

April 13, 2015

Mr. Lloyd Jordan
D.C. Board of Zoning Adjustment
441 4th Street NW, Suite 210S
Washington, DC 20001

Re: **BZA Appeal Case No. 18965 Motion to Dismiss**

Dear Members of the Board:

Sean Glass, Trustee (“Owner”) hereby moves that Appeal No. 18965 (the “Appeal”) should be dismissed by the Board of Zoning Adjustment (“BZA” or “Board”) because it was not timely filed and it has no substantive basis.

A. The Appeal was Untimely Filed and Should be Dismissed

Owner moves that the Appeal filed by Peter and Diana Minshall (the “Minshalls”) should be dismissed as it was not filed within the 60 day time period prescribed by the Zoning Regulations. It is well settled that “[t]he timely filing of an appeal with the Board is mandatory and jurisdictional.” *Mendelson v. District of Columbia Bd. Of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). See also *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. Of Zoning Adjustment*, 775 A.2d 1090 (D.C. 2001), *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013), *BZA Appeal No. 18300 of Lawrence and Kathleen Ausubel* (April 11, 2012). Section 3112.2(a) of the Zoning Regulations states that an appeal must be filed within 60 days from the date the person filing the appeal first had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever date is earlier. The course of events leading up to the Appeal illustrate that the Minshalls had knowledge of the decision complained of over two and half years before January 22, 2015, the date that the Appeal was filed. Therefore, the Minshalls appeal is untimely and should accordingly be dismissed.

The Minshalls are appealing the decision permitting construction of what they refer to as a “retaining wall.” The Minshalls allege that the construction of the “retaining wall” was permitted by Building Permit No. B1410905, issued on November 26, 2014. However, the wall at issue was not constructed pursuant to the November 26, 2014 Building Permit, but was rather lawfully constructed two years ago. On March 23, 2012, Building Permit No. B1110228 was issued to permit renovation of the residences at 3333 and 3329 Q Street NW. The work to be performed included interior renovations, a rear addition, and construction of a garage, pool, and five exterior stone walls. An additional permit, No. BP1200001, was issued on May 25,

2012 and permitted construction of an in ground pool with attached spa and water feature. The wall at issue in the Appeal was constructed in 2013, pursuant to permit No. BP1200001.

It is clear the Minshalls had both notice and knowledge of the decision complained of, the construction of the wall, well before the date that they filed this appeal. The Minshalls knew of the proposed construction over two years ago. A notification form was submitted to Mr. Minshall, as the adjacent owner of 3327 Q Street NW, on February 16, 2012, notifying him of proposed work involving a required pool fence near the property line. Furthermore, an October 26, 2012 email sent by Mr. Minshall indicates that the Minshalls had seen the plans and initial construction of the wall at issue. Additional emails between Mr. Minshall and the Owner's architect Robert Gurney exchanged in November 2012 indicate that Mr. Minshall was working with the architect to coordinate finishes for the Minshall's side of the wall upon its construction.

As this course of events illustrates, the Minshalls clearly had knowledge of the construction of the wall and were given several forms of notice of the construction of the wall, including the advance notification form prior to the start of construction, issuance of a building permit, as well as actual construction of the structure. Despite the Minshalls' knowledge of the planned construction in 2012, the Minshalls chose not to file an appeal during that time. Rather, the Minshalls waited over two and a half years to file an appeal pertaining to a structure that was initially permitted in May 2012 and has been in place since January 2013.

On January 4, 2013, the Minshalls were given further notice of the construction, through a notification that stated that the work on the wall would begin on January 8, 2013. The Minshalls raised issue with Mr. Glass about the location of the construction relative to the property line. Mr. Glass secured a survey which confirmed that the construction was entirely within the Glass property, and the construction continued until the wall was erected. Once the disagreement over the property line was resolved, the Minshalls did not challenge the construction of the wall in any manner. In fact, as illustrated in a series of emails from January 2014 between Diana Minshall and Steven McCaughan of Commonwealth Building and Design, the Minshalls were coordinating with Mr. Glass and his contractors to install a finish on the Minshall's side of the wall. The Minshalls undoubtedly knew of the wall construction, as evidenced by their instigation of the survey, and coordination regarding the finish material.

It was nearly two years after the wall was permitted and constructed that the Minshalls decided to involve building code officials in attempts to oppose the construction. On February 20, 2014, the Minshalls succeeded in obtaining a stop work order challenging the wall. The order was based on the work allegedly exceeding of the scope of a permit. However, only weeks later, on March 12, 2014, the stop work order was dismissed without prejudice. The original building permits permitting the renovations to Mr. Glass' property and construction of the wall were not appealed, rather they were challenged through the stop work order, which was quickly lifted. The original building permits were never revoked.

