempting to gain the benefit of the grandfather clause.

Conclusion

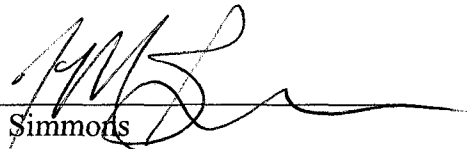
For all of the foregoing reasons, the loss in this matter is not a casualty and the attempted amendment of the notice of appeal should be denied.

Dated: June 27, 2008

Respectfully submitted,



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Certificate of Service

This is to certify that the foregoing Response to the B.Z.A.'S Request for Supplemental Briefing on (1) the Meaning of the Term "Casualty," (2) Appellant's Attempt to Amend the Notice of Appeal, and (3) Related Matters was served on each of the following by first class mail, postage prepaid, on June 27, 2008:

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