

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

**Appeal of Unit Owners' Association of
The Erie Condominium**

**Appeal No. 19174
Hearing: Feb. 9, 2016
ANC 1C**

**APPELLANT'S MEMORANDUM IN OPPOSITION TO DCRA'S JOINDER OF PERMIT
HOLDER'S MOTION TO DISMISS APPEAL AS UNTIMELY FILED AND OWNER'S
STATEMENT IN OPPOSITION TO APPEAL**

Appellant Unit Owners' Association of The Erie Condominium ("Appellant" or "Erie") files this memorandum in further support of this appeal. This filing is necessary to address arguments that have just been advanced by the Permit Holder in "Owner's Statement in Opposition to Appeal" ("Owner's Statement") and by the Respondent in "DCRA's Joinder of Permit Holder's Motion to Dismiss Appeal As Untimely Filed" ("DCRA's Memorandum" docketed as Exhibit 23 in Case 19174). Appellant did not receive the Owner's Statement or DCRA's Memorandum until February 5, 2015, i.e., two business days before the hearing date.

I. The Timeliness Issue

The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") essentially argues that Erie should have realized that it was being defrauded by 2337 Champlain Street, LLC ("Owner") and, therefore, should have located files at DCRA to verify the information provided by the Owner. This argument is flawed for several compelling reasons.

DCRA incorrectly assumes that the Appellant was aware of the Owner's deceit or "dubious as to the candor of the Permit Holder" for years. DCRA has absolutely no factual basis for challenging Erie's detailed recitation of facts and extensive supporting documents. Instead, counsel for DCRA simply mocks Appellant's serious allegations by saying that Erie

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was not “naively led as lambs to slaughter by a conniving Permit Holder...”¹ In fact, Erie reasonably believed that the Owner was providing accurate information about the re-designed project. The record does not support DCRA’s characterization of a continuous multi-year battle, but shows a seemingly collaborative exchange of information with the Owner for most of the period.² DCRA was not present at any meetings between the two private parties and it is not in any position to characterize the relationship.

The Owner had not participated in the 2012 BZA case and there was no history of any serious controversy between Erie and the Owner. Communications from the Owner seemed to be responsive. After buying the property, the Owner’s representations were absolutely clear: The Owner was not increasing the height of the penthouse or the roof, but the Owner was promising changes to the design that would purportedly benefit Erie. The new Owner acknowledged familiarity with BZA Case No. 18330 and with the terms of the settlement agreement. Of course, Appellant was also familiar with BZA Order 18330 and the Zoning Administrator’s Determination Letter, dated April 9, 2013, but this knowledge instilled *greater* confidence in the information that was being provided by the new Owner of the Property. Based upon all of these circumstances, as described more fully in other filings by the Appellant, Erie reasonably believed that it understood the material aspects of the project. Subsequent communications with the Owner simply reinforced this impression and induced continued reliance upon the Owner’s apparent candor.

¹ DCRA repeatedly asserts that Erie’s counsel is an “experienced zoning counsel,” “experienced and sophisticated expert counsel,” and a specialist in zoning and permits. Although these compliments are exaggerated, they are not pertinent to the issues before the Board. Undersigned counsel did not represent Erie continuously for four years, and DCRA cannot impute an attorney’s alleged knowledge to all of her past and present clients.

² Appellant did express concerns about excavation near the foundation of Erie Condominium, but that issue did not put Appellant on notice of misrepresentations about the unbuilt roof level of the new building.

DCRA contends that an owner's misconduct is completely irrelevant to the timeliness issue, but DCRA offers no supporting citations, and prior BZA cases consider the conduct of the permit holder. In Appeal No. 17414 (Geraldine Rebach and Jeffrey Schonberger), the Board expressly held that "[t]he actions of the builder and the completion of the garage at one story constitute the circumstances required by § 3112.2(d)." In that case, the builder represented that he would not build a second story on his garage, and the Board permitted a delayed appeal based (in part) upon the appellant's reliance upon that promise.

Here, the Owner's deceit establishes the reasonableness of the Appellant's conduct under 11 DCMR § 3112.2(a) and 11 DCMR § 3112.2(d). This appeal is not simply "leverage in [a] private battle" between the Appellant and the Owner, as alleged by DCRA. DCRA tries to summarily dismiss Appellant's "vociferous allegations of dissembling and deceit" as a "private matter," but these facts justify the timing of Erie's appeal and the exceptional circumstances presented by this case. Moreover, these facts show that the Zoning Administrator probably was the victim of the very same deceit and dissembling. DCRA fails to explain why there are two very different versions of the plans that the Zoning Administrator purportedly approved in 2014. DCRA should take these allegations seriously, instead of aligning in lock-step with the Owner and Holland & Knight.

