

BZA APPEAL NO. 18980

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

**PROPERTY OWNER’S MOTION TO DISMISS FOR FAILURE
TO TIMELY FILE; REQUEST FOR CONTINUANCE;
ARGUMENT FOR LACHES AND ESTOPPEL**

I. Introduction.

I am writing on behalf of District Design and Development Argonne LLC (“Argonne LLC”), the owner of the property located at 1636 Argonne Place, NW (the “Subject Property”). The Subject Property is improved with an existing structure, including a recently-constructed addition (the “Building”). As the owner of the property which is the subject of Appeal No. 18980 (the “Appeal”), Argonne LLC is automatically a party to the Appeal, pursuant to 11 DCMR 3199.1(a)(3).

Argonne LLC would first like to explain the timing of this “last-minute” filing. According to DCRA’s PIVS Permit Tracking System, Argonne LLC first applied for a permit for this project on March 5, 2014 with Building Permit Application No. B1404813. The Zoning Division of DCRA approved that permit application on March 19, 2014. Pursuant to the Board’s decision in the *Appeal of Susan L. Lynch*, No. 18469, March 19, 2014 is the date on which the decisions being appealed in the present appeal were made (the only exception being the decision by the Zoning Administrator made in December, 2014 to permit the retaining wall behind the rear wall of the subject building). The subject Building Permit was issued on September 9, 2014.

Over eight (8) months after his March 19th decision to grant full zoning approval for the Project, and almost three (3) months after issuance of the Building Permit, the Zoning Administrator caused the issuance of a Stop Work Order, finding that the Building would exceed maximum permitted FAR because of a recalculation of the Gross Floor Area on the lower level of the Building. Other than the lower-level Gross Floor Area issue (the “Retaining Wall Issue”), every aspect of the March 19th zoning approval has not changed since the original approval on March 19th and per the issuance of the Building Permit on September 9th.

Following the December Stop Work Order, Argonne LLC worked with the Zoning Administrator and then-DCRA General Counsel to revise the Building Permit to address the

lower-level GFA issue. That proposed revision was approved by the Zoning Administrator at a meeting with Argonne LLC on December 10, 2014, and the Stop Work Order was lifted on or around December 20, 2014. The present appeal was filed on February 13, 2015.

The latest development in this project took place on Thursday of last week, May 14, 2015, when the Zoning Administrator's counsel informed counsel for Argonne LLC that the Zoning Administrator intended to issue a Notice to Revoke the Building Permit based on a conclusion that the retaining wall approved five months earlier by the Zoning Administrator was no longer considered to be compliant with the Zoning Regulations. The Zoning Administrator had all the necessary information to make such a decision on December 10, 2014, when he approved the Building Permit revision and allowed work to continue for another five (5) months before pulling the second approval just three (3) business days prior to the BZA Appeal hearing date.

So, to summarize: Argonne LLC received a full zoning approval on *March 19th*. That was revoked 8 months later, in December. A week later, Argonne LLC received a zoning approval for the resolution of the single issue on which the approval was revoked in December – the Retaining Wall Issue. *That* approval was then revoked over five (5) months later - just last Thursday. The Appellant filed *this* Appeal nearly eleven (11) months after the original zoning approval, five (5) months after issuance and posting of the subject Building Permit, and a little over two (2) months after the approval of the Retaining Wall Issue.

Argonne LLC has relied in good faith on the original zoning approval on March 19, 2014. It has also relied in good faith on the Building Permit issued on September 9, 2014, and again on the Zoning Administrator's revised approval on December 10, 2014. In reliance on all of those approvals (the first approval being granted eleven (11) months prior to this Appeal), Argonne LLC has incurred significant expenses, right up to the notice of a reversal from the Zoning Administrator's counsel last Thursday. Up until Thursday, it was assumed that the Zoning Administrator and his counsel would defend the Retaining Wall Issue made in December (the decisions made prior to that should be barred for lack of timeliness, as asserted below). This late-breaking decision to reverse the decision from five (5) months ago is the primary reason for the timing of this filing.

We intend to keep this filing concise, and the purpose of this filing is to first request a continuance of at least two (2) weeks to give the Appellant the time to review a revised plan

submitted to DCRA this morning in response to the Zoning Administrator's reversal (in the event that the Zoning Administrator accepts the revised plan) or to give Argonne LLC time to submit further revised plans prior to a Board decision (in the event that the Zoning Administrator does not accept the revised plan).

