

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 RESPONSE TO APPELLANT’S OPPOSITION TO MOTIONS TO DISMISS
AND PRE-HEARING STATEMENT**

Appellant, ANC 1C, alleges that it was not a party to BZA Appeal 18980 in which the Board considered and ruled upon the issues raised by ANC 1C in this Appeal.

DCRA asserts that ANC 1C chose to participate in BZA Appeal 18980 and so cannot use an alternative representative or figurehead to raise the same issues that were already considered and ruled upon by the Board. This attempt to circumvent the process established in the Zoning Regulations for reconsideration of the Board’s decisions threatens to sow confusion as well as waste the resources of the Board, DCRA and permit holders as well as to block the applications and appeals of other citizens who seek only one attempt for Board review.

Furthermore, DCRA asserts that even if this Appeal was not barred by issue and claim preclusion, much of this Appeal is barred as outside the scope of the 2nd Revised Permit which is the subject of this Appeal. Another alleged error has already been carefully considered and rejected by the Board and has been established for over a decade.

DCRA therefore respectfully restates its request that the Board grant its motion to dismiss this Appeal.

ARGUMENT

1. ANC1C chose to intervene in BZA Appeal 18980 and so is bound by issue and claim preclusion

ANC 1C acted to participate in BZA Appeal 18980 by filing an April 6, 2015 letter that explicitly stated:

“ANC1C voted 6-0 to adopt the attached resolution stating ANC1C support for BZA appeal #18980, filed by Concerned Citizens of Argonne Place, and **authorizing Commissioner Alan Gambrell** to submit this resolution to the BZA

and to represent ANC 1C before the BZA in connection with this matter.¹
(emphases added).

ANC 1C could have chosen to not participate, or even to merely state its support for BZA Appeal 18980. Instead, ANC 1C chose to actively intervene by appointing Commissioner Gambrell, the first member of the BZA 18980 Appellants, as ANC 1C's representative. Furthermore, ANC 1C did not place any limitations on the role of Commissioner Gambrell's participation but provided an open-ended authorization. ANC 1C asserts that it "goes to great lengths to provide specific language in its resolutions so as to provide clarity and focus on positions and actions authorized on its behalf and in its name" (emphasis added).² If so, this April 6, 2015 authorization letter indicates that ANC 1C saw fit to not restrict or circumscribe Commissioner Gambrell's role as representative of ANC 1C in BZA Appeal 18980. Such an expansive authority is understandable since Commissioner Gambrell was and remains a member of ANC 1C and so ANC 1C would be kept informed of the results of BZA Appeal 18980.

ANC 1C cannot now unilaterally withdraw or circumscribe its prior authorization of Commissioner Gambrell as its representative in BZA Appeal 18980. ANC 1C is bound by its decision to grant such expansive authority to Commissioner Gambrell to act as its representative in BZA Appeal 18980. ANC 1C chose to participate in BZA Appeal 18980, and cannot now ask for a second bite at the apple under the premise that it was not involved or cognizant of BZA Appeal 18980.

2. BZA Appeal specifically included the 2nd Revised Permit that is the subject of this Appeal

The sole reason for DCRA's May 18, 2015 Motion to Continue was to allow DCRA to review the Permit Holder's proposed solution to errors that DCRA had identified.³ DCRA's July 1, 2015 Pre-Hearing Statement and Partial Motion to Dismiss explicitly stated that the 2nd Revised Permit had replaced the 1st Revised Permit and provided the plans approved by the 2nd

¹ BZA Appeal 18980 Exhibit 18, at 1.

² BZA Appeal 19115 presumed Exhibit 23 (Appellant's Motion in Opposition to Dismiss) at 2.

³ BZA Appeal 18980 Exhibit 24.

Revised Permit.⁴ As a matter of law, once a permit has been revised, the portions of the original permit that have been revised are no longer authorized as they have been replaced by the revised permit. Thus any appeal of a permit that addresses portions of the permit that have been revised by a subsequent revision is moot to the extent that the revisions address the alleged violations of the Zoning Regulations. In BZA Appeal 18980, the Board therefore did not consider the 1st Revised Permit that had been wholly replaced by the 2nd Revised Permit – instead the Board explicitly considered and ruled on the 2nd Revised Permit.

