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June 12, 2015

VIA EMAIL

Mr. Lloyd Jordan
Chairperson
District of Columbia Board of Zoning
Adjustment
441 4th Street, NW
Washington, DC 20001

Re: BZA Case No. 18965

Dear Chairperson Jordan and Members of the Board:

Enclosed please find a draft of the Intervenor's Proposed Findings of Fact and Conclusions of Law in the above-referenced case.

Sincerely,



Allison C. Prince

cc: Maximilian Tondro, Martin Sullivan
Enclosures

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Board of Zoning Adjustment

Appeal No. 18965 of Peter and Diana Minshall (the “Appellants”), pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to approve building permit application B1410905, issued on November 26, 2014 for alterations to an already existing a retaining wall (the “**Retaining Wall**”) on a residential property at 3333-3329 Q Street, NW and located in the R-3 District (Square 1278, lots 0265 and 0266).

HEARING DATE: April 14, 2015

DECISION DATE: May 5, 2015

FINDINGS OF FACT

The Project and Appeal

1. The Property that is the subject of this appeal is located at 3329 Q Street NW and the adjacent 3333 Q Street NW. (Exhibit 23)
2. The Property is located in the R-3 District and in the Georgetown Historic District.
3. The Owner of the Property, Sean P. Glass Revocable Trust (“**Owner**”), was issued Building Permit B1110228 on March 23, 2012, and Building Permit 1200001 on May 25, 2012. (Exhibit 23)
4. Plans approved for Building Permit 1110228 and Building Permit 1200001 include depictions of the Retaining Wall as part of a larger fence/wall structure, which consists of a retaining wall, and a fence structure located on top of the retaining wall. (Exhibit 23, Transcript p.42, 45-47)
5. On February 16, 2012, prior to construction of the Retaining Wall, Owner notified Appellants of proposed work along the property line. (Exhibit 22)
6. Appellants were given additional notice of the construction through a notification that stated that the work on the Retaining Wall would begin on January 8, 2013. (Exhibit 22)
7. On multiple occasions from 2012 to 2014, Appellants corresponded with Owner and Owner’s contractor regarding finishes to be installed on their side of the fence/wall structure. (Exhibit 22)

8. On February 20, 2014 a Stop Work Order alleging that the fence/wall structure exceeded the scope of the permit and the 7 foot height limit was granted in response to complaints issued by Appellants. (Exhibit 28)
9. On March 20, 2014, the DCRA hearing officer determined that all required permits had been obtained in connection with the fence/wall structure, and dismissed the Stop Work Order without prejudice. Appellant did not participate in the hearing. (Exhibit 28)
10. Appellant chose not to file an appeal of DCRA's dismissal of the Stop Work Order. (Exhibit 23, Transcript p.56)
11. Building Permits 1110228 and 1200001 were never appealed or revoked. (Exhibit 23, Transcript p.58)
12. Appellants requested that District of Columbia Office of Planning, Historic Preservation refer Building Permit 1200001 to the Commission on Fine Arts for review, two years after the issuance of the permit. (Exhibit 23)
13. District of Columbia Office of Planning, Historic Preservation referred the overall fence/wall structure to the Commission on Fine Arts by letter dated June 12, 2014. (Exhibit 23)
14. On July 17, 2014, the Commission on Fine Arts rejected the application for review until accompanied by evidence of a new DCRA permit application for the fence/wall structure. (Exhibit 23)
15. Owner submitted an application for a permit on August 13, 2014, pursuant to the request of the Commission on Fine Arts. (Exhibit 23)
16. The Zoning Administrator approved the proposed permit on August 13, 2014. (Exhibit 28)
17. The Commission on Fine Arts considered and approved the 2014 Permit application on September 18, 2014. (Exhibit 23)
18. Building Permit B1410905 was issued on November 26, 2014 and describes the work to be performed as including "add[ing] stucco facing to exterior of already constructed wall." (Exhibit 22)
19. On January 21, 2015, Appellant filed this appeal with the Board of Zoning Adjustment (the "**Board**"), alleging that Permit B1410905 was issued in violation of the Zoning Regulations, because the work permitted violated the retaining wall regulations enacted by the Zoning Commission effective June 13, 2014. (Exhibit 23).
20. On April 7, 2014, Owner filed a Motion to Intervene.

21. On April 13, 2015, Owner and DCRA each filed a Motion to Dismiss as untimely and on the merits.
22. On April 14, 2015, Appellants requested a continuance.
23. The Board conducted a hearing on May 5, 2015.
24. At the May 5, 2015 hearing all parties agreed that the Retaining Wall was constructed in January 2013. (Transcript p.41,43)
25. At the May 5, 2015 hearing it was established that the Retaining Wall portion of the fence/wall structure is less than 4 feet in height. (Transcript p.42, 47)

CONCLUSIONS OF LAW

The Appeal is Untimely

Section 3112.2 of the Zoning Regulations requires that an appeal be filed within 60 days of 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 is earlier. 11 DCMR Section 3112.2(a). The actual decision being appealed in the instant case is the 2012 decision to permit construction of the Retaining Wall, not the decision to issue the November 2014 Building Permit 1410905. The November 2014 Building Permit 1410905 merely specified details regarding the facing of the already constructed fence/wall structure. The Retaining Wall was constructed in 2013, pursuant to Building Permit 1200001 issued on May 25, 2012, and Building Permit 1110228, issued on March 23, 2012. Appellants had ample opportunity to timely oppose the construction of the Retaining Wall. Appellants had notice of the construction before it began, notice of the issuance of the building permits, and knowledge of the actual construction of the Retaining Wall. Yet, Appellants failed to file an appeal of that permit within the 60-day deadline. Furthermore, Appellants chose not to appeal DCRA's March 12, 2014 dismissal of the Stop Work Order. Therefore, the Board dismisses this appeal as untimely.

The Appellant Failed to Allege a Substantive Claim

Appellants' 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 Appellants' 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. Appellants allege that the retaining wall is 10.5 feet in height, when measured pursuant to §413.2 of the DC Zoning Regulations. However, the Retaining Wall portion of the fence/wall structure does not exceed the 4 foot height limit set out in the Zoning Regulations. Furthermore,

the Retaining Wall was in existence prior to June 13, 2014, the effective date of the retaining wall regulations. The height limit set out in §413.4(a) of the DC Zoning Regulations was not in effect at the time the Retaining Wall was constructed, in January 2013. The retaining wall is thus not subject to the 4 foot height limit set out in the Zoning Regulations. Therefore, the Board finds that Appellant failed to allege a substantive claim.

DECISION

For reasons discussed above, the Board **ORDERS** that the motion to **DISMISS** the appeal as untimely and on the merits is **GRANTED**.

VOTE: 4-0-0 (Lloyd Jordan, Marnique Heath, Jeff Hinkle, Anthony Hood voting to Dismiss, as untimely and on the merits; one Board seat vacant)

Vote taken on May 5, 2015