

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

Appeal of Capitol Hill Restoration Society

BZA Appeal No. 18154

Hearing Date: January 4, 2011

ANC 6B

2010 DEC 23 PM 9:09

**INTERVENOR,¹ MARY DONOVAN'S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

This Motion to Dismiss the Appeal of the Capitol Hill Restoration Society in BZA Appeal No. 18154 ("Appeal") for Lack of Jurisdiction is made and submitted to the Board of Zoning Adjustment by Greenstein DeLorme & Luchs, P.C., by Jacques B. DePuy, Esquire, and John Patrick Brown, Jr., Esquire, attorneys for the Intervenor,¹ Mrs. Mary M. Donovan, owner of 1363 Massachusetts Avenue, S.E. ("Property").

A. STATEMENT OF FACTS

Mrs. Donovan owns the Property and occupies the residence with her husband, on whose behalf a reasonable accommodation under the Federal Fair Housing Act was requested and approved.

On October 13, 2010, the Department of Consumer and Regulatory Affairs ("DCRA") issued Building Permit No. B1008586 authorizing Mrs. Donovan to construct a Rear Porch Addition to the Property (the "Permit"). Exhibit "A". The Permit was reviewed and approved by DCRA² in compliance with the "reasonable accommodation" provisions of the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B) (the "Act") and the District

¹ By letter dated and filed December 20, 2010, Mrs. Donovan requested to Intervene in this Appeal pursuant to 11 DCMR § 3112.15.

² Under 14 DCMR § 116.1, the Director of DCRA authorized Mr. Matthew LeGrant to act on behalf of DCRA as the reviewing official for Mrs. Donovan's request for reasonable accommodation under the Fair Housing Act. DCRA Bulletin No. 1-01D-08: Reasonable Accommodation Requests Policies and Procedures (January 9, 2009). As discussed in greater detail below, Mr. LeGrant was not acting in his capacity as Zoning Administrator and his decision was not based on the Zoning Regulations.

of Columbia implementing regulations, 14 D.C.R.R. § 111, *et. seq.* without regard to the applicable Zoning Regulations of the District of Columbia (“Zoning Regulations”).

B. ARGUMENT

1. DCRA’S APPROVAL OF A REASONABLE ACCOMMODATION IS BASED ON THE FAIR HOUSING ACT AND D.C. IMPLEMENTING REGULATIONS

The Fair Housing Act *intra alia* makes it unlawful to discriminate (i) by making unavailable a dwelling or (ii) in the provision of facilities in such dwelling because of a handicap of a person residing in the dwelling unit. Discrimination is defined in the Act as “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling...” (See 42 U.S.C. § 3604(f)(3)(B).)

The application and interpretation of the Fair Housing Act in the District of Columbia is governed by a Rulemaking of the Department of Consumer and Regulatory Affairs issued pursuant to the authority conferred by Reorganization Plan No. 1 of 1982 and Reorganization Plan No. 1 of 1983 and a Stipulated Agreement between the District of Columbia and the United States Department of Justice dated September 30, 1997, which rulemaking was published in the D.C. Register on November 13, 1998 and codified as 14 DCMR § 111 (“DCRA Rulemaking”). The DCRA Rulemaking *inter alia* implements the policy of the District of Columbia which is to facilitate housing for the handicapped and to comply fully with the spirit and the letter of the Fair Housing Act. The DCRA Rulemaking establishes procedures regarding requests for reasonable accommodation under the Fair Housing Act and states that “(a)ny person eligible under the Fair Housing

Act may request a reasonable accommodation as provided by the Fair Housing Act...pursuant to the procedures set out in this section in lieu of the procedures that would otherwise apply to such requests under other chapters of this Title.” (Emphasis added.)(See 14 DCMR §111.2.)

The application and interpretation of federal law pursuant to procedures established for such purpose in the District of Columbia does not authorize or allow for a decision on a reasonable accommodation under the Fair Housing Act to be based on, or limited by, the Zoning Regulations. United States v. District of Columbia, 538 F.Supp.2d 211, 219 (D. DC 2008) (granting declaratory judgment and injunctive relief against the District in the “Boys Town” case). In the aforementioned case, the Court found that both DCRA and later the BZA in Appeal No. 16791 (Southeast Citizens for Smart Development and ANC 6B) had violated the reasonable accommodation mandates of the Fair Housing Act. 538 F.Supp.2d 211, 218-219. Subsequent to the Court’s decision, the District and U.S. Department of Justice entered into a Settlement Agreement, dated May 1, 2009 (“Settlement Agreement”). Under this comprehensive agreement, the District agreed to implement additional Fair Housing Act procedures, including training, reporting and record-keeping, and designation of a Fair Housing Act Compliance Officer. The Settlement Agreement remains in effect and the District, including DCRA, continues to be subject to monitoring by the Department of Justice and federal court supervision.

Because of the applicability of the Fair Housing Act, the DCRA Rulemaking and the Settlement Agreement, the Zoning Regulations are irrelevant and inapplicable to a decision made by the Director of DCRA or her designee with respect to a reasonable accommodation under the Fair Housing Act.

2. DCRA'S APPROVAL OF A REASONABLE ACCOMMODATION UNDER THE FEDERAL FAIR HOUSING ACT IS A "FINAL DECISION" AND IS NOT SUBJECT TO FURTHER ADMINISTRATIVE REMEDIES OR PROCEEDINGS

Section 111.13 of the District of Columbia Municipal Regulations (14 DCMR § 111.13) states as follows: "The Director's decision pursuant to subsections 111.11 or 111.12 shall be deemed a final decision of the District of Columbia government, and, therefore, there shall not be any further resort to administrative remedies."³ The Director (through her designee)⁴ made a decision in writing granting approval as a reasonable accommodation on October 8, 2010 and the Permit was issued on October 13, 2010. Exhibit "A". That decision is final and is not subject to further administrative remedies, including an appeal of any kind.

