

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

**APPEAL NO. 18965 OF PETER MINSHALL AND DIANA MINSHALL
Tenants in Common - 3327 Q Street, NW**

**RESPONSE TO APPELLEE'S AND OWNER'S
MOTIONS TO DISMISS FOR UNTIMELINESS**

I. Introduction.

Sean Glass, owner of 3329 and 3333 Q Street, NW ("Owner") and Appellee DCRA have both filed Motions to Dismiss for Lack of Timeliness in the filing of this Appeal. The stories told in these Motions misrepresent some of the key facts regarding the construction of the subject retaining wall (the "Wall"). First, the Appellant has never claimed that it had no knowledge that a wall was constructed on its property line. They could not help but notice the approximate 10'5" foot high poured concrete wall towering over their living room.

But whether or not the Appellant knew of the Wall's *construction* is irrelevant, because, as Appellant eventually discovered, the subject wall was not lawfully permitted by DCRA. The first permit application process that legitimately reviewed and approved the Wall was for Permit No. B1410905; which was issued on November 28, 2014.

It is true that the Appellant did exchange emails with Owner discussing finishes for the Wall, without necessarily expressing dissatisfaction with the proposed wall at that point. But the rendering provided to Appellant from Owner's representative represented a wall of a height at least two feet lower than what was eventually constructed (See Exhibit A). Once the Wall was constructed, Peter Minshall immediately began to inquire as to how Owner was allowed to build a wall so high. What he discovered was that while the Wall may have been partially illustrated in

some plans here and there, it was never legitimately permitted. DCRA and OGB shared this conclusion with Appellant, and required a new permit application for a first review of all aspects of the Wall, by both OGB and DCRA. Peter Minshall intends to testify on these facts at the BZA hearing.

II. The Appeal Was Timely Filed.

The building permit for construction of the subject retaining wall was issued on November 28, 2014. This Appeal was filed on January 22, 2015, only 55 days after issuance of the permit. The decision being complained of in this case is the date of issuance of Building Permit No. B1410905 for 3329 Q Street, NW.

“Notwithstanding paragraphs (a) and (b) of this subsection, for purposes of establishing the timeliness of an appeal under this subsection, an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal.” (11 DCMR §3112.2(c))

The permit which is the subject of this Appeal is B1410905, authorizing – after the fact – construction of the Wall. Appellant is not appealing Building Permit No. BP1200001 and is not appealing Building Permit No. BP1110228. Those permits, both for 3333 Q Street, NW, not 3329 Q Street, NW, related to other work. It is true that Permit No. BP1110228 included some drawings of “masonry walls” – these were apparently only included as reference to a neighboring property (3329 Q) rather than an actual request for permit approval for a poured-concrete wall at 3329 Q Street. This all comes into perfect focus at the July, 2014, OGB hearing, at which meeting the OGB staff stated that the proposed Wall had never been before the OGB and that it

was before the OGB in 2014 for the first time, as a completely new permit application (see below).

There is no prejudice to the Owner in denying the Motions. The Owner built the Wall knowingly without the proper approvals. As detailed below, the plans submitted to the OGB had only the old wall remaining in place. In the first instance, because they failed to get the proper approvals, the Owner bears full responsibility for having to remove or adjust the wall. Secondly, DCRA's and Owner's arguments about timeliness have nothing to do with procedural implications of prejudice to the Owner, or unfairness of a late filing. This is about crafting a strategy to avoid a substantive consideration of the Appeal. The Owner constructed the Wall without a permit a couple years ago. They finally received that permit in November, 2014. The Appellant appealed same within 60 days.

III. Response to Owner's Arguments for Dismissal.

The Owner's arguments amount to this: The building permit being appealed is not the Building Permit issued in November 2014, but rather Building Permit # BP1200001, issued in May, 2012, or Building Permit #B1110228 (it's not entirely clear which one Owner is suggesting is the applicable permit).

This argument is based on several premises, all of which are false. These premises include: (i) The permits cited by Owner as authorizing the Wall were for the subject property, 3329 Q Street, NW. They were not; (ii) The Wall was lawfully constructed. It was not; (iii) The submission of Building Permit No. B1410905 to the OGB was meant for the OGB to "reexamine the construction plans" and "resubmit the plans to the Old Georgetown Board, which had already

approved of the plans..." and this was a "second" review by the Old Georgetown Board." It was clearly not a re-submission.