Despite the dismissal of the stop work order as well as the fact that the Minshalls did not file any appeals over the preceding two years, the Minshalls continued to indirectly oppose the wall. In June of 2014 Diana Minshall prevailed upon the Historic Preservation Office to

reexamine the construction plans and ultimately resubmit the plans to the Old Georgetown Board, which had already approved of the plans as part of the initial permit application process. The second and after-the-fact review by the Old Georgetown Board resulted in the issuance of a remedial permit No. B1410905 on November 26, 2014. This remedial permit describes the work to be performed as including “add[ing] stucco facing to exterior of already constructed wall,” clearly illustrating that the remedial permit is not intended to correct all issues covered in the original permits, and rather is directed at narrow aspects of the wall.

The Minshalls had ample opportunity to timely oppose the construction of the wall. They had notice of the construction before it began, notice of the issuance of the building permit, and knowledge of the actual construction of the wall. Yet, the Minshalls did not file an appeal until over two and a half years after the wall was permitted, and one and one-half years after the wall was constructed. The remedial permit should not be exploited to allow an appeal decision that is over two and a half years old.

The issuance of a building permit does not necessarily constitute an appealable decision. Several cases indicate that an appealable decision does not necessarily have to be in the form of a building permit. In *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 366 (D.C. 2008), the Court noted that “[t]he zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice.” In *BZA Appeal No. 18469 of Susan L. Lynch*, (March 19, 2013), the Board found that a zoning approval published in advance of the actual issuance of the permit can constitute an appealable decision. The date that the Appellant in *Lynch* had knowledge of or should have had knowledge of the earlier zoning approval, and not the date of the permit issuance, therefore started the 60 day appeal deadline. In this case, the Minshalls had notice that the construction project was permitted on May 25, 2012, at the latest. The decision complained of was permitted by the May 25, 2012 building permit, and not by the subsequent November 26, 2014 building permit. The issuance of a remedial building permit addressing a narrow aspect of the wall over two and a half years later should not allow the start of a new timeline to appeal the original decision.

B. The Minshalls have Failed to Allege a Substantive Claim and the Appeal Should be Dismissed

The Minshalls have filed appeals to both the BZA and the OAH. In their OAH appeal, the crux of the Minshalls’ argument is that the Permit was improperly issued because the fence constitutes a “party line fence” and does not comply with the regulations governing “party line fences” set out in §3112 of the DC Municipal Regulations. The Minshalls argue that the fence constitutes a “party line fence” because the “footings” of the fence extend onto the Minshalls’ property. However, the fence does not extend onto the Minshalls’ property. In fact, the above referenced survey confirmed that the fence was entirely within the Glass property and did not extend onto the Minshalls’ property in the manner of a “party line fence.” As the fence in question does not constitute a “party line fence,” the Minshalls’ inapposite arguments that the fence does not conform to the height, material, and approval procedure attendant to the construction of a “party line fence” are not addressed.

Furthermore, the fence conforms to the general height limitations set out in §3112 of the DC Municipal Regulations. §3112.1.3 of the DC Municipal Regulations states that “the measurement of the height of a fence shall be made from the top of the fence to grade, on the side of the fence where grade level is higher.” In this case, the grade is higher on Glass property at 3329 Q Street, and therefore the fence height should be measured on the side of the fence on the Glass property. The height of the wall when measured from the “top of the grade” at 3329 Q St. NW is five feet, well within the 7 foot height limit for fences within ten feet of a party line, as set out in §3112.3.3 of the DC Municipal Regulations.

In their BZA appeal, the Minshalls’ sole argument is that the structure at issue constitutes a retaining wall that exceeds the maximum height of 4 feet set out in §413.4(a) of the DC Zoning Regulations. However, contrary to the Minshalls’ allegations, only a portion of the structure at issue constitutes a retaining wall. In fact, the structure is partially comprised of a retaining wall and partially comprised of a fence. The Minshalls allege that the retaining wall is 10.5 feet in height, when measured pursuant to §413.2. §413.2 states that “the height of a retaining wall is the vertical distance measured from the natural grade at the base of the wall to the top of the wall.” The natural grade is defined in the Zoning Regulations as “the undisturbed level formed without human intervention or, where the undisturbed ground level cannot be determined because of an existing building or structure, the undisturbed existing grade.” When the height of the retaining wall portion of the structure is measured from the natural grade at the base of the wall at 3327 Q St side, the height of the wall is does not exceed the 4 foot height limit set out in the Zoning Regulations. Furthermore, the wall was in existence prior to June 13, 2014, the effective date of the retaining wall regulations, and therefore constitutes a lawfully preexisting nonconforming structure.

C. Conclusion

The Minshalls have known about the construction of the wall since its proposal stage in January 2012, and they received notice of the permitting and construction in May 2012, and January 2013, respectively. They had ample opportunity to file a timely appeal of the original permits allowing the construction and renovation project, but declined to do so. The wall at issue was constructed two years ago. The issuance of a narrow remedial permit should not reopen for appeal broader issues that were permitted in May of 2012.

Sincerely,

A handwritten signature in black ink that reads "Allison Prince". The signature is written in a cursive, flowing style.

Allison C. Prince

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing document to the following addresses on April 13, 2015, via E-mail and electronic mail.

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