

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

Appeal of Advisory Neighborhood Commission 1C

BZA Appeal 19115

DCRA’S MOTION TO DISMISS AS PREVIOUSLY DECIDED
UNDER LEGAL DOCTRINES OF CLAIM AND ISSUE PRECLUSION
(RES JUDICATA AND COLLATERAL/DIRECT ESTOPPEL)

Appellants allege that the Zoning Administrator (the “ZA”) erred in approving Building Permit B1509180, issued June 23, 2015 (the “**2nd Revised Permit**”), which revised the rear retaining wall approved by B1502210, issued on December 18, 2014 (the “**1st Revised Permit**”), which in turn had revised B1404813, issued on September 9, 2014 (the “**Permit**”) to convert a single family dwelling into a four unit apartment house (the “**Project**”) at 1636 Argonne Place, N.W. (the “**Property**”), located in the R-5-B Zone District.

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that the Board of Zoning Adjustment (the “**Board**”) has already heard and ruled on Appellant’s appeal of the 2nd Revised Permit in BZA Appeal 18980. Appellants are therefore barred from re-litigating an appeal that was already considered and ruled upon by the Board under the legal doctrines of claim and issue preclusion (*res judicata* and collateral/direct estoppel). Appellant seeks to have a second bite at the proverbial apple in direct contradiction to fundamental notions of fairness that are codified in claim and issue preclusion. Moreover, one of the claims raised in this Appeal – that the front adjacent finished grade was more than four feet below the ceiling of the lower level - was not part of the 2nd Revised Permit, but had been approved by the Permit and so is time-barred from being raised in this Appeal.

Therefore, DCRA respectfully requests that the Board dismiss this Appeal as previously decided in BZA Appeal 18980.

APPELLANT’S ALLEGATIONS

Appellant alleges that the ZA erred in approving the 2nd Revised Permit because the ZA incorrectly determined “adjacent finished grade”

- 1) at the rear of the building; and

2) at the front of the building.

Appellants therefore alleges that the lower level should have been considered a “basement” and not a “cellar” under the Zoning Regulations and so should have been included in the calculation of Floor Area Ratio (“F.A.R.”).¹ Within its Pre-Hearing Statement, Appellant expands on these two claims, alleging five errors related to the determination of the adjacent finished grade which are included within the two stated claims in the appeal and a sixth error that the retaining wall approved in the 2nd Revised Permit lacked a legitimate purpose.

DCRA rejects all of these allegations as barred under claim and issue preclusion having been considered and ruled upon by the Board in BZA Appeal 18980 filed by the same Appellant, ANC 1C.

ARGUMENT

The Appeal is barred under the legal doctrines of claim and issue preclusion

The Court of Appeals has described the legal doctrines of claim and issue preclusion as follows:

“Generally speaking, once a claim has been finally adjudicated, the doctrine of claim preclusion, or *res judicata*, prevents the same parties from relitigating the same claim, including any issue that either was or might have been raised in the first proceeding. As a corollary, the doctrine of issue preclusion, embracing the concepts of direct and collateral estoppels, prevents the same parties from relitigating an issue actually decided in a previous, final adjudication, whether on the same or a different claim.” (internal citations removed)
Rhema Christian Center v. District of Columbia Board of Zoning Adjustment, 515 A.2d 189, 194 (D.C. 1986).

In the zoning context, claim preclusion would apply to a decision on a specific alleged violation of the Zoning Regulations, while issue preclusion would apply to an underlying issue that implicates multiple violations of the Zoning Regulations (e.g., lot size which affects lot occupancy, pervious surface and F.A.R. calculations). The Court of Appeals in *Rhema* specifically confirmed that the Board has the authority to rule on the basis of either or both claim and issue preclusion and concluded that:

¹ BZA Appeal 19115 Exhibit 19, Appellant’s Pre-Hearing Statement, at 1.

“[the] preclusion doctrine has an important role in assuring finality to Board proceedings, the integrity of the zoning plan, and respite for property owners who seek to uphold that plan.”

Rhema, 515 A.2d at 198.

The Appellant in this Appeal was the same in BZA Appeal 18980

The Appellant in BZA Appeal 18980 was ANC 1C, which provided an authorization for “Commissioner Alan Gambrell” to represent ANC 1C before the BZA in that appeal.² Indeed the Appellant listed on the Form 125 – Appeal in BZA 18980 was “Alan Gambrell”.³ ANC 1C is also the Appellant in this Appeal.

