

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4TH STREET, N.W.
WASHINGTON, D.C. 20001

APPEAL OF BERKLEY SMALLWOOD

BZA Appeal No. 19708

APPELLANT'S MEMORANDUM IN OPPOSITION TO MOTION TO EXPAND APPEAL

Appellant Berkley Smallwood submits this memorandum in opposition to the motion of the District of Columbia Department of Consumer and Regulatory Affairs to incorporate the Zoning Administrator's May 4, 2018 decision rejecting Building Permit Application No. B1801942 into this appeal or, in the alternative, to dismiss the appeal.

Factual Background

Mr. Smallwood owns a property at 3652 Park Place, N.W. The house on the property has three levels and is divided into two units, one unit consisting of the lowest two levels and the second unit consisting of the floor above. There is an internal connection between the lowest level and the ground floor. Mr. Smallwood wishes to construct two bedrooms and a bathroom on the lowest level in order to enhance the value of the first unit. This plan and no other is the subject of Building Permit Application No. B1801942.

Relevant Procedural Background

The Zoning Administrator issued a decision dated November 28, 2017 which insisted that Mr. Smallwood obtain a revised Certificate of Occupancy and that he remove an electrical meter and hvac equipment located in the lowest level of the building. The Zoning Administrator's position, as he reiterates in the instant motion, is that the electrical panel and the hvac equipment

create a “separate and third dwelling unit in the building, which would require BZA relief.”
(quoting from Exhibit 6 attached to the instant motion.)

Merits of the Dispute

The Zoning Administrator’s position is plainly in error. The definition of “Dwelling Unit” is set forth in DCMR Title 11, Subtitle B, section 100.1:

“Dwelling Unit: One (1) or more habitable rooms comprising complete, independent living facilities for one (1) or more persons, and including within those rooms permanent provisions for living, sleeping, cooking, and sanitation. A dwelling unit is intended for a single household.”

The lowest level of the building does not comprise a dwelling unit, and no work for which Application B180942 seeks a permit would make it a dwelling unit. There is no provision for cooking, and none is intended. Mr. Smallwood during the course of this controversy has repeatedly stated to the Zoning Administrator that he does not intend to create a third dwelling unit. The third electrical panel and hvac unit were installed in the building pursuant to a permit duly issued by DCRA in approximately 2014, inspected and approved, and given a Certificate of Occupancy. The third electrical panel and hvac equipment do not create a separate dwelling unit, and there is no legal basis upon which the Zoning Administrator can demand that these items be removed from the building.

The Instant Motion

On November 28, 2017, the Zoning Administrator refused “to grant approval allowing further processing of building permit B1801942” unless Mr. Smallwood complied with conditions that the Zoning Administrator imposed. The Zoning Administrator imposed these

conditions in this decision for the first time, adding to conditions that he had previously imposed with which Mr. Smallwood had complied. The appeal is taken from this decision of the Zoning Administrator.

The Zoning Administrator's decision of November 28, 2017 is subject to the authority of this Board to review appeals. 11 DCMR Y-302.1 states: "Any person aggrieved or any officer or department of the government of the District of Columbia or the federal government affected by an order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely zoning appeal with the Board." There can be no doubt of this Board's authority to hear the instant appeal.

The Zoning Administrator wishes to expand the scope of Mr. Smallwood's appeal by incorporating the Zoning Administrator's decision of May 4, 2018, three weeks ago. In effect the Zoning Administrator wishes to appeal his own decision. His representative requested a continuance of the hearing scheduled for May 2, 2018 on the ground that his legal counsel had left the department. Mr. Smallwood agreed to this postponement, then the Zoning Administrator issued his new decision. Incorporating the Zoning Administrator's decision dated May 4, 2018 would add nothing but further delay to the existing controversy.

11 DCMR Y-302.13 provides: "An appeal may not be amended to add issues not identified in the statement of the issues on appeal submitted in response to Subtitle Y §302.12(g) unless the appellee impeded the appellant's ability to identify the new issues identified."

The instant motion argues (in the fifth full paragraph on page 5) that the appeal is premature on the ground that the decision of November 28, 2017, from which the appeal was taken, was superseded by the decision of May 4, 2018. There is no substantive difference

between the two decisions: both prevent Mr. Smallwood from completing the work which he wishes to perform on his property, and for the same, erroneous reason, namely that the Zoning Administrator deems the work to create a third “dwelling unit” in the building. The relief which Mr. Smallwood is not premature; on the contrary, it is overdue.

The instant motion argues that the appeal should be dismissed because the plans which are the subject of the Building Permit Application have not been submitted with the appeal. The plans are unnecessary to the appeal. The issues between the parties have been fully articulated in the parties’ respective submissions to the Board, and the plans would add nothing but bulk. It is too late, moreover, for the Zoning Administrator to complain of incomplete documentation. The Office of Zoning sent the following notice to Mr. Smallwood on January 8, 2018, reciting the content of 11 DCMR Y-500.1, 500.2: “Thank you for filing your Application/Appeal with the Office of Zoning... Your Application/Appeal will be reviewed for completeness within five (5) business days by Office of Zoning (OZ) staff. If it is determined that all the required documents have been submitted, you will receive an email with instructions on the next steps in the application process... If your Application/Appeal is deemed to be deficient, you will receive an email detailing the items that are required to be submitted within five (5) business days.” The Office of Zoning did not request addition of the plans to the record at that time. It would cause only delay to add them now.

Conclusion. Mr. Smallwood has already waited a long time for a permit to be granted to improve his property in utter compliance with applicable law and regulations. The third electrical panel and hvac unit that the Zoning Administrator wishes to be removed were installed years ago pursuant to a building permit, approved, and given a Certificate of Occupancy. It is time for the Zoning Administrator's erroneous decision of November 28, 2017 to be reversed. The instant motion should be denied.

Respectfully submitted this 25th day of May, 2018.

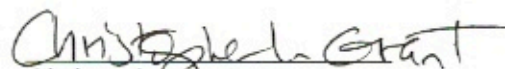

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Certificate of Service

I certify that I have this 25th day of May 2018 served a copy of this memorandum via electronic mail upon:

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