In addition, this filing is made for the purpose of asserting the affirmative defenses of laches and estoppel, and to move for dismissal - for lack to timeliness - of all claims of error other than the claim relating to the retaining wall as every decision other than that was made on March 19, 2014, and made official in the Building Permit issued on September 9, 2014; dates which are eleven months prior, and five months prior, respectively, to the Appellant's filing of this Appeal.

II. Request for Continuance.

After a fourteen-month period in which two approvals were granted, and then each of those approvals revoked after significant periods of time and at great expense, Argonne LLC respectfully requests a continuance of at least two weeks, in light of DCRA's current stated intention to revoke the subject Building Permit on the reversal of a December, 2014 decision on the Retaining Wall Issue. A continuance is appropriate, and in the interest of all parties, for the following reasons.

Argonne LLC has already submitted a revised plan in response to last Thursday's reversal. If the Zoning Administrator accepts this proposal, Argonne LLC is prepared to go forward but suggests that a two-week continuance would provide the Appellant an opportunity to review the revised plan. If the Zoning Administrator does not accept this proposal regarding the Retaining Wall issue, then Argonne LLC will submit a new revised plan almost immediately, and will eventually submit a plan which is (again) acceptable to the Zoning Administrator. The proper procedure in such an event is to continue the Appeal pending such a resolution, pursuant to a decision of this Board in *BZA Appeal No. 18321 of the Citizens Association of Georgetown*. In Order No. 18321, the BZA found that an appeal was not made moot when the Zoning Administrator issued a Notice to Revoke the subject building permit, because the subject permit was not yet revoked, and because the owner had the opportunity to cure the alleged violation and avoid the actual revocation. Because that case was not made moot, it was considered to be a "live" case and the Board did not make its decision in that case until the deadline had passed for

the owner to obtain a revised permit. When the deadline passed, the Board then issued its decision and dismissed the case as moot. Using No. 18321 as a guide, if a Notice to Revoke is issued to Argonne LLC today, the Board could entertain the other Motions herein and could hear the Appeal, as the Appeal would still be “live.” It would then hold its decision in abeyance pending a possible revision of the Retaining Wall Issue. But in light of all that confusion, a continuance would seem to be a more efficient and clear procedure for the Board and the parties.

Additionally, if the Board grants the Appeal on the Retaining Wall Issue, Argonne LLC will soon correct any deficiency and submit a revised plan. The Appellant would then have to file an entirely new appeal if it chose to contest that newly revised plan approval. It would make more sense to wait until the Zoning Administrator has accepted Argonne LLC’s plan and then allow the Appellant a chance to review and then contest the revised plan as part of this Appeal, if Appellant still objects.

III. Motion to Dismiss All But One Claim of Error as Not Timely Challenged.

All but one of the decisions being challenged in this Appeal – that being the Retaining Wall Issue decided in December, 2014 – were made on March 19, 2014, eleven (11) months prior to the Appeal filing, and a permit was issued on those decisions on September 9, 2014, five (5) months prior to the Appeal filing. Upon permit issuance, Argonne LLC immediately posted its permit on the Subject Property and began construction of the work approved therein. The group of appellants has been aware of the September 9th Building Permit since shortly after its issuance. Mr. Gambrell, the Appellant’s chief representative, is on record in an e-mail stating that his interest in the case began on October 28, 2014, over one hundred (100) days before the Appeal was filed.

Based on these undisputed facts, the Appellants filed their Appeal at least one hundred (100) days after they fully knew of the decisions being challenged. 11 DCMR § 3112.2(a) requires that an appeal shall be filed within sixty (60) days from the date the person appealing the administrative decision knew or should have known of the decision complained of. Section 3112.2(d) provides that the Board may extend the appeal period only (i) if the appellant demonstrates that there are exceptional circumstances that are outside of the appellant’s control and could not have been reasonably anticipated that substantially impaired the appellant’s ability

to file an appeal to the Board; and (ii) the extension cannot prejudice the parties to an appeal, including in this case, Argonne LLC.

The argument for any such extension would fail on both accounts, as there clearly was nothing that substantially impaired the Appellant's ability to appeal to the point where the Appeal was not filed until more than five (5) months after the Building Permit was issued, and extending the period would also greatly prejudice Argonne LLP, which spent approximately \$150,000 in construction costs alone between issuance of the Building Permit and the December Stop Work Order (let alone the February appeal filing date).

