

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of Peter & Diana Minshall

Appeal No. 18965

**RESPONDENT'S RESPONSE TO APPELLANT'S RESPONSE TO RESPONDENT'S
AND PERMIT HOLDER'S MOTIONS TO DISMISS APPEAL AS UNTIMELY**

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”), asserts that Appellant’s Response to DCRA’s Motion to Dismiss as Untimely did not rebut DCRA’s assertions that the retaining wall at issue in the appeal was validly permitted in 2012. DCRA therefore respectfully requests that the Board grant DCRA’s Motion to Dismiss on the basis of (i) Appellant’s untimely appeal of the 2011 Building and Swimming Pool Permits, (ii) the Board’s lack of jurisdiction over a retaining wall built before the June 13, 2014 adoption of retaining wall regulation in the Zoning Regulations, (iii) Appellant’s untimely appeal of the 2014 Permit, or alternatively (iv) the merits – that the Zoning Administrator correctly approved the 2014 Permit as compliant with the Zoning Regulations.

ARGUMENT

1. Object at issue is only the retaining wall

The object at issue is a one hundred plus foot long retaining wall (the “**Retaining Wall**”), on top of which sits a fence/wall (the “**Fence/Wall**”), that was built on the Permit Holder’s property adjacent to the lot line shared with Appellant. This Retaining Wall and Fence/Wall replaced the prior fence atop a retaining wall illustrated in photos in **Exhibits F, 1-A and 1-B**.¹ The replacement Retaining Wall and Fence/Wall is shown in photos in **Exhibit C** and in elevation in **Exhibit N**, as well as in a rendering dated October 1, 2012 forwarded to Appellant in an October

¹ Photographs of Appellant’s back yard facing Permit Holder’s property showing the pre-existing retaining wall with fence above: 1-A looking toward Q Street; 1-B looking toward rear property line.

26, 2012 email by the Permit Holder, who had received it from his architect. **Exhibit 1-C**², presumably the “rendering” referred to, but not provided to the Board, in Appellant’s Response, at 1 (instead referring to a photomontage created by Appellant).

This appeal is before the Board only for the retaining wall portion of the structure, under the Zoning Commission’s first regulation of retaining walls in Section 413 of the Zoning Regulations, effective a little under a year ago on June 13, 2014. The Zoning Commission defined a “retaining wall” as “a vertical, self-supporting structure constructed of concrete, durable wood, masonry or other materials, designed to resist the lateral displacement of soil or other materials.” 11 District of Columbia Municipal Regulations (“**DCMR**”) 199.1. Where a fence or wall is constructed on top of a retaining wall, as in this case, the portion regulated as a “retaining wall” under 11 DCMR 199.1 would be that portion dedicated to “resisting the lateral displacement of soil or other materials” – in other words that portion between the higher grade supported and the lower grade protected by the retaining wall. The portion of the fence or wall above the highest grade is regulated as a fence under the Construction Code (12-A DCMR 3112), with appeal not to the Board, but to the Office of Administrative Hearings – which Appellant is currently pursuing. Appellant’s assertion that the entire height of the retaining wall plus fence/wall would bring any fence built atop a retaining wall under the Zoning Regulations, a result not contemplated by the Zoning Commission in adopting of Section 413, which was focused on concerns about artificially raising allowable building heights by “berming up”.³

2. Appellant failed to rebut DCRA’s assertions that retaining wall under 2011 Building and 2012 Swimming Pool Permits

Appellant agrees that it is not appealing the 2011 Building and 2012 Swimming Pool Permits, under which DCRA asserts the Retaining Wall was approved, because Appellant abandoned its rights to appeal those permits back in May and September of 2012, almost three years ago. Appellant asserts that these permits are not relevant because they are listed as applying to 3333 Q Street and “related to other work.” Appellant’s Response at 2. But the plats approved by the Zoning Administrator for the 2011 Building and 2012 Swimming Pool Permits, as well as the overall plan submitted with the 2011 Building Permit explicitly show the

² October 26, 2012 email from Sean Glass, the Permit Holder to Appellant, with attached Sheet A3.0d, “Proposed East Elevation (View of Site Wall from Neighbors [*sic*] Property)”, dated October 1, 2012.

³ See Zoning Commission Order No. 13-06, March 31, 2014 (61 D.C. Reg. 5981, June 13, 2014).

permitted activities located in the common back yard of 3333 and 3329 Q Street. **Exhibits H, I and L.** The Permit Holder owns and uses this common back yard effectively as one property, with structural walls crossing and linking the entire common back yard, as can be seen in these photos of the construction with the concrete horizontal connectors crossing the shared back yard and tying into the stairwell leading to the underground garage and the Retaining Wall. **Exhibits 1-E, 1-F and 1-G⁴** (compare with structural details illustrated in **Exhibits J, K and N**).