In fact, the Owner's counsel's effusive assertions that the 2014 OGB review was a "second" review or a "re-submittal" or "directed at narrow aspects of the wall" is completely false, and not supported by anything in the record save the 2014 building permit description, which would have been created by the Owner's representative. We do not know on what the Owner bases its "second review" or "narrow aspects" theory, because all the evidence clearly shows this was a de novo review of every aspect of the Wall.

In our prehearing statement, we submitted several documents which show conclusively that the 2014 permit application was not for "narrow aspects" of the Wall, nor was it for a "second review" of the wall. If these documents leave any doubt that the Wall was first reviewed and approved in late 2014, the following information should remove it.

The CFA's Meeting Minutes from its September 18, 2014 meeting read [emphasis added]:

The Commission regrets that the fence/wall along east property line was constructed without review. No objection to issuance of permit for mahogany fence and wall with stone veneer at west and stucco at east which varies from approximately 3'-1 1/2" to 6'-10 1/2" tall per drawings dated 15 August 2014. Note: Any subsequent modifications to the approved design, including those made during DCRA technical review, must be re-submitted to the Commission for approval prior to issuance of permit.

In addition to the official CFA minutes, the following are excerpts from the OGB's July, 2014 meeting, at which the Owner submitted plans for the Wall to OGB for the first time. The following quotes are from Thomas Luebke, Secretary of the CFA:

“There’s been some discussion about whether this work was permitted – our records at CFA and the Old Georgetown Board show no record of your ever reviewing this fence and wall in concept or in permit. We have no record of this.”

“So normally, when something is constructed without review and a permit issued without OGB or Commission advice we consider the case afterwards as if it hadn’t been built, so this is your charge today. Your charge of course is to consider the location, height, material, and character of the proposed wall.”

“This Board or the CFA has never been presented drawings that indicated anything but that the existing fence would remain. We have no record of having seen this or signed off on this in any form.”

“Just to be clear, both the concept drawings and the permit drawings, which were filed by you or your agent to this Board indicate that the existing wall remains. That’s what we have on record. We do not have anything else about any other construction.”

These emphatic statements from the Secretary of the CFA completely expose the fallacy of the Owner’s claims that this was a resubmittal of plans, or a “second” review, or that the 2014 review was “directed at narrow aspects of the wall.” These comments along with every other bit of evidence except for the Owner’s self-created building permit description, proves conclusively that the Wall was not lawfully permitted until November, 2014. It also proves that the 2014 OGB review was not limited to certain “narrow aspects” of the Wall. It was for a de novo review of the “location, height, material, and character of the proposed wall”...“as if it hadn’t been built”.

A review of the evidence finds that the Owner is the only party that believes that the Wall was lawfully permitted prior to November 2014. As the wall was not lawfully permitted under any permit prior to the November 2014 permit (1) The Wall was not lawfully constructed, and (2) there was nothing for the Appellant to appeal. This appeal, therefore, filed 54 days after issuance of the only applicable building permit, is timely, pursuant to 11 DCMR § 3112.2 (c).

Finally, the building permits that the Owner cites as authorizing the original construction of the Wall are for 3333 Q Street, not 3329 Q Street, which could in part account for the Owner’s

confusion about having the Wall lawfully authorized by a prior permit. But there can be no such excuse for Owner's claim that the Wall was previously reviewed by OGB, as OGB itself claims otherwise.

Because the Wall was never lawfully permitted prior to the 2014 permit, the 2014 permit is the only permit to be appealed here, and the Appellant has done so on a timely basis. The Owner's Motion to Dismiss is based entirely on the false premise that the Wall was lawfully permitted and previously considered by OGB. It clearly was not, and therefore the Owner's Motion should be denied.

IV. Response to Separate Argument from DCRA.

DCRA has raised an interesting proposition (one tellingly not even raised by Owner's counsel), relying on the *Lynch* case (which was not reviewed by the Court of Appeals). DCRA is claiming that not only does the appeal period begin when the Zoning Division records its internal review of an application, rather than the building permit or C of O issuance date (which is the minimum starting date for every BZA appeal case other than *Lynch*, including *Basken* and *Mendelson*).

