



BEFORE THE ZONING COMMISSION OR
BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA



FORM 150 – MOTION FORM

THIS FORM IS FOR PARTIES ONLY. IF YOU ARE NOT A PARTY PLEASE FILE A
FORM 153 – REQUEST TO ACCEPT AN UNTIMELY FILING OR TO REOPEN THE RECORD.

Before completing this form, please review the instructions on the reverse side. Print or type all information unless otherwise indicated. All information must be completely filled out.

CASE NO.: 19081

Motion of:

☐ Applicant

☐ Petitioner

☐ Appellant

☐ Party

☒ Intervenor

☐ Other _____

PLEASE TAKE NOTICE, that the undersigned will bring a motion to:

Dismiss the Appeal for lack of jurisdiction and mootness. Also, Motion to Strike matters not related to the subject appeal.

Points and Authorities:

Please state each and every reason why the Zoning Commission (ZC) or Board of Zoning Adjustment (BZA) should grant your motion, including relevant references to the Zoning Regulations or Map and where appropriate a concise statement of material facts. If you are requesting the record be reopened, the document(s) that you are requesting the record to be reopened for must be submitted separately from this form. No substantive information should be included on this form.

Please see attached motion.

CERTIFICATE OF SERVICE

I hereby certify that on this

1st 4th

day of

December Month

,

2nd

0th

1st

5th

I served a copy of the foregoing Motion to each Applicant, Petitioner, Appellant, Party, and/or Intervenor, and the Office of Planning

in the above-referenced ZC or BZA case via:

☐ Mailed letter

☐ Hand delivery

☒ E-Mail

☐ Other _____

Signature:

Print Name:

Samantha Mazo, Griffin, Murphy, Moldenhauer & Wiggins, LLP

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Board of Zoning Adjustment
District of Columbia
CASE NO. 19081
EXHIBIT NO. 41

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Via IZIS and email to bzasubmissions@dc.gov

December 14, 2015

Marnique Y. Heath, Chairperson

Board of Zoning Adjustment

441 4th Street, NW

Suite 210S

Washington, DC 20001

Re: BZA Appeal No. 19081 – 1828 Ontario Street NW

Property Owner's Motion to Dismiss Appeal

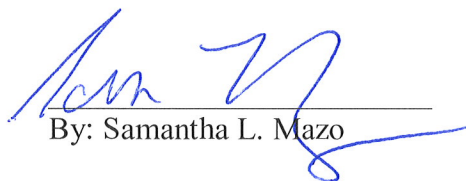
Chairperson Heath and Honorable Members of the Board:

On behalf of 1828 Ontario Place LLC, the owner of the subject property, enclosed please find the Property Owner's Motion to Dismiss the above-referenced appeal. The appeal is scheduled to be heard before the Board of Zoning Adjustment on December 22, 2015.

Thank you for your attention to this matter.

Sincerely,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS,
LLP



By: Samantha L. Mazo

Enclosure

Cc (via email):

ANC 1C

DCRA c/o Maximilian Tondro

Michael Rafferty

Stacie Desai

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

**APPEAL OF ANC 1C
REGARDING 1828 ONTARIO PLACE, N.W.
(the “Property”)**

APPEAL NO. 19081

**MOTION OF THE PROPERTY OWNER TO DISMISS THE APPEAL FOR
LACK OF JURISDICTION AND FOR MOOTNESS, AND MOTION TO STRIKE**

I. INTRODUCTION

In its December 8, 2015 Pre-Hearing Statement, the ANC 1C and Michael Rafferty (the “Appellants”) allege that the Department of Consumer and Regulatory Affairs (“DCRA”) erred in issuing the Property’s November 16, 2015 building permit (the “November 16 Permit”) because that permit approved the removal of bricks from interior party walls of the Property’s garage without an engineering report demonstrating structural soundness of the party walls following removal (the “Appeal”).¹

The Appellants’ allegation of error pertains to DCRA’s application of the District’s building code set forth at Chapter 12A of the District of Columbia Municipal Regulations (“DCMR”). The Appellants do not allege a violation of the Zoning Regulations set out at Chapter 11 of the DCMR.