DCRA incorrectly contends that Erie knew that it could inspect the DCRA Approved Plans and simply decided not to do so. There is no evidence establishing that Appellant actually knew the location or availability of particular records. The permit does not say that the application and plans are available to the public. BZA 19174 Exhibit 16K (Permit Holder's Motion to Dismiss, Exhibit K), at 1. Erie Condominium is an eight-unit building

that is comprised of private citizens who are not zoning experts. Although Appellant retained an attorney intermittently, Erie did not have any zoning attorney on retainer during the summer of 2015 and no zoning attorney lives in the building. DCRA incorrectly implies that Appellant had first-hand knowledge of permitting practices and Erie's alleged ability to consult the Approved Plans.

Moreover, there is no evidence that the Approved Plans were available for public inspection by Appellant. After retaining undersigned counsel again and filing this appeal, Mr. Wiedis of Erie Condominium went to DCRA to inspect the Approved Plans. He was advised by DCRA staff that he could not inspect the plans because he was not authorized to do so. In any event, DCRA could not find them. After filing this appeal, Appellant also contacted the Zoning Administrator on multiple occasions and asked for information and plans regarding the project. He never provided any of the requested plans or information. To date, the Appellant still does not have a full set of DCRA Approved Plans because public officials have withheld or misplaced them. This is a recurrent problem that should not inure to DCRA's benefit.

DCRA claims that it would be "substantially prejudiced" by the timing of this appeal, but it cannot support that conclusory assertion. This case is not likely to open the floodgates for other appellants, because the BZA is unlikely to encounter many other owners who engage in the same type of misconduct. In any event, this case should be evaluated on the unique facts presented, and the Board's order could easily distinguish this case from more typical circumstances. This is **not** a situation where a neighbor unexpectedly sees a posted building permit and has no idea what is being built next door. In that situation, the posted building permit or initial construction activities might prompt

an investigation by the neighbor to discern the nature of the project. Here, by contrast, Erie already knew about the project from numerous sources, already knew the constraints imposed upon the Owner by BZA and the Zoning Administrator, and had no reason to question the information that had been provided by the Owner.

Finally, DCRA and the Owner completely ignore the “under roof” provisions in 11 DCMR § 3112.2(b). These provisions were added to provide more time when an appellant may not have notice or knowledge of the decision until construction is underway. 50 D.C. Reg. 1201. That provision fits the circumstances presented in this case.

II. The Owner is Asking the BZA to Re-Write the Zoning Regulations and to Dramatically Expand the Zoning Administrator’s Authority

The Owner has just filed “Owner’s Statement in Opposition to Appeal,” which advances numerous legal theories that are inconsistent with District of Columbia court decisions, prior BZA rulings and published Zoning Regulations.³ The Owner is asking the BZA to ignore the plain meaning of 11 DCMR § 3125.8. That published and binding regulation states:

An applicant shall be required to carry out the construction, renovation, or alteration only in accordance with the plans approved by the Board, unless the Board orders otherwise.

11 DCMR § 3125.8 (2015). The requirements set forth in the quoted regulation were re-stated in BZA Order 18330, relating to the subject Property as follows:

PURSUANT TO 11 DCMR § 3125, APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION

³ The “Owner’s Memorandum” is not dated and it does not include any certificate of service. As of February 6, 2016, it has not yet been docketed by the Office of Zoning in BZA Case 19174. The Owner’s Memorandum was mailed on or about February 3, 2016 to Appellant’s counsel. It purportedly responds only to Appellant’s “initial appeal documentation in the record at Exhibit 3,” even though Appellant transmitted a copy of Appellant’s Pre-Hearing Statement to Owner’s counsel by U.S. mail, postage pre-paid, on January 22, 2016. A copy was sent to DCRA’s counsel on the same date. He has responded to that filing.

FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE REMOVAL OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE. **AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD AS THE SAME MAY BE AMENDED AN/OR MODIFIED FROM TIME TO TIME BY THE BOARD OF ZONING ADJUSTMENT.**

See BZA Order 18330 (submitted in BZA Case 19174 at Exh. 3) (emphasis added). BZA Order 18330 also stated that the application (for zoning relief) was GRANTED, **SUBJECT** to the approved plans, as shown on Exhibit 30.” *Id.* (emphasis added).

