

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

Appeal of Advisory Neighborhood Commission 6C, *et al.*

BZA Appeal 19207

**DCRA'S MOTION TO DISMISS APPEAL AS MOOT AND AS WITHOUT
JURISDICTION**

Appellants allege that the Zoning Administrator (“ZA”) Appellants allege that the Zoning Administrator (the “ZA”) erred in approving Building Permits B1509391 and B1512716, issued on July 2, and October 1, 2015, respectively (collectively, the “**Permits**”), to renovate an existing house and add a “new rear addition on 2nd level with balcony” (the “**Project**”) at 518 6th Street, N.E. (the “**Property**”), in the R-4 Zone District, because the Permits authorized construction that violated Section 403.2 of the Zoning Regulations. The ZA responded by requiring the Permit Holder provide the ZA with a professional survey of the property to rebut the Appellants’ allegations, and when that survey showed that the Project did indeed exceed the lot occupancy requirements, the ZA informed the Permit Holder that the ZA would immediately revoke the Permits unless the Permit Holders surrendered the Permits and cancelled their open building permit applications, a significant financial cost. When the Permit Holder did indeed surrender the Permits and cancel the building permit applications, the ZA informed Appellant, believing that the surrender and cancellation represented an expeditious and appropriate resolution to the issues raised by the Appeal. Appellant instead raised a new allegation that the ZA violated his authority to accept the surrender of a permit and that the Board of Zoning Adjustment (the “**Board**”) should order the ZA to revoke the already surrendered Permits as the only process allowed under the Zoning Regulations to terminate a permit.

Respondent, the District of Columbia Department of Consumer and Regulatory Affairs (“**DCRA**”), asserts that Appellants failed to cite any provision of the Zoning Regulations that the ZA violated in accepting the surrender of the Permits despite having the burden of proof; and that as the Permits have been surrendered by the Permit Holder and therefore withdrawn by DCRA, as shown on the publicly accessible PIVS website, that the Appeal is moot, which Section 3100.7 of the Zoning Regulations declare “shall not be consider[ed]” by the Board; and

also outside of the jurisdiction of the Board as Appellants cite their interpretations of the Title 12A of the District of Columbia Municipal Regulations ("**Building Code**"), appeals of which are not under the jurisdiction of the Board, but instead fall under the jurisdiction of the Office of Administrative Hearings ("**OAH**"). Therefore, DCRA respectfully requests that the Board grant this Motion to Dismiss and deny this Appeal.

APPELLANTS' ALLEGATIONS

Appellants allege that the ZA, and DCRA, lacks authority to accept the surrender of permits and thereupon withdraw the permits as null and void. Yet Appellants fail to cite a provision in the Zoning Regulations that prohibits this action of the ZA. Instead Appellants cite provisions in the Building Code that also do not prohibit this action of the Code Official, and then argue that the Board should accept Appellants' interpretation of the Building Code – which is clearly outside the jurisdiction of the Board – despite the established legal principle of administrative deference owed to agencies' interpretations of their own rules unless clearly unreasonable. Appellants have failed to meet their burden of proof.

ARGUMENT

The Zoning Regulations do not speak to the process of revoking a permit – the only reference to "revocation" occurs in Section 1708.1(f) governing combined lot development which authorizes the revocation of a certificate of occupancy ("**CofO**") for a lot sending FAR under certain circumstances.

The Building Code provides two specific procedures for revocation of a permit under Section 105.6:

- summary revocation under Section 105.6.1.1, when DCRA recognizes an erroneous permit issuance due to DCRA's mistake within five business days of permit issuance; and
- "normal" revocation, for all other circumstances.

Summary revocation is clearly not at issue in this case, as the Permits were surrendered on January 7, 2016, three and six months, respectively after the Permits were issued. Section 105.6.1.1 does have the only reference to "surrender" in Chapter 1 ("Administration and Enforcement") of the Building Code other than a parallel provision for revoking CofOs in Section 110.5.3.1 but this provision does not define surrender, instead using the word to indicate

that the permit or CofO holder must turn in the permit or CofO, but that failure to do so does not stay the summary revocation.

“Normal” revocation is the subject of the remainder of Section 105.6 – which specifies the specific notice that must be provided and appeal rights. This process is a lengthy one, since a Notice of Revocation is only a “proposed action” under Section 105.6.1 that only becomes effective 60 days after the receipt of the required notice, and then only if the permit holder opts not to appeal the revocation to the Board under Section 105.6.4.2 for revocations based on alleged zoning violations. Service of the required notice is deemed to be 10 days after mailing of the Notice to Revoke under Section 105.6.3, so that the minimum time required for a Notice of Revocation to become effective is 70 days after issuance.