The Commission of Fine Arts/Old Georgetown Board's ("CFA") interpretation of what DCRA approved is not relevant to this Appeal

CFA is not relevant to this Appeal for several reasons. CFA has a limited jurisdiction – to provide DCRA with a “report as to the exterior architectural features, height, appearance, color, and texture of the materials of exterior construction which is subject to public view from a public highway” (emphases added). D.C. Official Code § 6-1202. This Appeal only concerns the Retaining Wall, which is not visible from the public right of way of Q Street, as it is hidden by Appellant’s fence as seen in the photo in **Exhibit 1-D**.⁵

Indeed CFA itself only addressed the Fence/Wall portion, not the Retaining Wall, as it limited its approval to “the mahogany fence and wall with stone veneer at west and stucco at east which varies from approximately 3’-1 ½” to 6’-10 ½” tall per drawings dated 15 August 2014” (emphases added). Appellant’s Response, at 4 and **Exhibit W-1**. Appellant has asserted that the combined retaining wall plus fence/wall above are “approximately 10’ 5” foot high”. Thus CFA clearly only reviewed the visible portion of the Fence/Wall, not lower Retaining Wall atop which rested the Fence/Wall reviewed by CFA.

CFA chose to limit its review only to the upper Fence/Wall probably because CFA itself had reviewed the 2011 Building Permit, which included the concrete retaining wall that supported the swimming pool, underground garage and patio. CFA approved the 2011 Building Permit, specifically including the “underground garage; and stone terrace with pool.” CFA No. OB 11-274/HPA 11-476, September 5, 2011.

⁴ Photos of common backyard of 3333 and 3329 Q Street, N.W.: 1-E, from rear of 3333 Q Street, N.W. looking to rear lot line with continuous concrete wall and footer; 1-F, from 3329 Q Street, N.W. looking to 3333 Q Street, N.W. with continuous concrete wall and footer; 1-G, from rear looking to Q street with stairwell on left leading to underground garage on right.

⁵ Photo of 3327 and 3329 Q Street, N.W., from Q Street right of way (p. 13 of Attachments to the HP Letter to CFA).

Moreover, DCRA is not required to adopt CFA's recommendations, but "shall take such actions as in [its] judgment are right and proper in the circumstances." D.C. Official Code §6-1202. In this case, the Historic Preservation Division of the Office of Planning ("HP"), which had referred the 2011 Building Permit to CFA for review, determined upon review of the 2012 Swimming Pool Permit - which illustrated the fence/wall on top of retaining wall and referred to the concrete retaining wall supporting the fence/wall as part of the 2011 Building Permit – that CFA review was not necessary. HP, acting within its authority, therefore approved the 2012 Swimming Pool Permit for both HP and CFA on May 25, 2012. **Exhibit P.** DCRA, and the Permit Holder, relied on this approval for almost two years before Appellant decided to oppose the Fence/Wall and the Retaining Wall supporting it. Appellant had notice of the 2012 Swimming Pool Permit but chose not to appeal HP's determination that it did not require CFA review – or any other permit - until February 2014, a year and a half after the permit was issued – nine times the 60 day appeals period. **Exhibit O.**

3. This Appeal is barred for lack of jurisdiction under Zoning Regulations

The Retaining Wall was included within the scope of the 2011 Building Permit, which included references to the Retaining Wall in the structural details and plan. **Exhibits H, J and K.** The Swimming Pool Permit further included the Retaining Wall as the substructure on which the Fence/Wall was built. **Exhibit M.** The Retaining Wall, as approved under the 2011 Building Permit (with or without the 2012 Swimming Pool Permit), does not come under the jurisdiction of the Board because retaining walls were not regulated under the Zoning Regulations until over two years after these permits were issued – on June 13, 2014, the effective date of 11 DCMR 413.

4. This Appeal is barred for failure to timely file appeal the 2011 Building and 2012 Swimming Pool Permits

Appellant also failed to appeal either permit within the 60 day time period provided for by 11 DCMR 3112.2, even though Appellant had ample notice, including both a rendering of the Retaining Wall and Fence/Wall, as well the specific construction plan for removing the previously existing retaining wall and fence and replacing it with the Retaining Wall and

Fence/Wall. **Exhibits P, 1-C and 1-H.**⁶ Yet Appellant refused to appeal at that time, but instead abandoned the right to appeal by July 24, 2012, 60 days after the issuance of the 2012 Swimming Pool Permit.

Appellant admits knowing of the Retaining Wall, but asserts it did not know it was illegal. Appellant's Response at 1. Appellant therefore asserts that it has an indefinite time period to appeal any permit based on Appellant's assertion that the construction was illegal. This is a recipe for countless appeals years after the fact wasting resources and contradictory to the purpose of the 60 day appeal period provided by 11 DCMR 3112 – to provide finality on which all parties can rely. The time for Appellant to have inquired and confirmed its suspicion that the Retaining Wall was not included in a permit was during the 60 day appeals period. Appellant received notice of the Retaining Wall in February 2012, with plenty of time to inquire. Appellant's choice to not inquire was precisely that – a choice, of Appellant's free will, to allow the Retaining Wall to be constructed. Appellant's assertion that it "immediately began to inquire" once the Retaining Wall and Fence/Wall was built (Appellant's Response, at 1), which occurred in late 2012, is belied by the fact that it only filed a complaint leading to the inspection and Stop Work Order in February 2014, over a year later.