ANC 1C was aware that the Board had incorporated the 2nd Revised Permit into BZA Appeal 18980 at the time of its filing of this Appeal in August 17, 2015, since ANC 1C as well as its authorized representative, Commissioner Gambrell, received DCRA's May 28 Motion to Continue and DCRA's July 1 Pre-Hearing Statement that specifically addressed this issue (ANC 1C also received copies of all other filings in BZA Appeal 18980). Moreover, Commissioner Gambrell represented ANC 1C at the Board's July 7, 2015 hearing at which the then-chair announced that the Board had included the 2nd Revised Permit into BZA Appeal 18980. The timing instead suggests that ANC 1C sought to obtain a second opportunity to appeal the same issues after not obtaining its desired results in its first appeal.

3. Even if claim and issue preclusion did not bar this Appeal, this Appeal would be limited only to what was included in the scope of the 2nd Revised Permit, not the Permit which was issued over a year ago on September 9, 2014 (Alleged Errors 1, 4)

The scope of work of the 2nd Revised Permit at issue in this Appeal is very limited. Therefore this Appeal, even if it were not barred by issue and claim preclusion, would be similarly limited to this scope:

“Revision to B1404813 [the Permit] to remove approximately 73 square feet of cellar and install retaining wall”⁵

The 2nd Revised Permit did not address the adjacent finished grade at the front of the Property – further corroborated by the plans approved with this 2nd Revised Permit which only addressed the rear adjacent finished grade. The front adjacent finished grade had been determined as part of

⁴ BZA Appeal 18980 Exhibit 35 at 1 and 12-17 (2nd Revised Permit and Plans).

⁵ BZA Appeal 18980 Exhibit 35, at 13 (Exhibit C).

the Permit and was not changed by the 2nd Revised Permit. This was the reason for the Board's dismissal on timeliness grounds of this part of BZA Appeal 18980 – as ANC 1C recognizes in its chart attached to its most recent filing.⁶ Yet ANC 1C appears to assert that despite losing on this issue in BZA Appeal 18980 it may now revive it. Moreover, ANC 1C appears to assert that it may appeal any portion of a permit that was subsequently revised by appealing the revision – even those portions of the original permit that were not affected by the revision. This runs directly counter to the Zoning Regulations establishment of the sixty (60) day appeal period, as well as the legal doctrines of estoppels and laches. In this case, ANC 1C asserts that they have the right to appeal portions of a building permit that was issued on September 9, 2014 – almost a year before they filed this Appeal on August 17, 2015.

Therefore ANC 1C's alleged Errors 1 and 4 are barred as not part of the 2nd Revised Permit and should be dismissed.

4. The Board has long affirmed the ZA's discretion to select the grade plane or perimeter wall method for a specific project (Alleged Error 3)

The Board has considered appeals based on the ZA's choice to apply one of these methods to a specific project. Over a decade ago, this Board, after careful consideration of the relative merits of each method explicitly endorsed and authorized the ZA's exercise of discretion to choose which method to apply to a particular project:

“The Zoning Regulations provide no guidance on how to calculate the FAR of partial basements and partial cellars. The Zoning Administrator's office has employed at least two methods for calculating lower level FAR: the grade plane method and the perimeter wall method. In this instance, the Zoning Administrator utilized the latter. KCA [Appellant] asserted the “grade plane” method was the appropriate means to calculate partial basements/cellars.

Under the “perimeter wall” method, the FAR is determined by establishing a ratio between the linear footage of the portion perimeter wall with more than four feet out of grade and the total square footage of the lower lever. Under the “grade plane” method, a plane is established between the grade at the front of the building and the grade at the rear of the building. The point at which this plane intersects at a four foot level, any portion that exceeds that plane counts toward FAR and any portion that does not is considered a cellar.

⁶ BZA Appeal 19115 presumed Exhibit 23 (Appellant's Motion in Opposition to Dismiss) at 3.

Both methods appear reasonable and the choice of which is most appropriate is within the Zoning Administrator’s discretion.” (emphasis added).⁷

This part of this Appeal has been long settled by the Board and relied upon in the issuance of countless permits and construction projects across the District and therefore is without merit. Therefore ANC 1C’s alleged Error 3 is without merit and should be dismissed.

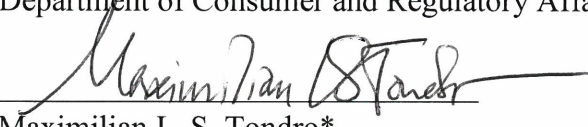
CONCLUSION

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.

Respectfully submitted,
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Date:

11/30/2015


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⁷ BZA Appeal No. 17109 of Kalorama Citizens Association, at 14.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2015, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

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