That is, unless the permit holder opts to surrender the permit to DCRA and renounce its rights under the permit. In that case, DCRA classifies the permit as withdrawn or cancelled effective immediately upon the surrender of the permit. This is a process that is completely under the Permit Operation Division under the Chief Building Official – the ZA only refers a permit to be surrendered to the Permit Division to process and cancel the permit. To surrender a permit, a permit holder must sign a notarized form or a letter requesting cancellation, as was done in this case (BZA Appeal 19207, Exhibit 19, at 3). Although this is not a quotidian event, permit surrenders happen fairly frequently, especially for trade permits – six such permits were surrendered and cancelled today (March 29): two electrical (E1503561 and E31055165), two plumbing (P1503736 and P1503427), and two mechanical (M1501188 and M1501995). DCRA does not track surrendered and cancelled permits, nor is it possible to search for them in the DCRA permit tracking database, except by an individual review of each permit. Thus a reporting of surrendered and cancelled permits is based on the memories of individual employees at DCRA – for example the Permit Center Manager, who has held that title for approximately the past two months remembers having accepted the surrender and cancellation of five other permits since February 8 - four electrical permits (E1603000-4) and one garage permit (G22027346). As regards complete building permits, I am familiar with the surrender of five building permits for the following addresses over the past year since I joined DCRA – 1117 Allison Street, N.W.; 1744 D Street, N.E.; 1120 Park Street, N.E. (where the Board was incredibly patient in accommodating the parties’ negotiations that resulted in a resolution that included the surrender of the permit appealed); 452 Newton Place, N.W.; and 1835 Ontario Place, N.W.

I have also directly been involved in the surrender of two CofOs over the past two months – one for 3701 Newark Street, N.W. and one for 320 D Street, N.E. Both of these CofOs were revoked under the summary revocation provisions of Section 110.5.3.1, but whereas the error in the 3701 Newark Street was that it had been issued too early, a day prior to final inspection, an easily resolvable issue, the error for 320 D Street was that the CofO violated the existing Board order for that property. As a result, DCRA required the surrender of both CofOs under the summary revocation provision, but returned the CofO for 3701 Newark Street to the CofO holder once the outstanding issues had been addressed by the next day, whereas the CofO holder for 320 D Street was required to apply for a new CofO and the original CofO revoked using Section 110.5.3.1's summary revocation authority. Had the inspection of 3701 Newark Street not been successful, that CofO would also have been summarily revoked.

In both of these CofO cases, DCRA was able to use the expeditious authority of summary revocation, but once the five business day period passes, DCRA is forced to either pursue the long, drawn-out formal revocation process under Section 105.6, or achieve the same result much faster by having the permit holder surrender the permit which DCRA then cancels. The effect is the same, as DCRA enters the surrender and cancellation in its system. Please note that even when the Board orders the revocation of a permit as a result of an appeal, there is significant time lag, since that revocation does not become effective until ten days after the service of the written order of the Board on the permit holder – which can be a matter of months. Thus the surrender and cancellation of a permit is an expeditious means of resolving the issue.

As I explained at the initial hearing, permit applicants may desire to surrender and cancel a permit for a variety of reasons – including because they have changed their minds and would like a refund of at least part of the permit fees as is permissible under Section 108.6 of the Building Code:

“108.6 Refunds. In the case of a revocation of a permit or of abandonment or discontinuance of a building project, upon written request made by the permit holder before the permit expires, the portion of the work actually completed shall be computed and any excess fee for the incomplete work shall be returned to the permit holder as soon as practicable after written request is made. All plan examination and permit processing fees, all fees for inspections actually performed, and all penalties that have been imposed on the permit holder under the requirements of the *Construction Codes* shall be withheld first. Refunds may not be granted for permits issued after six months.” (italics and underscore added)

This provision anticipates a voluntary means of terminating a permit, which must be a permanent termination as DCRA would not grant refunds for a permit that could be revived. To accept Appellants' allegations that the only way for this to occur would be for the permit holder to request that DCRA issue a Notice of Revocation, and then sit out the 70 days until the Notice became a final action, would be to defy not only long standing practice, but also common sense.

As to Appellants' assertion that the ZA, and DCRA, lack the authority to accept surrendered permits, Section 104.1 of the Building Code specifies that among other authority granted to the Code Official, defined by Section 202 of the Building Code as the Director of DCRA or designee:

“The code official is hereby authorized and directed to enforce the provisions of the Construction Codes. The code official shall have the authority to render interpretations of the Construction Codes and to adopt policies and procedures in order to clarify the application of its provisions. Such interpretations, policies and procedures shall be in compliance with the intent and purpose of the Construction Codes. Such policies and procedures shall not have the effect of waiving requirements specifically provided for in the Construction Codes.” (italics and underscore added)

This provision authorizes the Code Official to implement procedures as required to effectively administer the Building and other Construction Codes. Moreover, any appeal of the Code Official's determination that the Building Code authorizes the surrender and cancellation of a permit in lieu of revocation – because there is no provision in the Zoning Regulations governing surrender and cancellation or revocation of a permit – is to OAH under Section 112.2.1, since the appeal would be of the Code Official's interpretation of the Building Code.