The claim and issues raised in this Appeal were already raised in BZA Appeal 18980

Although the Board has not yet issued a Final Order in BZA Appeal 18980, the transcripts for the Board’s hearings show that the Appellant raised the same claims and issues as are in this Appeal, and the Board ruled on those very claims and issues – namely the determination of the adjacent finished grade in the rear and front of the building and the resulting effect on F.A.R. calculation.

Front adjacent finished grade

Appellant had already raised this in Appellant’s Pre-Hearing Statement in BZA Appeal 18980 as alleged “Error 1, no. 5”:

“5. **Misidentification of Recognized Adjacent Finished Grade.** The Zoning Administrator disregards the fact that the subject property’s front entryway to the lower level is the adjacent finished grade.”⁴

This error was accompanied by multiple exhibits addressing Appellant’s allegations as to the determination of the front adjacent finished grade.⁵ At the July 7, 2015 hearing, the Board considered the motions of the Permit Holder and DCRA to dismiss all issues and claims not solely related to the 1st and 2nd Revised Permits as untimely filed. After hearing oral arguments, the then-Board chair stated:

² BZA Appeal 18980 Exhibit 18.

³ BZA Appeal 18980 Exhibit 3.

⁴ BZA Appeal 18980 Exhibit 3, at 4.

⁵ BZA Appeal 18980 Exhibit 22B, at 1 and 3-4.

“I think the Board’s hard-pressed to not find the lack of timely filing regarding those matters that were not changed as of October 2014. ... So, in that case then, I would move that we would agree as to the motion to dismiss for timeliness on those issues, other than the ones that I talked about, that being the parking space, the rear retaining wall and the rear grade issue, those would be the only one that are remaining, so that would be my motion. Anyone second or third it?”

Vice-Chairperson Heath: I’ll second.

Chairperson Jordan: Motion made and second, additional discussion? All those in favor aye?

(Chorus of ayes.)

Chairperson Jordan: Those opposed nay, the motion carries. Mr. Moy, let’s go ahead, let’s go through it. Go ahead.

Mr. Moy: Okay. On the Chairman’s motion and second by Vice Chairperson Heath, the Board vote is 4 to 0, the motion carries, sir.”⁶

The Board therefore dismissed Appellant’s allegations as to the determination of the front adjacent finished grade as based on the Permit and so untimely filed.

Therefore, this allegation by the Appellant in this Appeal is barred under claim and issue preclusion as having been previously considered and ruled upon by the Board. Furthermore, in that ruling, the Board determined that the subject of the front adjacent finished grade was not within the scope of the 2nd Revised Permit and so this second appeal of this issue would also be time-barred.

Rear adjacent finished grade

The Board specifically included the 2nd Revised Permit in BZA Appeal 18980 and made a final decision from the bench on the appeal as incorporating the 2nd Revised Permit

At the July 7, 2015 hearing, the then-chair of the Board, after asking the parties whether the 2nd Revised Permit had rendered that appeal moot unless that was incorporated into that appeal (18980) stated:

“I do think that there are remaining issues for this Board [after dismissing the other claims as untimely filed], although we did not get a, you can look at it a couple of ways, we did not re-amend the appeal to conclude [*sic*] the June 23rd changes [included in the 2nd Revised Permit issued that day], however, that just happened so we would certainly take that as your oral motion to include that revised building permit for us to hear evidence.”

⁶ BZA Appeal 18980 July 7, 2015 Transcript at 67-69.

On that basis, the Board acted to consider Appellant's allegations as applied to the 2nd Revised Permit. In asking for draft Findings of Fact and Conclusions of Law from the parties, the then-chair of the Board clarified the scope as "those issues that are before the Board in that being what we talked about remaining for the Board to address the retaining wall at [*sic*] it relates to the berm and the parking space and the grade measurement".⁷

At the subsequent September 15, 2015 hearing at which the Board issued its decision, the then-chair of the Board stated that "that Board made a ruling that dismissed part of the case. And part of the case remained, that being the parking space, the retaining wall and the rear grade as the issues."⁸ Indeed the then-chair of the Board explicitly stated "so then I would suggest that the Board would sustain the Zoning Administrator's decision regarding the *second revised permit*." (italics added).⁹ The then-chair of the Board continued: "I would offer that the Board find that they [DCRA/Permit Holder] established that the adjacent finished grade at the rear of the building at the top of the retaining wall and soil is held up by the retaining wall."¹⁰ The then-chair of the Board moved to "sustain the decision of the Zoning Administrator regarding the retaining wall and the permission of the 12 percent grade, and that we would overrule the decision regarding the parking space."¹¹ This motion was duly seconded and approved by the Board on a vote of 3-0.¹²

Therefore, this allegation by the Appellant was also considered and ruled upon by the Board in BZA Appeal 18980. Therefore this second appeal of the same allegation is barred under claim and issue preclusion doctrines.

