

Appeal of)
Lawrence and Kathleen Ausubel) Appeal No. 18577
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Appellants Lawrence and Kathleen Ausubel submit this reply brief in response to certain inaccurate and misleading statements made by 2750 32nd St. Trust (hereinafter “Owners”) in the Pre-hearing brief they filed on July 26, 2013.

Owners begin their brief by characterizing the instant appeal as the latest in a series of challenges “to stop or otherwise control the renovation activities of the Owners”, and they proceed to provide selective detail of the history of litigation between these parties. In reality, the Ausubels were concerned by the Owners’ lack of attention to the protection of several large, old trees on and near the property line and by the safety threat¹ to the Ausubels’ family and home if the Owners were to cut the roots very close to the trees. The Ausubels appealed the issuance of the building permit in Appeal No. 18300, and sought its stay in the accompanying civil lawsuit, 2011 CA 5856 B, until the tree issues could be resolved.

Board of Zoning Adjustment
District of Columbia
CASE NO.18577
EXHIBIT NO.37

The Ausubels' appeal, No. 18300, received the full support of ANC 3C, as expressed in two separate resolutions, Resolution 2011-050 (Exhibit 21 in appeal no. 18300, filed 9/23/11) and Resolution 2011-058 (Exhibit 22 in appeal no. 18300, filed 10/20/11). The first resolution, approved by a vote of 8-0, requested a stay of the building permit and an expedited hearing by the BZA. The second, again approved by a vote of 8-0, noted that the Urban Forestry Administration had contacted the Zoning Administrator stating that the Owners' proposed construction was likely to cause fatal damage to two protected trees, and asked that the Zoning Administrator review the Owners' amended tree protection plan to ensure compliance with the TSP Overlay, among other things.

Ultimately, the Board did not consider the resolutions of ANC 3C because it dismissed appeal no. 18300 as untimely, on the Owners' motion. Although the Ausubels filed the appeal within 60 days of the issue date of the challenged building permit, the Board accepted the Owners' argument that the appeal should have been filed within 60 days of the Zoning Administrator's email stating the plans would be approved, which was sent nearly a month before the permit was issued.

The civil case also sought a stay of the building permit. In that case, the Owners' representative conceded that construction under their existing plans (which had been approved by Mr. LeGrant) came too close to the protected trees as reflected in industry research and practice, and they revised their plans to provide greater protection. As the Board had dismissed appeal no. 18300 by the time of trial, the civil case, in which a stay of the building permit had been requested pending the decision of the Board of Zoning Adjustment, was dismissed as well.

The Owners also incorrectly assert that the Court “ruled for the Vorobeks on all counts”. When the Ausubels filed the civil lawsuit, the Owners filed a counterclaim against the Ausubels for an alleged encroachment, dating to 1991 or earlier, of the Owners’ property. The Court entered final judgment on the counterclaim in favor of the Ausubels, not the Owners—see Exhibit A (attached).

In summary, the Owners have attempted to characterize the Ausubels’ efforts to enforce the zoning regulations as a jihad to obstruct Owners’ plans to enlarge their house. Their theory appears to be that the instant appeal is just another battle in an unfair war of neighbor on neighbor, and as such should be discounted. The Ausubels, supported by ANC 3C and the Urban Forestry Administration, sought to enforce the law, protect trees, and to ensure the safety of their family and property, by obtaining thorough review of the Owners’ plans. The fact that their efforts failed on timeliness grounds should have no bearing on this appeal. Owners’ guesthouse addition is not under assault. It has been complete for some time now. Were the Board to order in this case that the cabinet be moved, the Owners would simply need to relocate their transformer cabinet to the other side of their retaining wall.

2. Owners Mischaracterize the Ausubels’ Argument Regarding Measurement of the Side Yard Setback

Owners assert that the Ausubels are advocating for the measurement of a side yard beginning at the house, not the property line, which would put the 8-foot side yard on the parking pad in front of 2750 32nd St. Owners even include a diagram to show how ridiculous such an argument would be. The problem is that the Ausubels never made such an argument—the Owners did.

In their statement in support of appeal no. 18525, Owners relied on Appeal No 17414, as they do in the instant appeal, and noted that the measurement of the rear yard in that case ran from the building line outward to the rear lot line. See Appeal no 18525, Exhibit 4 (Appellant Statement in Support of Appeal), fn 2. In Appeal no. 17414, the Board rejected the contention that the rear yard be measured from the rear lot line to the building. See Appeal No. 17414, BZA Order, fn 2.

