BEFORE THE BOARD OF ZONING ADJUSTMENT

OF THE DISTRICT OF COLUMBIA

Appeal of Henry P. Sailer
Lisa S. Kelly, M.D.
Steven S.Wolf, M.D.
Arthur L. Levi
Veronica and Bruce Steinwald
Veronique LaGrange
Benoit Blarel

BZA Appeal No. 17054
Public Hearing Date: October 21, 2003
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APPELLANTS' OPPOSITION
TO INTERVENOR'S MOTION TO INTERVENE AND DISMISS

The Appellants[1], Henry P. Sailer, Lisa S. Kelly, M.D., Steven S. Wolf, M.D., Arthur L. Levi, Veronica and Bruce Steinwald, Veronique LaGrange and Benoit Blarel, respectfully submit the following Opposition to the Motion to Intervene and Dismiss filed by Brian Logan Real Estate.

I. Summary of Opposition

As set forth in detail below by the Appellants, the following conclusions are inescapable:

A. For timeliness purposes, the date on which Mr. Brian Logan (hereinafter "Logan") obtained his last building permit, June 13, 2003, is controlling. This occurred thirteen (13) days after the Notice of Intent to Appeal was filed (and in direct response to it)and only nineteen (19) days before the Appeal was filed.

B. Logan obtained numerous piecemeal and cumulative permits over an extended period of time and he alone should bear the risk of proceeding with construction before obtaining all necessary permits.

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[1] Judith Lanius is **not** one of the Appellants. Her actions should not in any way be attributed to or associated with the Appellants.

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C. Logan had actual knowledge that his property was subject to the Chain Bridge Road University Terrace Overlay District ("CBUT") and he is responsible for proceeding with construction based on the building permits which on their face were not subjected to review and approval under the CBUT restrictions.

D. Every one of the building permit applications submitted by Logan should have been reviewed and approved subject to the tree removal restrictions under CBUT even if the trees were cut down previously.

E. Brian Logan Real Estate is not the real party in interest involving the property at 3101 Chain Bridge Road and should not be allowed to intervene in this matter.

II. Chronology of Events

For the Board's understanding, the Appellants provide the following complete chronology of relevant events:

January 25, 2000: Brian Logan, individually, takes title to 3101 Chain Bridge Road, N.W. for $760,000. Shortly thereafter, Logan occupies the property as his personal residence.

January 16, 2001: Logan obtains a letter from an arborist purporting to state that a large regulated tree is unsafe and presents a hazard to his property and the neighbor's property. Despite the urgency of the hazard reported, Logan takes no action to remove the tree until February 8, 2003, more than two (2) years later.

May 9, 2001: Logan submits Tree and Slope Information Form to DCRA.

August 8, 2001: Logan receives Building Permit No. B432397 to remove "hazardous" tree, but does not do so until February 8, 2003, eighteen (18) months later.

November 27, 2001: Logan submits application for building permit for construction of new single family dwelling. The application makes no reference to the CBUT Overlay and includes none of the required Tree Removal documentation or other required information for review and approval.

July 30, 2002: Logan was provided actual notice that his property is subject to the CBUT Overlay.

August 6, 2002: Logan receives Building Permit No. B447750 renewing the earlier permit for tree removal.

January 29, 2003: Logan receives Building Permit No. B448548 for a new single family house. This permit was not identified as being within the boundaries of the CBUT Overlay and was not subject to review and approval accordingly. This permit does not include authorization for sheeting and shoring, the in ground pool, or conversion of impervious to pervious surfaces as were each later required. Also, the permit was issued based on Lot 870, an Assessment and Taxation Lot, not the required single Record Lot under 11 DCMR 3202.3. The required Subdivision should have been subject to review and approval under the CBUT Overlay.

February 5, 2003: Logan receives an "Emergency" Demolition Permit for the existing structure based on undisclosed "unsafe conditions." With Logan having lived in the existing property for more than two (2) years, it strains credibility, without any explanation, that unsafe conditions existed or just arose warranting emergency action. More likely, the "emergency" allowed Logan to circumvent the normal raze permit process, including required notice to the affected Advisory Neighborhood Commission. In a matter of days, Logan accomplished what normally takes a minimum of eight weeks and rigorous scrutiny by DCRA and the community.

February 5, 2003: Logan receives Building Permit No. B448706 renewing for a second time the earlier permit for tree removal.

February 8, 2003: On a Saturday, Logan demolishes existing house and removes trees beyond the scope of permit and in violation of CBUT Overlay.

February 10, 2003: Stop Work Order issued by DCRA.

March 4, 2003: Logan receives Building Permit No. B449057 for sheeting and shoring.

March 24, 2003: Stop Work Order lifted by DCRA, but no notice provided to, or knowledge obtained by, Appellants or others in community until June 25, 2003.

March 31, 2003: Subdivision Plat recorded in Office of D.C. Surveyor creating Lot 30, the single Record Lot required to obtain all previous and subsequent permits.

May 20, 2003: Logan obtains Building Permit No. B451476 for construction of an in-ground swimming pool.

May 31, 2003: First Notice of Intent to Appeal filed by Appellants.

June 13, 2003: Logan applies for and obtains Building Permit No. B452193 to Revise Permit # B448548 to show pervious drive to accessory garage structure.