The Building Permit was issued on November 28, 2014. DCRA is actually proposing that the appeal period had run before the applicable building permit was even issued. This Board has never had a case where an appeal period started and ended prior to the issuance of a permit. This is what DCRA is now advocating – that its decision date is somehow detached from the official decision that gives the permit applicant its actual approval, in this case the date of issuance of the permit. If the Board subscribed to DCRA's position on timeliness, it makes DCRA virtually

appeal-proof, as it can now claim that the actual decision is the internal decision made by the zoning division, not the “decision” that actually effectively provides approval to the applicant.

Until an applicant has the authority and acknowledgement from DCRA that it is permitted to do what it has requested permission to do, there is no decision to be appealed. What DCRA is now proposing is a safe harbor for DCRA; where it can record a zoning approval and watch the 60-day appeal period run out before a permit is even issued, leaving an appellant the burden of arguing extenuating circumstances, rather than relying on the certain language of the Zoning Regulations regarding the 60-day minimum time period.

V. Discussion of Cases Cited in the Motions.

Regarding the Cases cited by Owner’s counsel, they are easily distinguishable from the current situation, and furthermore, the decisions reached in those cases do not support the conclusions asserted by Owner and Appellee in this case.

Basken is a case often cited by those arguing untimeliness in cases where the construction has already taken place, or where there have been a series of decisions. The key fact about *Basken* not mentioned by the Owner or Appellee in their briefs is that in *Basken* the Board determined that the 60-day appeal period began on the date a *revised* building permit was issued, and that extenuating circumstances extended the deadline to 60 days after a clarification letter was written by DCRA, making the effective appeal period about 8 months long, from revised building permit issuance date to 60 days after a clarification letter from DCRA. The main point that *Basken* stands for is that an appeal period can begin at the building permit issuance date, as opposed to the later C of O issuance date. It does *not* provide that an appeal period begins on the

date that un-approved construction takes place, or on the date of an internal zoning division approval.

In this case, the subject structure was not lawfully reviewed, because it was never reviewed by the OGB. This is why it was sent back for what OGB itself termed as a first-time review. This case is further distinguished by the fact that the Owner provided plans to OGB that showed only the existing wall. The reason it was not reviewed is the sole responsibility of the Owner; it was not a result of any mistake or oversight by the Commission of Fine Arts.

The Owner also cites the *Mendelson* case in its Motion. It is interesting to note that the Commission of Fine Arts chose not to do an after-the-fact review of the proposed plans in that case. The Commission *did* choose to do such a review in this case, perhaps because it determined that the Owner should have known to include the proposed wall in its other submitted plans, whereas in *Mendelson*, DCRA did not refer the case at all. *Mendelson* and *Basken* both point to the conclusion that the Owner bears the responsibility of failing to properly process its permit application for the Wall; *i.e.*, as a matter of law, the Wall was not constructed in good faith. As it was not constructed in good faith, it must be subject to the Zoning Regulations in effect when the proper review subsequently took place, in late 2014.

VI. Substantive Defense.

The substantive defense seems to be: the subject Wall is not really just a wall. It is actually a wall with a fence on top of it, despite all appearances to the contrary. The Owner's own engineer has termed it a Retaining Wall per the drawings, and it meets the definition of Retaining Wall in 11 DCMR § 199.1. There is nothing in the language of the Regulations or

anywhere else that would support altering that definition to say that a retaining wall can be part retaining wall, and part something else, when it is in reality a single unitary structure.

VII. Conclusion.

The Owner and DCRA base their arguments on the belief that the Wall was properly permitted in 2011 or 2012, and that it was previously reviewed by OGB, and in particular, on the fact that the building permit on its face appears to limit the review of the Wall to merely adding stucco to an existing wall. While the verbiage on the building permit would have been created by the Owner's representatives, and allowed by the Appellee, it does not alter the reality shown by every other document in this case. The Wall was first lawfully approved in November 2014, and appealed within sixty (60) days thereafter. The Appellant therefore requests that the Board deny the Motions.