Aware that Owners seemed to be arguing that side yards should be measured from the house to the lot line, the Ausubels specifically stated in their statement in support of the instant appeal that the measurement should be from the side lot line to the house, not the reverse. See Appellant's Statement in Support of Appeal, p. 7. Appellants maintain that the Zoning Administrator correctly began the measurement from the side lot line they share with Owners, and correctly measured on a measured on a perpendicular line from the side lot line, but that he chose an end point that did not take account of the full depth of the Owners' house, as measured from the front lot line. Neither Owners nor DCRA attempt to rebut Appellants' arguments regarding measurement of the depth of a building.

3. Owners have Conceded that the Electrical Cabinet is a "Structure"

In their prehearing brief, the Owners suggest that "The Board can also take the position that the emergency generator transfer switch and cabinet enclosure is not a 'structure', and may therefore be located anywhere on the lot." The Owners took the opposite position in their own appeal. Indeed, Owners' statement in support of their Appeal no. 18525 refers to the electrical cabinet as a "structure" no

fewer than 11 times, including in a section heading entitled “The Structure is Located in the Front Yard”.

4. Owners Edited Selectively the History of Email Correspondence

Neither Owners nor DCRA have raised a timeliness argument in the instant case, yet Owners undertook to attach to their prehearing brief an email from Kathleen Ausubel to the Owners dated July 1, 2012.² See Exhibit #32 to the instant appeal—Exhibit D to Owners’ Prehearing Statement filed July 26, 2013. The exhibit shows that the email had been forwarded from Mr. Dorobek, the recipient, to Mr. Collins, his attorney, on November 13. In Appeal no. 18525, Owners took the position that they were out of town, and did not know when the Notice of Violation had been sent to them. Owners attached email correspondence between Mr. Collins and Mr. LeGrant, dated December 12, 2012, in which Mr. Collins requested advice from Mr. LeGrant on when the Notice of Violation at issue in this case was mailed. Mr. LeGrant responded that it had been mailed November 14. (Exhibit #6 to Appeal No. 18525)

Owners used Mr. LeGrant’s email to document that their Appeal No. 18525, filed January 10, 2012, was timely. However, DCRA emailed the Ausubels a copy of the NOV (the attachment’s file name was “2750 32nd St NW - NOV 11-6-12.pdf”) on November 9; and the cover email (on which Mr. LeGrant was copied) stated that the

² Owners never responded to this email, and declined to communicate with the Ausubels on this substantive issue. It was therefore a surprise to learn from Owners’ brief that they would consent to the erection of a fence on the property line. Details as to how the installation of a fence could be reconciled with the TSP overlay or the safety of the electrical cabinet are not addressed.

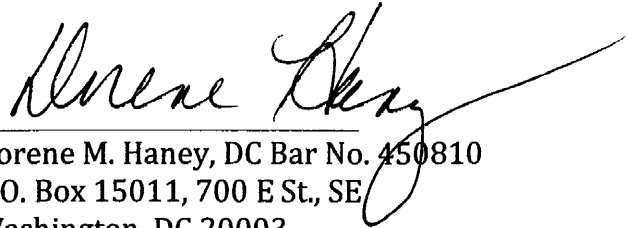
purpose of the email was “to provide you with a copy of the notice *that was sent* to the property owner (*emphasis added*)”—see Exhibit B (attached).

Conclusion

It is no secret that this appeal is not the first appeal involving these parties. The relevance of the prior appeal, focused on the tree protection plan, to this appeal is not altogether clear. What is clear from Owners’ brief, however, is that they believe that filings in appeal no. 18300 and 18525 may have some bearing on this case. Appellants ask that reference be made to the facts and filings themselves, rather than the characterization of them made by parties, in deciding the issue in this appeal.

July 29, 2013

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Dorene Haney", with a long, sweeping horizontal line extending to the right.

Dorene M. Haney, DC Bar No. 450810
P.O. Box 15011, 700 E St., SE
Washington, DC 20003
Phone: (703) 646-0173
Email: ghaney@ghaneylaw.com

Attorney for Appellants

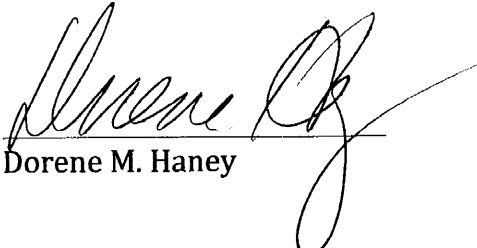
CERTIFICATE OF SERVICE

I hereby certify that the attached Appellants' Reply Brief was served via electronic mail on the following, this 29th day of July, 2013:

Jay Surabian, Esq.
DCRA Office of the General Counsel
1100 4th St., SW, 5th Floor
Washington, DC 20024
jay.surabian@dc.gov

Christopher H. Collins, Esq.
Holland & Knight
800 17th St, NW
Washington, DC 20006
chris.collins@hklaw.com

ANC 3C
4025 Brandywine St., NW
Washington, DC 20016
Anc3coffice@gmail.com


Dorene M. Haney