The cited regulation permits modifications to the plans **by the BZA**, not by the Zoning Administrator.^{4 5} The Zoning Regulations create a “minor” modification process that requires notice to other parties, a statement of the reasons for the requested modification, and a copy of the proposed plans. Sections 3129.2 through 3129.9 set forth procedures for modification of plans by the Board, including a streamlined request for “minor modifications.” Section 3129.6 defines “minor modification” to “modifications that do not change the material facts upon which the Board based its original approval of the application.” 11 DCMR § 3129.6 (2015).

Despite the plain text of the Zoning Regulations, the Owner asserts that DCRA can issue building permits for projects that include modifications to BZA-approved plans “so long as the plans do not impact the relief granted or the conditions set forth in the BZA order.” The Owner does not cite any statutory or regulatory language to support this interpretation. It does not submit any BZA orders which have authorized this practice by the Zoning Administrator.

⁴ On occasion, a BZA order will expressly provide the zoning applicant with flexibility to deviate from the approved plans. For example, the Board included the following language in BZA Order No. 17723 (Bozzuto Development Company): “Pursuant to 11 DCMR 3125.8, the Applicant shall carry out construction only in accordance with the plans approved by the Board, except that Applicant shall have the following **flexibility**...”. The Board did not include similar language in BZA Order 18330.

⁵ This case is not governed by the planned unit development (PUD) procedures, which provide the Zoning Administrator with the authority to approve certain very minor modifications to final PUD plans approved by the Zoning Commission (e.g., two percent in height). *See, e.g.*, 11 DCMR §2409.6 (2015).

Instead, the Owner is asking this Board to invent language that does not appear in the cited Zoning Regulations. The BZA cannot simply ignore the plain meaning of Regulations and insert new language that dramatically alters that meaning. Even if the Zoning Administrator has “historically” interpreted Section 3125.8 in the manner suggested, the BZA cannot lawfully adopt that suggested interpretation because it is inconsistent with the unambiguous text of the Zoning Regulations.

The Owner’s interpretation of the Zoning Regulations would also undermine the important statutory role of the BZA, which requires the Board to consider an applicant’s plans, conduct a hearing, and issue findings of fact in contested cases. In the context of a special exception request, the Board evaluates the likely impact of the proposed building upon adjacent neighbors by considering a number of factors. In BZA Case 18330, the Board considered numerous facts, including the proposed nine-foot height of the penthouse structure, shadow studies, and the relative heights of the two adjacent rooftop surfaces. It authorized a taller building based upon the applicant’s express plan to limit the height of the penthouses on top of the taller building. The Owner and DCRA cannot simply ignore that material aspect of the BZA-approved plans later. The height of the penthouse was a material issue that related directly to the applicant’s requested special exception to increase the height of the roof. The Zoning Administrator subsequently approved a penthouse height of 206.83 feet on April 9, 2013, with knowledge of Erie’s interests in that one-foot reduction. Thereafter, he cannot approve of a penthouse elevation of 213.10 feet.

The Zoning Administrator routinely considers the impact of proposed changes upon adjacent properties, including changes that do not relate solely to the relief granted by the Board. *See, e.g.*, BZA Case 19174 at Exhibit 3 (Zoning Administrator’s letter discussing height and

placement of roof structures). Yet, he inexplicably failed to engage in that same analysis when the Owner submitted plans for an increase in penthouse height at the permitting phase. If he simply made a mistake, then he should admit his error.

In sum, the Zoning Administrator violated the Zoning Regulations and BZA Order 18330 by approving a building permit that departed materially from the BZA-approved plans. The Owner and DCRA have not disputed the alleged inconsistencies between the permitted plans and the plans approved by the BZA in 2012. Accordingly, the appeal should be granted.

III. The Doctrines of Equitable Estoppel and Laches Do Not Apply

This appeal is not barred by the doctrines of equitable estoppel or laches. Equitable estoppel is “judicially disfavored in the zoning context because of the public interest in enforcement of zoning laws.” *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427 (D.C. 2008) (quoting *Beins v. District of Columbia Bd. of Zoning Adjustment*, 572 A.2d 122, 126 (D.C. 1990)). “Because of the public interest in enforcement of the zoning laws, stringent conditions are placed on the assertion of an equitable estoppel defense against the government” and the equities must “strongly” favor the party invoking the doctrine. *West End Citizens Assn. v. District of Columbia Bd. of Zoning Adjustment*, 112 A.3d 900, 903 (D.C. 2015). “For the equities to favor the party claiming the estoppel, any injury to the public that would flow from non-enforcement of the zoning laws must be minimal and outweighed by the injury estoppel would avoid.” *Id.* at 904. In *West End*, the court also stated that the estoppel defense may not apply to private enforcement of rights.⁶