Respectfully,



Martin P. Sullivan, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing document to the following email addresses on April 21, 2015.

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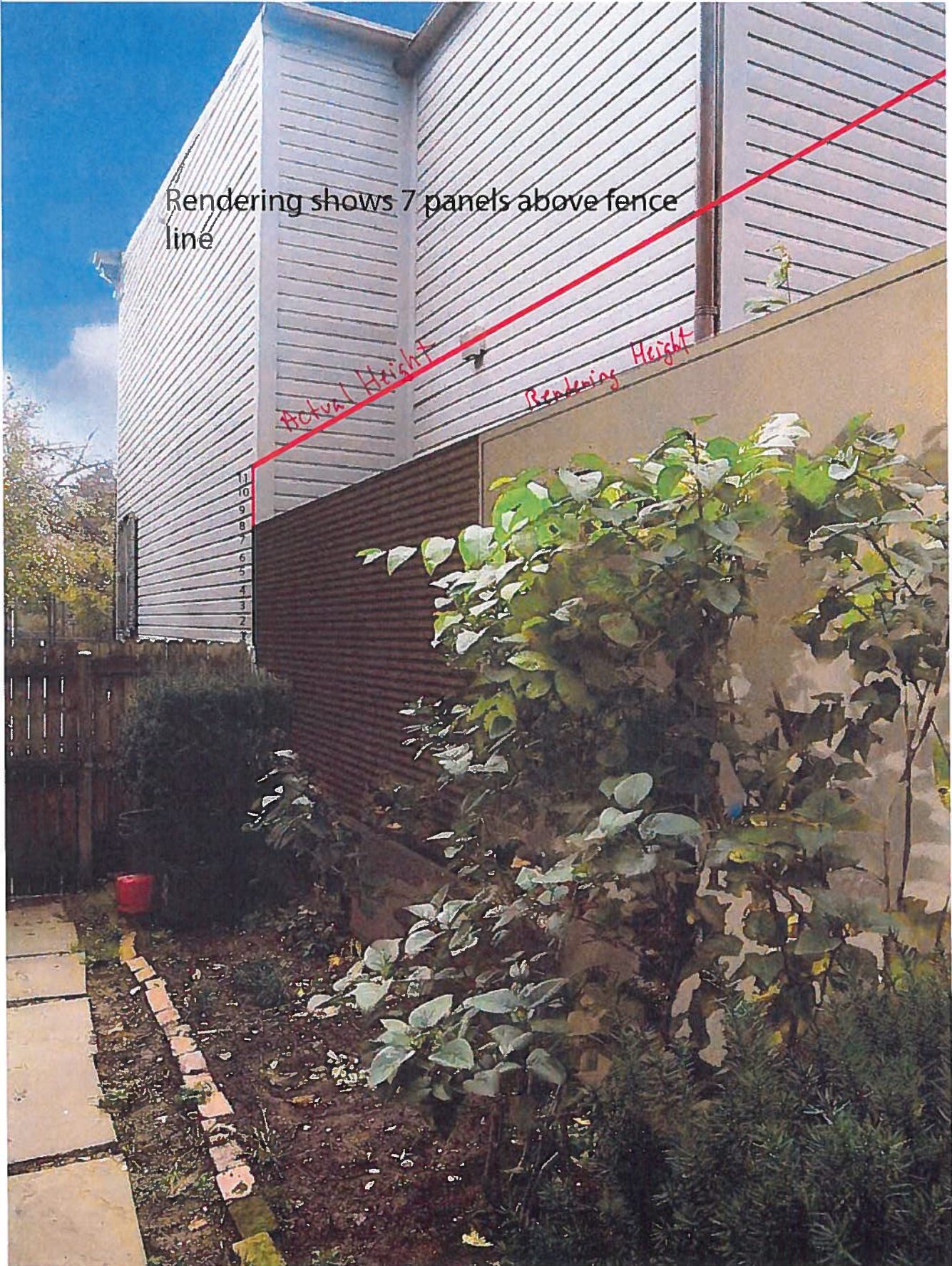
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EXHIBIT A

Photo showing difference between rendering height and actual height.



Rendering shows 7 panels above fence line

Actual Height

Rendering Height

11
10
9
8
7
6
5
4
3
2