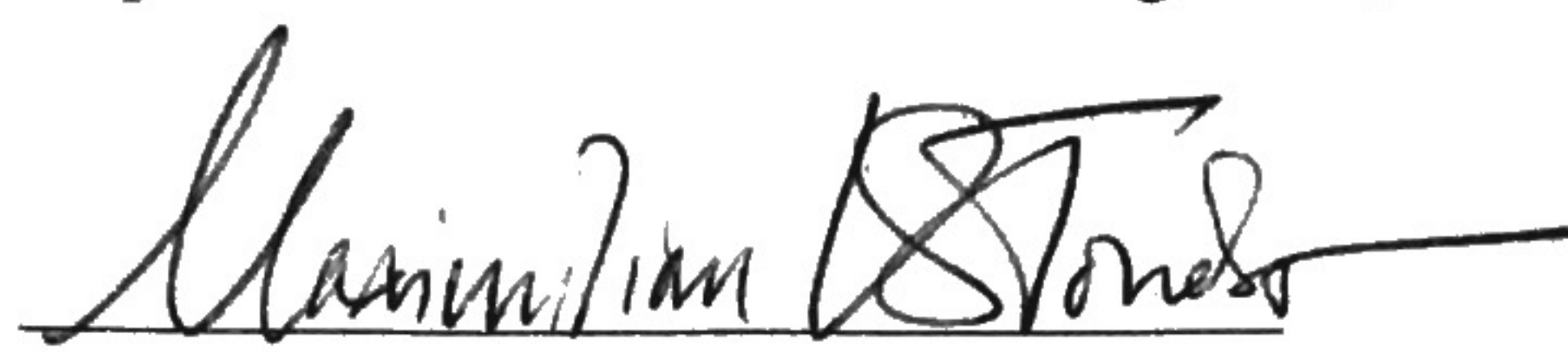
As I stated at the initial hearing, the jurisdictional issue is a key aspect to this appeal – Appellants are seeking to have the Board interpret the Building Code, and specifically the means by which the Code Official administers and interprets the Building Code. This is not only explicitly outside the authority of the Board, it could also have potential ripple effects far beyond this case – if the Board rules that the Building Code only provides authority to revoke a permit, then DCRA either has to assert that it believes the Board is wrong and only is to be followed for permits involving zoning errors, or DCRA has to apply the Board's decision consistently and then likely explain to OAH how the Board has jurisdiction over the interpretation of the Construction Codes. The action taken by the ZA was to refer the surrender of the Permits to the Permit Operations Division for processing under the Building Code.

CONCLUSION

For the reasons stated above, DCRA asserts that the allegations stated in the Appeal are without merit and that the Appeal fails to establish a valid reason to overrule the ZA's acceptance of the surrender and cancellation of the Permits. DCRA therefore respectfully requests that the Board affirm that the ZA's action and dismiss the Appeal as moot and outside of the jurisdiction of the Board.

Respectfully submitted,
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Date: 3/29/16



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March 2016, a copy of the foregoing Pre-Hearing Statement was served via electronic mail to:

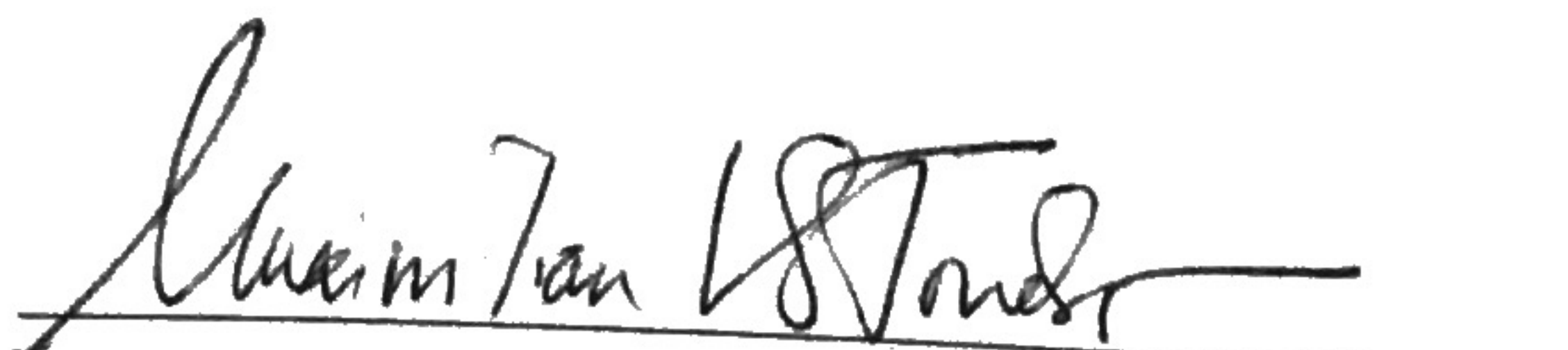
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