Indeed, recognizing that the issue on Appeal is not a zoning error properly before the Board of Zoning Adjustment (the “Board”), Mr. Rafferty has separately raised the same

¹ Importantly, the Appellants concede that the proposed parking space layout approved in the November 16 Permit satisfies the Zoning Regulations. The sole issue on Appeal is whether the proposed parking spaces approved in the November 16 Permit could structurally “fit” on the Property.

allegations in a building code appeal filed with the Office of Administrative Hearings (“OAH”) on December 2, 2015. A copy of that filing, which is virtually identical to the materials submitted to the Board, is attached as **Exhibit “A”**. Therefore, the Appellants have expressly acknowledged its claims to be outside the purview of this Board, and the subject appeal should be dismissed for that reason. The Appellants should be prohibited from such forum shopping by raising the same issue before two different administrative bodies.

Moreover, as will be described further below, on December 11 DCRA issued a new building permit, permit No. B1602713 (the “Building Permit”) that revised and replaced the November 16 Permit, which is the subject of this Appeal. The Building Permit application materials included a structural report and structural plans stamped by a professional engineer registered in the District of Columbia to approve the brick removal necessary to provide the required parking space dimensions. Copies of the Building Permit and the structural report and plans submitted in support are attached as **Exhibit “B”**.

Therefore, assuming *arguendo* that the Appellants properly alleged zoning error in DCRA’s approval of the November 16 Permit, which they have not, DCRA’s approval of the Building Permit renders the subject Appeal moot because it does exactly what the Appellants allege the November 16 Permit did not do: The Building Permit includes both a structural report and stamped structural plans documenting that the “structural stability of the [party] wall will remain sound” following the removal of the bricks from the garage walls. Accordingly, the issues raised in the Appeal are no longer “live”. Therefore, this Appeal should be dismissed, as the claims made by the Appellants are both beyond the Board’s purview and have been rendered moot by the approval of the Building Permit.

II. SUMMARY OF FACTS

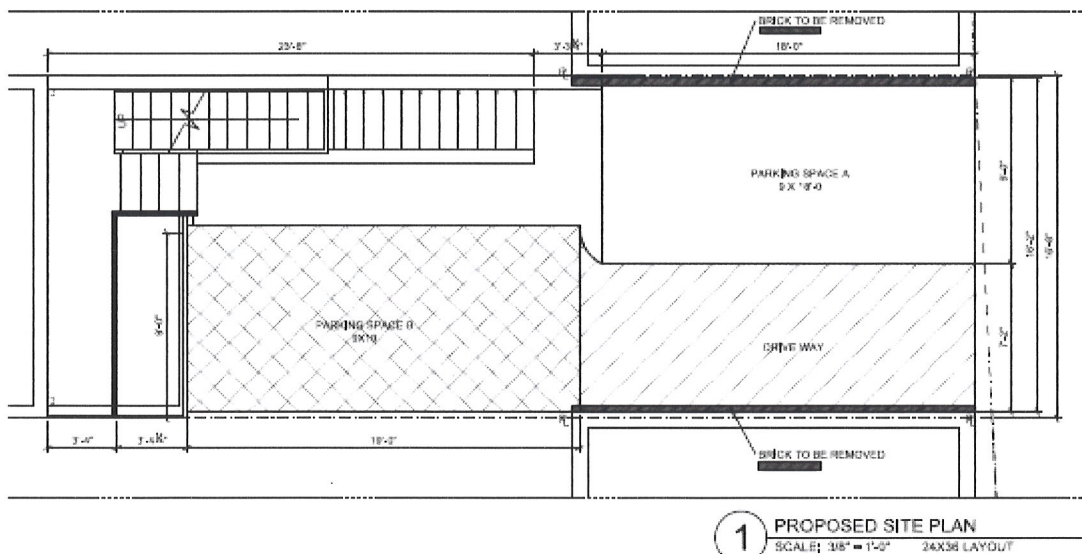
The Property is located at 1828 Ontario Place, N.W. in the R-5-B Zone. The Property is a row dwelling with a detached garage (the “Garage”).

