

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

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Appeal of Lawrence and Kathleen Ausubel

Appeal No. 18300

**DISTRICT OF COLUMBIA'S OPPOSITION TO REQUEST FOR STAY OF BUILDING
PERMIT AND RESPONSE TO THE MOTION TO DISMISS**

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"), by and through undersigned counsel, respectfully submits its opposition to the Request For Stay Of The Building Permit filed on September 9, 2011 by Appellants and its response to the Motion to Dismiss filed by Intervenor on October 28, 2011.

1) The Request To Stay The Building Permit Must Be Denied

Appellants are asking the Board to stay Building Permit no. 1103986 (the "Building Permit") issued by DCRA on July 13, 2011 allowing the construction of an addition to 2750 32nd St., NW (the "Property"). The Property is owned by 2750 32nd Street Trust ("Owner"). The Appellants are the owners of 2744 32nd Street, NW, which abuts the Property. In their appeal Appellants argue that the Building Permit was issued by DCRA in violation of provisions of the Zoning Regulations concerning the Tree and Slope Protection Overlay ("TSP").

On November 2, 2011, Owner filed an opposition to Appellants' request for stay of the Building Permit. Owner correctly explains that in order to prevail in a motion for stay, the moving party must meet all elements of the well established four prong test:

[T]he party seeking the stay must demonstrate that (i) it is likely to prevail on the merits, (ii) irreparable injury will result if the stay is denied, (iii) the opposing

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EXHIBIT NO. 30

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March 2011; that Zoning Administrator informed Appellants of his decision that the project was in compliance with the TSP Overlay regulations on June 14; that Appellants had notice of the issuance of the Building Permit on July 13; and that Appellants indicated their intention to file an appeal with the Board even before the Building Permit was issued. The Appellants' lengthy delay in seeking the stay should by itself serve as a basis for the Board to deny this request and make clear that there is in fact no emergency.

Accordingly, the request for stay must be denied by the Board.

2) DCRA's Response To The Motion To Dismiss

The Owners' Motion to Dismiss essentially raises the legal question of whether the Zoning Administrator's approval of a plan or stated intent to approve a plan in advance of the issuance of a building permit is sufficient to trigger the 60 day filing deadline when the Appellants had notice of such approval. Appellants argue that it is the issuance of the building permit that triggers the 60 day deadline. Considering that it does not appear that the Board has previously addressed this question and that DCRA has not raised this issue in prior cases, DCRA declines to take a position on this question.

Nevertheless, in order to assist the Board in deciding this issue, DCRA responds to the Motion to Dismiss and Appellants' Opposition as follows:

a. After informing the Appellants on June 14 that he would approve the application and plans, the Zoning Administrator did just that. On June 21, the Zoning Administrator stamped and signed the plans and application and entered a notation in DCRA's computer system that the zoning review of the building permit application was approved. Depending on the scope of work, building permit applications must often be reviewed by multiple disciplines (plumbing, electrical, structural, etc.) and sometimes by other government agencies. While the Zoning

party will not be harmed by a stay, and (iv) the public interest favors the granting of a stay.

See Appeal No. 17532-B of AppleTree Institute for Education Innovation, Inc. (Aug. 8, 2008) (citing *Kuflom v. District of Columbia Bureau of Motor Vehicle Services*, 543 A.2d 340, 344 (D.C. 1988)).

DCRA joins Owner's opposition to the request as it is clear that Appellants fail to meet any of the four parts of this test. Not only do the facts of this case not support the granting of a stay, but the Appellants' request is facially deficient as it fails make any statement as to whether the Owner will be harmed by a stay or address how the public interest favors the granting of a stay. Similarly, Appellants make no attempt to argue the likelihood of their success in this appeal nor do they describe how whatever injury or harm will befall them as a result of this construction is either imminent or irreparable.