The issuance of a Stop Work Order in December, and the subsequent revision on the Retaining Wall Issue, did not impair the Appellant's ability to timely file a challenge of all the other zoning decisions in the September 9th Building Permit, and the Stop Work Order does not grant an additional sixty (60) days on all the previous decisions not affected or altered by the Stop Work Order. And for good measure, the Building Permit had been issued and posted well over sixty (60) days prior to even the December Stop Work Order. The Appeal should have been filed even before the issuance of the December Stop Work Order.

Furthermore, the fact that the new decision by the Zoning Administrator to approve the Retaining Wall Issue does not re-open the 60-day appeal period for previously-made decisions. See Woodley Park Community Association v. BZA, (490 A.2d 628), and BZA Appeal No. 16935 of Southeast Citizens for Smart Development, in which the Court of Appeals, and the Board, respectively, bifurcated their dispositions on Motions to Dismiss for lack of timeliness, finding that a revised permit for the same project may include zoning decisions for which the appeal was not timely, while also including zoning decisions which were timely filed.

By the analysis used in Woodley Park and Appeal No. 16935, the Board should dismiss this Appeal for failure to file the appeal within sixty (60) days of the date the Appellant knew or should have known of the decisions being challenged. The only decision which was arguably timely filed was the December, 2014 decision on the Retaining Wall Issue. That is therefore the only appealable decision (arguably) before the Board in this Appeal. Any other Zoning Administrator decision relating to Lot Occupancy, Parking, FAR (other than as it is impacted by the Retaining Wall), or anything else other than the Retaining Wall Issue, were not challenged within sixty (60) days of the date on which the Appellant knew of those decisions. And there is no cause for any extension of the 60-day period, let alone an extension to February 13, 2015.

IV. The Appeal is Barred By Laches and Estoppel.

Argonne LLC received its zoning approval for this project on March 19, 2014. It received the Building Permit on September 9, 2014. Almost three months after issuance of the Building Permit, a Stop Work Order was issued. In that time between the initial zoning approval and the Stop Work Order, Argonne LLC had spent approximately \$154,840 in construction hard costs alone (all of that spent after September 9, 2014). It spent an additional \$29,000 in soft costs and \$121,000 in interest between the time of the March 19 zoning approval and December Stop Work Order.

In order to make out a claim for laches, a party must establish an "omission to assert a right for an *unreasonable and unsatisfactorily explained length of time* under circumstances prejudicial to the party asserting laches." *Wieck v. District of Columbia Board of Zoning Adjustment*, 383 A.2d 7, 11 (D.C.1978) (quoting 3 RATHKOPF, LAW OF ZONING AND PLANNING 67-1 (3d ed. 1972)) (emphasis added); *see also Goto v. District of Columbia Board of Zoning Adjustment, supra*, 423 A.2d at 925. The elements required to establish estoppel are: "a party (1) acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party invoking the doctrine." *Wieck v. BZA, supra*, 383 A.2d at 11. In this case, Argonne LLC made the permanent and expensive improvements noted above in justifiable reliance on the affirmative act of DCRA in approving the subject Building Permit. DCRA then took no action for almost three (3) months, when the Stop Work Order was issued. The equities strongly favor Argonne LLP in this case, as it will be catastrophically damaged by a reversal of the September 9th Building Permit. Whereas, granting of the Appeal will only lead to a resolution that will not change the appearance or density of the Building exterior, as such solutions exist. While those solutions would be very damaging to Argonne LLP, they would be little-noticed by the Appellants or anybody outside the Subject Building.

V. Summary.

Argonne LLP again apologizes for the time of this filing, but respectfully requests that the BZA grant the Motion for a Continuance, the Motion to Dismiss all but one issue for lack of timeliness, and/or the affirmative defenses of laches and estoppel. Argonne LLP has submitted a revised plan to the Zoning Administrator this morning, and presuming approval thereof, will

defend such approval against any claim of error regarding the revised plan, regardless of the eventual BZA hearing date.

Respectfully,

A handwritten signature in black ink, reading "Martin P. Sullivan". The signature is written in a cursive, slightly slanted style.

Martin P. Sullivan, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2015, a copy of the foregoing was served via electronic mail to:

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A handwritten signature in black ink, reading "Martin P. Sullivan". The signature is written in a cursive style with a large, stylized 'M' and 'S'.

Martin P. Sullivan