Retaining Wall lacking a "legitimate purpose"

The Board specifically inquired of the parties in BZA Appeal 18980 as to their positions on this issue.

At the September 15, 2015 hearing where the Board rendered its decision, the then-chair of the Board stated:

⁷ BZA Appeal 18980 July 7, 2015 Transcript at 92.

⁸ BZA Appeal 18980 September 15, 2015 Transcript at 7.

⁹ BZA Appeal 18980 September 15, 2015 Transcript at 8.

¹⁰ BZA Appeal 18980 September 15, 2015 Transcript at 8.

¹¹ BZA Appeal 18980 September 15, 2015 Transcript at 11.

¹² BZA Appeal 18980 September 15, 2015 Transcript at 11.

“DCRA provided evidence that the retaining wall was necessary and served as restraining the lateral displacement of soil. And that was not contradicted during the hearing. In fact, the Board asked the Applicant [*sic*: Appellant] directly, Is this retaining wall being used to restrain soil displacement? And there was really no response given. Kind of side-stepped it.

So I would offer that the Board find that the retaining wall serves a legitimate purpose to prevent the soil erosion as what you normally would use with a retaining wall.”¹³

Therefore this allegation by the Appellant was also explicitly considered and ruled upon by the Board in BZA Appeal 18980. Again, this attempt by Appellant to relitigate the same issues a second time is barred by claim and issue preclusion doctrines.

Appellants erroneously assert a right to a second appeal after having argued and lost the first appeal – their recourse is not through a second appeal but through a motion for reconsideration and/or an appeal to the Court of Appeals

DCRA challenges Appellant’s assertion that after it has already argued and lost an appeal, that Appellant can try again to appeal the same issues with the aim of achieving a different result. This is a waste of the resources of the Board and to the other parties seeking a hearing from the Board, as well as of DCRA as well as being profoundly unfair to the Permit Holder. Section 3126 of the Zoning Regulations provide for an appellant to request a reconsideration of a ruling by the Board. Alternatively, an Appellant can appeal the Board’s decision to the Court of Appeals. The Board is not authorized to overrule its own decisions except under the provisions of Section 3126.

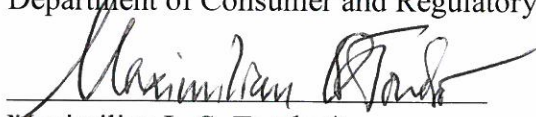
CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are barred from consideration by the Board in this Appeal because the Board has already considered and ruled on these same allegations by the same Appellant in BZA Appeal 18980. DCRA therefore respectfully requests that the Board dismiss this Appeal as barred under claim and issue preclusion doctrines.

¹³ BZA Appeal 18980 September 15, 2015 Transcript at 8.

Respectfully submitted,
CHARLES THOMAS
General Counsel
Department of Consumer and Regulatory Affairs

Date: 11/15/2015


Maximilian L. S. Tondro*

Assistant General Counsel, Office of General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, S.W., Suite 5266
Washington, D.C. 20024
(202) 442-8403 (office) / (202) 442-9477 (fax)
maximilian.tondro@dc.gov

Attorney for Department of Consumer and Regulatory Affairs

* Admitted to practice in Maryland. Practicing in the District of Columbia pursuant to D.C. Court of Appeals Rule 49(c)(4).

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

JonMarc Buffa, Chair of ANC 1C Planning,
Zoning and Transportation Committee
William Simpson, Chairperson
Advisory Neighborhood Commission 1C
P.O. Box 21009

Kalorama Station
Washington, D.C. 20009

1C08@anc.dc.gov

1C06@anc.dc.gov

Appellant

Marty P. Sullivan
Sullivan & Barros, LLP
1990 M Street, N.W., Suite 200
Washington, D.C. 20036
msullivan@sullivanbarros.com
Attorney for Permit Holder


Maximilian L.S. Tondro