Based on the foregoing, the Board of Zoning Adjustment has no jurisdiction to consider the Appeal and has no power or authority to grant any remedies or take any other action with respect to the Appeal.

3. THE BZA'S JURISDICTION IS STRICTLY LIMITED TO THE ZONING REGULATIONS

The Zoning Act of 1938 authorizes the Board of Zoning Adjustment to hear and decide appeals of decisions granting or refusing a building permit or certificate of occupancy "based in whole or in part upon any zoning regulation or map adopted under this subchapter." DC ST § 6-641(f). Furthermore, the Zoning Act specifies that appeals may be heard by the BZA "where it is alleged by the appellant that there is error in any

³ Sections 111.11 and 111.12 state, in relevant part, as follows:

111.11 The Director shall set forth in writing the decision on the request for reasonable accommodation.The Director's decision and notice shall be sent to the applicant by certified mail."

111.12 If the Director fails to render his or her decision on a request for reasonable accommodation within the time allotted by subsection 111.9, the request shall be deemed granted.

⁴ All references herein to the D.C.R.A. Director shall be to the Director or her designee.

requirement, decision, determination, or refusal made by any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this subchapter." (Emphasis added.) DC ST § 6-641.07(g)(1), 11 DCMR § 3100.2. The decision by the DCRA Director to grant a reasonable accommodation was made pursuant to the Fair Housing Act and the DCRA Rulemaking (Title 14), not the Zoning Regulations.

The Zoning Regulations, in Section 3100 entitled "Jurisdiction; Authority; Powers" of the Board of Zoning Adjustment, authorize the BZA to hear and decide appeals where an error is alleged by an appellant in a determination made by any administrative officer "in the administration or enforcement of the Zoning Regulations." (Emphasis added.) 11 DCMR § 3100.2. The decision of the Director to approve a request for a reasonable accommodation was made pursuant to the Fair Housing Act and the DCRA Rulemaking, not the Zoning Regulations.

Based on the foregoing, it is respectfully established that the Board does not have jurisdiction to hear or take any action with respect to the Appeal and it must be dismissed with prejudice.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.



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Counsel for Mrs. Mary Donovan, Intervenor

EXHIBIT "A"

Department of Consumer and Regulatory Affairs

Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4589

Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557



BUILDING PERMIT

THIS PERMIT MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS OF WORK
UNTIL WORK IS COMPLETED AND APPROVED

Issue Date: 10/13/2010

PERMIT NO. B1008586

Expiration Date: 10/13/2011

Address of Project 1363 MASSACHUSETTS AVE SE		Zone: R-4	Ward: 6	Square: 1037	Suffix:	Lot: 0073
Description Of Work: Rear porch addition.						
Permission Is Hereby Granted To: Donovan Mary M		Owner Address: 1363 MASSACHUSETTS AVE SE WASHINGTON, DC 20003-1540			PERMIT FEE: \$266.00	
Permit Type: Addition Alteration Repair	Existing Use: Two-Family Flat - R-3		Proposed Use: Two-Family Flat - R-3		Plans: Yes	
Agent Name:	Agent Address:	Existing Dwell Units: 2	Proposed Dwell Units: 2	No. of Stories: 2	Floor(s) Involved:	
Conditions/ Restrictions: This Permit Expires if no Construction is Started Within 1 Year or if the Inspection is Over 1 Year. All Construction Done According To The Current Building Codes And Zoning Regulations; As a condition precedent to the issuance of this permit, the owner agrees to conform with all conditions set forth herein, and to perform the work authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all work authorized by this permit and to require any change in construction which may be necessary to ensure compliance with the permit and with all the applicable regulations of the District of Columbia. Work authorized under this Permit must start within one(1) year of the date appearing on this permit or the permit is automatically void. If work is started, any application for partial refund must be made within six months of the date appearing on this permit. Lead Paint Abatement Whenever work related to this Permit could result in the disturbance of lead based paint, the respondent shall abide by all applicable provisions of the 'Lead-Hazard Prevention and Elimination Act of 2008' and the EPA 'Lead Renovation, Repair and Painting rule' regarding lead-based paint activities including adherence to lead-safe work practices. For more information, go to http://ddoe.dc.gov , Lead and Healthy Housing.						
Director: Linda K. Argo		Permit Clerk: Virender Bhogal				
TO REPORT WASTE FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557						

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Intervenor, Mary Donovan's Motion to Dismiss for Lack of Jurisdiction was served by electronic mail and by first-class mail, this 23rd day of December, 2010, upon the following:

Mr. Matthew LeGrant
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
1100 4th Street, S.W.
Washington, D.C. 20024

Melinda M. Bolling, Esq.
Jay A. Surabian, Esq.
Office of the General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W.
Washington, D.C. 20024

Mr. Gary M. Peterson
Capitol Hill Restoration Society
810 Massachusetts Avenue, N.E.
Washington, D.C. 20002-6016

Mr. David Garrison, Chairperson
Advisory Neighborhood Commission 6B
703 D Street, S.E.
Washington, D.C. 20003

A handwritten signature in black ink, appearing to read 'JTB', is written over a horizontal line.

John Patrick Brown, Jr.