The Garage’s interior dimensions are 18’ in length and 15’ – 8” in width as shown in the photos of the measurements and existing site plan included on Sheet A0100 of the Building Permit attached with **Exhibit “B”** (the “Garage Dimensions”). The Garage Dimensions allow for the grandfathering of a parking space with the standard 9’ in width, but substandard 18’ in length. This parking space is identified as “Parking Space A” in the “Proposed Site Plan” shown on Sheet A0100 of the Building Permit (“Parking Space A”).²

The width of the Property itself is 16’-8” (“Lot Width”). The 12-inch difference between the width of the Garage (15’ -8”) and the Lot Width (16’-8”) is due to the 6-inches of brick on each side of the Garage walls abutting the adjacent garage walls (Garage’s east side wall has two wythes of brick (6 inches) and the Garage’s west side wall has two wythes (6 inches) of brick). A wythe is defined as “a vertical section of bricks or other masonry that is one unit thick”. In this instance, the width of each wythe is 3 inches. As explained below, as part of the November 16 Permit, the Applicant proposed to remove one wythe (3 inches) from each wall (removing a total of six inches of brick), thereby increasing the Garage width from the 15’ – 8” to 16’ – 2” . The six inches of brick slated for removed are located within the Property’s boundary lines.

² References to the sizes of the proposed parking spaces are from the Proposed Site Plan at Sheet A0100 of the Building Permit. The dimensions/layout of the parking spaces shown on the Building Permit are consistent with the dimensions/layout of the parking spaces approved in the November 16 Permit.

By way of background, on or about July 20, 2015, building permit No. B1412288 was issued by DCRA to convert the Property from a single-family dwelling to a four-unit apartment house as permitted by matter of right in the R-5-B Zone, with two parking spaces, one that was 9' x 19' and the other that was 8' by 16'. On November 16, 2015, DCRA issued the November 16 Permit which also approved two parking spaces, Parking Space A – at 9' by 18' and Parking Space B at 9' x 19'. A driveway, 7' – 2" in width, connected Parking Space B to the alley in the rear (the "Driveway"). Because the interior Garage Dimension was only 15' - 8", and the required width for Parking Space A and the Driveway was 16' – 2", the plans submitted in support of the November 16 Permit show in capital letters "BRICKS TO BE REMOVED" from both sides of the garage walls. An image of the Proposed Site Plan approved with the November 16 Permit is below:



Copies of the plans as approved by DCRA's Zoning Section were sent to Appellants and filed with the Board on November 13, 2015. Those plans are included in the record at **BZA** **Exhibit 35.**

At the November 17, 2015 Hearing on the Appeal, the Board granted the Appellants' motion for a continuance but limited the matters on appeal to allegations of zoning errors.

On or about December 11, 2015, the Property Owner submitted the Building Permit to DCRA for review. As indicated in the description of work, the Building Permit is a "Revision to Building Permit B1412288 and B1601746 [the November 16 Permit] to remove 1 brick wythe from each side of garage party wall, install p.t. [pressure treated] ledger board at top of garage wall with 2 x 10 p.t. [pressure treated] framing at 24 inches o.c. [off center]." The Building Permit application included a letter that was signed and stamped by the project's civil engineer, Fadil M. Abelfatah, a registered professional engineer in the District stating that "after careful review to the condition and structural stability of the wall and proposed parge repair after removing one brick wythe, it appears to be that the structural integrity of the wall will remain sound. We recommend a 2x10 p.t. [pressure treated] joists at 24" o.c. [off center] connected to ledger to span between the walls after parge repairs completed." A copy of this letter and plans approved as part of the Building Permit are included herein at **Exhibit "B"**. Also, Mr. Abdelfatah signed and stamped the structural plans identified as A0100 and A0100-2 that document the width of the wythes to be removed (3 inches on each side), the width of the remaining footings (9 inches on each side) and the requirements and location of the proposed pressure treated ledger board installation.

Based on these plans, as signed and stamped by the project engineer, DCRA issued the Building Permit on December 11, 2015, thereby revising and replacing the November 16 Permit.

III. THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Pursuant to § 8 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(1) (2012 Repl.), the Board's purview is to hear and decide appeals based on an allegation that an administrative officer erred in rendering a decision or determination in administering the Zoning Regulations. Further, Section 3100.2 establishes the Board's scope on appeal noting that "... pursuant to the Zoning Act, [the Board] shall also hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the *Zoning Regulations*, Title 11 DCMR." (emphasis added).

In this Appeal, the sole issue raised by the Appellants – whether the November 16 Permit included sufficient evidence to demonstrate the party walls would be structurally sound following removal of the brick— pertains only to application of the District's building code. Not the Zoning Regulations. Indeed, structural review is outside the authority of the Zoning Administrator and is conducted by a different division DCRA.

Also, as stated above, Mr. Rafferty has filed a separate building code appeal to the OAH, which is the appropriate forum for this review. Accordingly, Mr. Rafferty could have an opportunity to have this issue adjudicated in that forum, and would not be prejudiced by dismissal of this Appeal.

For these reasons, the subject Appeal should be dismissed as beyond the Board's purview on appeal of zoning decisions.

IV: THE APPEAL SHOULD BE DISMISSED FOR MOOTNESS

Subsection 3100.7 of the Zoning Regulations restricts the Board from considering “moot questions.” It is understood that “[a] case is moot when the legal issues present are no longer ‘live’ or when the parties lack a legally cognizable interest in the outcome.” *Appeal No. 18321 of the Citizens Association of Georgetown*, 60 DCR 6821, 6825 (May 2, 2013) (quoting *N St. Follies, Ltd. P’ship v. District of Columbia Bd. of Zoning Adjustment*, 949 A.2d 584, 588 (D.C. 2008)). “The central question is . . . whether the decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties.” *N St. Follies*, 949 A.2d at 589 (quoting 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533 (1984)); *See also, Appeal No. 18857 of Advisory Neighborhood Commission 3D* (March 10, 2015).

Here, there is no “live” dispute. The Appellants’ argument was based upon an allegation that the November 16 Permit did not include a structural report demonstrating that the remaining party walls would be structurally sound. That claim no longer exists as a result of DCRA’s approval of the Building Permit, which included both a structural report and structural plans stamped and signed by a professional engineer. That approval, therefore, rendered this Appeal moot, and it should be dismissed.

V: MOTION TO STRIKE EVIDENCE OR STATEMENTS NOT RELEVANT TO THE ISSUES RAISED ON APPEAL

At the November 17 hearing, the Board expressly limited the scope of the Appeal to zoning matters.

Contrary to the clear direction provided by the Board, a certain individual, Mr. O. Olowofoyeku, who identified himself as a “homeowner on Ontario Place” but failed to give his address, has now attempted to vastly expand the scope of the information presented to the Board by filing an undated letter into the Record. The Property Owner, consequently, files this motion to strike Mr. Olowofoyeku’s letter as it is beyond the scope of the Board’s parameters on the Appeal. Also, we note that Mr. Olowofoyeku is not authorized to act on behalf of the ANC and/or the Appellants, and he has not filed for Party Status. Accordingly, this letter, should be stricken from the Record. Also, for the same reasons, we urge the Board to limit testimony on matters outside the Appeal’s limited scope during the December 22, 2015 Hearing.

VI: WITNESSES

The following witnesses will appear on behalf of the Property Owner, if necessary:

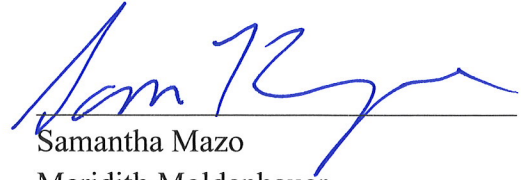
1. Chris Bogdan, on behalf of the Property Owner
2. KC Price, design consultant on behalf of the Property Owner
3. Any other witnesses necessary to counter testimony given by the Appellants

VII: CONCLUSION

For the reasons stated above, the Board should dismiss the subject Appeal for lack of jurisdiction and/or mootness. Further, the Board should strike filings and testimony that are not directly relevant to the issues raised by the Appellants on Appeal.

Respectfully submitted,

GRIFFIN, MURPHY,
MOLDENHAUER & WIGGINS,
LLP



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