In reviewing the Owner's building permit application, the Zoning Administrator took extraordinary efforts to ensure compliance with the TSP Overlay requirements. His decision to approve the Building Permit was made only after a review process that extended over the course of more than two months wherein the Zoning Administrator had multiple meetings with both the Appellants and the Owner, had numerous email exchanges with representatives from both parties, received reports from both the Appellants' and the Owner's arborists, and sought input from the Urban Forestry Administration. Thus, the Zoning Administrator's decision came about only after he had carefully reviewed all of the relevant information and given the Appellants a full opportunity to express their concerns.

The Board must also consider that the appeal and this request for what the Appellants call an "emergency stay" was not submitted to the Board until 58 days after the Building Permit was issued. The Board should deny Appellants' attempt to seek emergency action from the Board on September 9 considering that Appellants had engaged counsel and hired an arborist as early as

Administrator's review was recorded as complete on June 21, the last review by the District Department of the Environment was not completed until July 13. *See* Building Plan Review Status print out attached hereto as Exhibit A.¹ Thus, the permit was not issued until July 13.

b. Appellants' claim of DCRA "obstructionism" is inaccurate and unwarranted. The use of the term "obstructionism" suggests that DCRA deliberately prevented Appellants from obtaining a copy of the revised plans. Such an accusation is completely unfounded and reckless. Even the facts as set forth by Appellants' demonstrate that DCRA was cooperative and responsive to Appellants and their representatives. DCRA acknowledged receipt of the FOIA request within two days. When Appellants' counsel asked the FOIA Officer to expedite the request, he responded in writing on the same day that he would. The day after Appellants' counsel asked for the request to be expedited Ms. Llontop was informed by DCRA's Records Room that it had the plans and that a copy could be picked up in 7-10 business days.² Then, exactly 10 business days later, Appellants were informed that the copies were ready.

Not only are these self-serving claims of obstructionism false, but Appellants fail to establish how any delay in obtaining a copy of the revised plan prohibited them from filing an appeal with the Board. First, Appellants fail to explain how DCRA's actions prevented them from filing with the Board, but not with Superior Court (Complaint was filed on July 22). Second, both Kinley Bray's email to the Zoning Administrator on April 21 and the Ausubels' email to Director Majett on July 12 (both sent before the Building Permit was issued) explain in great detail their view that the proposed construction is in violation of the TSP regulations and will affect their property. *See Appellants' Opposition To Owner's Motion To Dismiss Appeal at*

¹ It should be noted that access to this information is accessible to the public on DCRA's website.

² The 7-10 business day wait can be attributed to the fact that copying of large plan sets are done off-site by a third party contractor.

Exhibits B and D. This same complaint forms the basis of the instant appeal. The Ausubels' email of July 12 even indicates that they are aware that the Zoning Administrator approved the plans on June 21 and that they intend to file an appeal with the Board.

For the reasons set forth above, DCRA asks the Board to deny the request for stay, but does not oppose nor support the pending motion to dismiss.

Respectfully Submitted,

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November 4, 2011


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was served by email, this 4th day of November 2011, to the following:

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EXHIBIT A

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Building Plan Review Status

Project Information

- Application ID: B1103986
- Date filed: 2/17/2011
- Address: 2750 32ND ST NW
- Agent: Phillip Dunham, Capitol Permits (202) 387-6669

Application Status

Please see the table below for review statuses. The table is not shown if the reviews have not been identified. A blank Status date means that the initial review has not been completed.

Discipline	Review Status	Status Date
DDOE Review	DDOE Review Approved	7/13/2011
Electrical Review	Electrical Review Approved	7/8/2011
Fire Review	Fire Review Approved	7/8/2011
Mechanical Review	Mechanical Review N/A	6/27/2011
Plumbing Review	Plumbing Review Approved	6/27/2011
Structural Review	Structural Review Approved	4/11/2011
Wall Check Verification	Wall Check Pending	
Zoning Review	Zoning Review Approved - WC	6/21/2011
Issue Permit	Permit Issued	7/13/2011

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