

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

APPEAL NO. 18965 OF PETER MINSHALL AND DIANA MINSHALL

OWNER'S RESPONSE TO APPELLANT'S RESPONSE TO MOTION TO DISMISS

Sean Glass, Trustee ("Owner") hereby reiterates that Appeal No. 18965 (the "Appeal") should be dismissed by the Board of Zoning Adjustment ("BZA" or "Board") because it was not timely filed. The course of events described by the Appellant in the Response to Respondent's and Owner's Motions to Dismiss for Untimeliness contains glaring omissions and requires clarification of the actual circumstances surrounding the construction of the subject fence/wall/retaining wall ("the wall"). Clarification of these circumstances will demonstrate that Appellant's appeal should be dismissed because it was not timely filed, and furthermore equity demands that the appeal be estopped.

A. The Original 2012 Building Permit Was Never Appealed

In the Response to Owner's Motion to Dismiss for Untimeliness, Appellant presents a narrative that omits several significant occurrences which demonstrate clearly that Peter and Diana Minshall (the "Minshalls") sat on their rights for over two years. The timeline of events regarding the permitting and construction of the wall preceding this appeal is discussed more fully in both Owner's Motion to Dismiss and Respondent's Motion to Dismiss and will not be revisited here in detail. However, it is important to point out that Appellant's Response completely ignores the dismissal of a Stop Work Order challenging the wall, which was initially issued after repeated complaints by the Minshalls.

The wall was constructed in 2013, pursuant to Building Permit 1200001, issued on May 25, 2012. The Minshalls failed to file an appeal of that permit within the 60-day deadline. However, after corresponding from at least January 5 to February 4, 2014, with Owner and Owner's contractor regarding the installation of finishes of the Minshall's choice on their side of the wall, the Minshalls filed a complaint with an inspector from the District of Columbia Office of Planning, Historic Preservation ("HP") on February 18, 2014. On February 20, 2014, the Minshalls succeeded in obtaining a Stop Work Order challenging the wall. The Stop Work Order alleged that the wall exceeded the scope of the permit and also exceeded the 7 foot height limit. However, only weeks later, at the appeal hearing on March 20, 2014, the DCRA hearing officer determined that all required permits had been obtained and dismissed the Stop Work Order without prejudice.

Building Permit 1200001 was never revoked. Even when challenged indirectly by the Minshalls through the Stop Work Order, the permitting of the wall was upheld. Now, over two years after the wall was permitted, the Minshalls are trying to exploit a remedial permit that was necessitated as part of the Old Georgetown Board ("OGB") review process, to advance an after-the-fact appeal of the already constructed wall.

B. The 2014 Building Permit Was Not Timely Appealed

Despite the fact that the wall was permitted in 2012, was upheld as lawfully permitted as evidenced by the dismissal of the Stop Work Order, and was in existence for two years before Appellant decided to file this appeal, Appellant asserts the "first permit application process that legitimately reviewed and approved the wall was for Permit No. B1410905, dated November 26, 2014." This assertion is patently false. However, even accepting this assertion, purely for the

sake of argument, it is clear the Minshalls did not file a timely appeal in connection with this later, remedial permit.

The Board has held that an appealable decision does not necessarily have to be in the form of a building permit. As the Board found in *BZA Appeal No. 18469 of Susan L. Lynch* (March 19, 2013), the approval of the Zoning Administrator constitutes an appealable form of decision that begins the 60-day deadline for filing a timely appeal. After the OGB's review of the wall, the Owner filed a permit application. As a condition of the review, the Zoning Administrator approved the proposed permit on August 13, 2014. As was the case in *Lynch*, this approval signified that no objections or impediments would prevent the issuance of a permit from a zoning standpoint. Therefore, the Zoning Administrator's approval on August 13, 2014 constitutes the appealable administrative decision.

The Minshalls had notice, or at the very least reasonably should have had knowledge, of the Zoning Administrator's approval when it was issued. The 60 day timeframe for appeal provided by DCMR §3112.2(a), starts from the earlier of when the Appellant had notice or should have had notice of the administrative decision complained of. The Minshalls were surely aware of the OGB review, as they had in fact encouraged such review by prevailing upon HP to refer the wall to the OGB. Moreover, five months prior to the Zoning Administrator's decision, the Minshalls had engaged an expert zoning attorney who is undoubtedly experienced in tracking permit status. In fact, the Minshall's have hired two attorneys. One is handling the BZA challenge and another is handling the pending OAH challenge. The attorney who is handling the OAH matter indicated that he learned of the permit through the online system. Therefore, the Minshalls through their two attorneys had or should have reasonably had knowledge of the appealable decision on August 13, 2014, well before the formal issuance of the building permit

on November 26, 2014. The August 13, 2014 decision of the Zoning Administrator constituted the appealable administrative decision that began the 60-day appeal deadline. Even when entertaining the Minshalls' narrative ignoring the valid 2012 permit, the dismissal of the Stop Work Order, the correspondence regarding finishes to be installed on the wall, and the actual existence of the wall, the Minshalls' appeal is untimely filed. The appealable decision complained of is the Zoning Administrator's August 13, 2014 decision, and the time for appealing this decision expired on October 12, 2014.

C. The Appeal Should be Estopped

The Board should be estopped from granting the Minshalls' appeal. Owner repeatedly communicated with Appellant between and during the construction process. Owner and his architect provided drawings of the proposed wall to the Appellant well in advance of construction. Appellant's architect indicated in writing that he had no objection to the wall. Owner acted in good faith and sought the permits and permissions required for construction. Owner was granted two building permits, in March and May 2012, and relied on them to begin the construction at significant cost. Owner continued to act properly and notified the Minshalls of impending work near the property line by sending them a notification form on February 16, 2012. Additionally, once the Minshalls succeeded in encouraging DCRA to issue a Stop Work Order for the wall, Owner properly challenged this order, which was subsequently dismissed without prejudice on March 12, 2014. Owner relied on the DCRA hearing official's dismissal of the Stop Work Order in concluding that the challenge was over. However, Owner was then forced to undergo further review of the wall by OGB, and now is enduring a costly and time-consuming BZA appeal process. Owner relied on the May 2012 permit, as well as the dismissal of the Stop Work Order in good faith, yet is nevertheless facing appeal of the wall that was

constructed more than two years ago. Owner should be able to rely on the prior administrative decisions regarding the wall and not be subjected to an after-the-fact and untimely appeal.

Further, the Minshalls' appeal should be estopped by the equitable doctrine of laches. The Court of Appeals has recognized the availability of laches and estoppel in zoning matters. *See Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917 (1980). In *Sisson v. District of Columbia Board of Zoning Adjustment*, 805 A.2d 964 (D.C. 2002), the Court discusses the two tests of a laches defense: the defendant has been prejudiced by delay and that delay was unreasonable. In this case, looking at the "entire course of events" as suggested by the Court in *Goto*, Owner has had to endure frustrating "behind the scenes" efforts by Appellant to undermine the wall. As set out in more detail in the Owner's Motion to Dismiss and Respondent's Motion to Dismiss, the Minshalls had ample opportunity to timely appeal the May 2012 building permit, and the dismissal of the Stop Work Order associated with the wall. However, the Minshalls declined to appeal in a timely manner. Only now, more than two years after the construction of the wall, have the Minshalls unreasonably chosen to raise an untimely appeal. Owner has been prejudiced by this delay, spending significant sums on construction of the wall, and expending time and energy addressing this delayed and after the fact appeal. Equity requires that the appeal be estopped.

Respectfully,



Allison C. Prince

April 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing document to the following via E-mail on April 28, 2015.

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