⁶ In *Economides*, the Court found that the defense may not be available until the BZA grants an appeal. The Board has also taken the position that “estoppel should not bar a neighboring property owner (as distinct from the District) from asserting rights under the Zoning Regulations.” BZA Order 17109 (Kalorama Citizens Association) (2005) (citations omitted). The Board has rejected prior requests to use estoppel and laches in a manner that precludes innocent private appellants from seeking to eliminate zoning violations. *Id.*

"Laches is rarely applied in the zoning context except in the clearest and most convincing circumstances." BZA Order 17109 (Kalorama Citizens Association) (2005). (*citation omitted*). It is an equitable defense that can only be invoked by a person with clean hands. *Id.* Laches must be predicated upon *inexcusable* delay which has resulted in *substantial* prejudice. *Wieck v. District of Columbia Bd. of Zoning Adjustment*, 383 A.2d 7 (D.C. 1978) (finding 6 and ½ year delay in government enforcement was inexcusable).

Even if these equitable doctrines could be applied in this case, they cannot be invoked to protect a party who has engaged in bad faith conduct. The equities strongly favor Erie for the reasons previously stated in the record of this case. The Owner conveyed inaccurate information to the Appellant and District in an effort to procure an illegal building permit.

The Owner cannot prove that it made expensive and permanent improvements based upon the Owner's justifiable reliance upon actions of the District. Any such reliance was not justified. The Owner was familiar with BZA Order 18330 and the determination letter from April 9, 2013 before it purchased the subject property. The real estate contract referenced both of those documents. The Owner had actual notice of the restrictions associated with development of the property and somehow procured a building permit in violation of those limitations.⁷ Under these circumstances, the Owner could not justifiably rely upon a mistake that it knowingly procured from DCRA. The Owner's reliance upon

⁷ The Owner did not justifiably rely upon the Zoning Administrator's determination letter, dated February 10, 2014, because that letter did not approve the height increase of the penthouse in the permit set of plans. That letter certainly did not approve the extra 10 inches that were added to the penthouse after the date of that letter and, more importantly, that letter did not improve any height increase. **The Zoning Administrator did not post any plans with that letter showing a change in the height of the penthouse.**

DCRA was not "justifiable and reasonable" regarding material departures from BZA-approved plans because the Board, not the Zoning Administrator, has final administrative responsibility to interpret the Zoning Regulations. D.C. Code § 6-641.07 (g)(4) (2016); *Bannum, Inc. v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006). And, the Owner cannot complain about *any* expenditures incurred during the first 60 days after issuance of the permit because those costs were incurred at the Owner's risk. *Id.*

Moreover, this appeal focuses upon the roof level of the Residential Building and the structures and decking on top of the roof. As such, the Owner cannot complain about the total expenses and improvements associated with unrelated parts of the building. The Owner knew about Appellant's concerns before the roof was built, before the rooftop structures were under roof, and before any rooftop decking was installed. At the time of the appeal, the rooftop cabanas had been very roughly framed with a few pieces of wood. *See* BZA Case 19174 at Exhibit 19 (photo). The Owner had not "built the majority of the penthouse" when the appeal was filed on October 23, 2015, as falsely asserted by the Owner. The Owner continued to build at its own risk after Erie challenged the largely unbuilt penthouse structures and roof decking.

The Owner now has the audacity to complain that it would also be prejudiced by *future* delays arising from an adverse Board decision herein that would require a subsequent BZA proceeding to modify plans. The Board should not consider this assertion when evaluating the equitable defenses. The Owner never asked for an expedited hearing here and never filed a request to modify its plans. The Owner should have applied to the BZA for a modification of its plans before securing any permit.

In sum, the Appeal should be GRANTED.

Respectfully submitted,



Laurie B. Horvitz, Esq.

On behalf of Appellant Unit Owners' Association of The
Erie Condominium

PROOF OF SERVICE

I hereby certify that on February 8, 2016, a copy of the foregoing Memorandum was served on the following parties to BZA Case No. 19174 by email and U.S. Mail to:

Mathew LeGrant, Zoning Administrator
DC Consumer and Regulatory Affairs
1100 4th Street, SW
Washington, DC 20024

Christy Moseley Shiker, Esq.
Holland & Knight LLP
800 17th Street, NW, Suite 1100
Washington, D.C. 20006

Maximilian L.S. Tondro
Assistant General Counsel
Department of Consumer and Regulatory Affairs
1100 4th Street, SW 5th Floor
Washington, DC 20024


Laurie B. Horvitz