Appellant further asserts that while it knew of the Retaining Wall, and of the permits in 2012, it did not know the precise height of the wall. Appellant's Response, at 1. However, the plans submitted and approved by CFA and DCRA for the 2014 Building Permit closely correspond to the rendering provided by the Permit Holder to Appellant in October 2012. **Exhibit 1-I.**⁷ This was an issue that Appellant could have clarified with DCRA at any time, but Appellant chose not to do so. Again, this was Appellant's choice.

Moreover, this assertion suggests that Appellant recognizes that the Retaining Wall was approved under a valid permit, but that the Retaining Wall as built exceeded the height permitted by the permit. If so, the only portion of the Retaining Wall that would be illegally constructed would be that portion that exceeded the height shown on the plans (for example **Exhibit M** under the 2012 Swimming Pool Permit) – the portion of the Retaining Wall and Fence/Wall below the height shown on the plans would have been validly permitted. Since the Board only has

⁶ September 28, 2012 email from Permit Holder to Appellant forwarding demolition and construction plan for Retaining Wall and Fence/Wall.

⁷ Sheet A3.0d, "Proposed East Elevation (View of Site Wall from Neighbor's Property)", dated August 12, 2014 submitted for CFA and DCRA review for 2014 Permit.

jurisdiction over retaining walls as of June 13, 2014, the Retaining Wall as permitted under the 2011 Building and 2012 Swimming Pool Permits would not come under the Board's jurisdiction.

Therefore DCRA respectfully requests the Board dismiss the Appeal as both lacking jurisdiction because the Retaining Wall received a valid permit in 2012 before retaining walls were regulated by the Zoning Regulations and because Appellant abandoned the right to appeal despite ample notice.

5. The Appeal of the 2014 Permit was untimely filed based on the date of the “administrative decision” of the Zoning Administrator

Appellant asserts that 11 DCMR 3112 does not mean what it says – that the

“decision, determination or refusal made by an administrative officer ... in the administration of the Zoning Regulations may file a timely appeal with the Board ...

- (a) ... within sixty (60) days from the date the person appealing the **administrative decision** has notice of knowledge of the decision complained of, of reasonably should have had notice or knowledge of the decision complained of, whichever is earlier ...
- (b) 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.”

The Zoning Administrator approved the 2014 Permit as compliant with the Zoning Regulations – “administrative decision” – on August 13, 2014. The Board has considered, most recently in BZA Appeal 18888 (1700 Columbia Road, N.W.), the “administrative decision” referred to in 11 DCMR 3112 as that of the Zoning Administrator, because that is what determines compliance with the Zoning Regulations. The Board has in the past extended the start of the appeals period where the appellant clearly did not have actual or constructive knowledge for some time after the issuance of the permit. This appeal is not that situation.

In this Appeal, Appellant knew of the 2014 Permit because Appellant's instigated CFA review which required a DCRA permit. Moreover, Appellant was represented by an expert attorney who was very familiar with the zoning process of the District of Columbia and who knows very well how the DCRA Permit Tracking website works. Appellant therefore clearly “knew or should have known” of the Zoning Administrator's decision on August 13, 2014 or at any time subsequent in the following 60 days. Appellant only had to file the barest of appeals to stop the clock on the appeals period. Yet Appellant chose to once again delay, and thereby should be considered to have abandoned its right to appeal the Zoning Administrator's approval of the 2014 Permit.

6. **The equities in this case are with the Permit Holder and DCRA, not Appellant who has consistently abandoned its rights to appeal despite ample notice and multiple appeals opportunities**

Appellant received multiple notice of the permits and of the Retaining Wall – so much so that Appellant admits being aware of the Retaining Wall. Yet Appellant consistently chose to let multiple opportunities to appeal lapse – to abandon its right of appeal. Appellant asserts it “immediately began to inquire” about the permits for the Retaining Wall ... over a year after construction of the Retaining Wall. After waiting more than two years from the issuance of the 2011 Building and 2012 Swimming Pool Permits, Appellant finally asserted its right to appeal. This is profoundly inequitable – to DCRA and taxpayers, as well as to the Permit Holder, who both relied on a thorough and intense permit review process and the finality of a validly issued permit.

For these reasons, DCRA therefore respectfully requests that the Board grant DCRA’s Motion to Dismiss the Appeal.

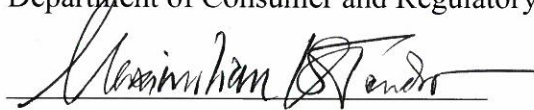
Respectfully submitted,

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Date: 4/29/2015



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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