July 2, 2003: Appellants file this Appeal.

September 15, 2003: Appellants receive from Brian Logan some, but not all, of the drawings related to the Original January 29, 2003 Permit and the June 13, 2003 Permit. Appellants have been unable to verify that the drawings provided by Logan are the same as the drawings submitted to DCRA for obtaining permits. Appellants, despite repeated attempts, were unable to review the approved permit drawings from DCRA until October 7, 2003. The permit records were stored in the basement of 941 North Capitol Street, but were unavailable as a result of construction activity in the basement. Appellants have still not received the requested copies of the approved drawings from DCRA.

October 7, 2003. Logan provided Appellants with a copy of a Boundary and Topographic Survey dated March 15, 2000 which shows the trees located on the property. There is no record that this Survey was ever provided to DCRA or subject to review under the CBUT Overlay. Based on this information, Appellants have determined that Logan has actually removed and/or fatally damaged more trees than set forth in the tree removal permits or allowed under the CBUT Overlay.[2]

III. Argument

A. Timeliness Must Be Determined Based on the June 13, 2003 Building Permit

Over a twenty-two (22) month period (August 8, 2001 through June 13, 2003), Logan obtained no less than nine (9) permits or other required approvals for the construction of the proposed single-family detached dwelling. As clearly established by the Sisson case, the relevant date for applying the sixty-day timeliness rule is June 13, 2003 when Brian Logan obtained what is presumably the final permit for this development project. Sisson v. District of

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[2] The Appellants have simultaneously filed a Supplemental Pre-Hearing Statement documenting the substantial violation of the tree removal restrictions. Specifically, although only three (3) regulated trees were requested and approved for removal, five (5) additional regulated trees were removed, and five (5) additional regulated trees were fatally damaged by Logan's construction activities. The total percentage circumference of regulated trees removed and/or fatally damaged is at least forty-five percent (45%), which exceeds the twenty-five percent (25%) maximum.

Columbia Board of Zoning Adjustment, 805 A.2d 964 (D.C. 2002). There is no reasonable basis for adopting the original building permit issuance date of January 29, 2003. In the Motion, it is admitted and well-documented that the January 29, 2003 was not the final step, but just another step in the cumulative and piecemeal approach to obtaining approval for this project. After January 29, 2003, at least six (6) additional permits or approvals were required. First, the "Emergency" raze permit was issued on February 5, 2003. Second, the Tree Removal Permit was renewed on February 5, 2003. Third, Building Permit No. B449057 for the required sheeting and shoring was issued on March 4, 2003. Fourth, a Subdivision Plat creating Lot 30 as the single Record Lot required under 11 DCMR 3202.3 to obtain a building permit was recorded by the D.C. Surveyor. No explanation is offered or apparent on how all the previous permits were issued prior to the creation of the mandatory single Record Lot. Fifth, Building Permit No. B451476 for construction of an in-ground pool was issued on May 20, 2003. Sixth and finally, Building Permit No. B452193 to "Revise Permit #B448548 [January 29, 2003] to show pervious drive to Accessory Garage Structure." was applied for and issued on the same day, June 13, 2003.

All six permits and approvals which occurred after the original January 29, 2003 Permit are significant because each is directly or indirectly related to determining compliance with the restrictions imposed by the CBUT Overlay, including the issues raised in the Appellants' Appeal. Specifically, these six permits raise the following questions, including application of the CBUT Overlay restrictions in general, the tree removal restrictions and scope of tree removal actually completed, the impervious surface restrictions, the lot occupancy requirement, and the use and access requirements for the accessory garage with second floor domestic quarters.

Most significantly, the June 13, 2003 Permit establishes the timeliness of this Appeal and that no prejudice resulted. Prior to the June 13, 2003 Permit, no accurate or complete review of the proposed construction was possible. In fact, this sixth permit is the direct result of the Notice of Intent to Appeal which was filed on May 31, 2003. The Notice of Intent to Appeal provided Brian Logan a clear warning that notwithstanding the piecemeal and cumulative nature of the permitting, the totality of the project was not in compliance with the CBUT Overlay. Responding within less than two weeks, Logan scrambled to revise his permit to attempt to simultaneously comply with at least the impervious surface and required access to the accessory structure requirements. As more fully set forth in the Appellants' PreHearing Statement, Logan's latest permit was wholly unsuccessful in bringing his development project into compliance with the applicable Zoning Regulations. This Appeal was filed just nineteen (19) days after Logan obtained the June 13, 2003 Permit.

The instant situation is even more compelling than the events in Sisson. In Sisson, the Court had no difficulty in determining that the Appellant had no reasonable basis for appealing until the last of five (5) building permits over a nine (9) month period were issued. Sisson, at 969. Here, the piecemeal and cumulative permitting involved nine (9) permits over a twenty-two (22) month period. Six of the permits were issued after the original and incomplete permit was obtained. Similarly, as more fully discussed and established in the Appellants' Supplemental Prehearing Statement, Logan, like Sisson, did work without permits and/or beyond the scope of the permits issues constituting exceptional circumstances beyond the Appellants' control.

B. Logan Bears The Risk of Proceeding With Construction Before Obtaining All Necessary Permits.

Although Brain Logan knew he had not obtained all necessary approvals, he demolished the existing structure and proceeded with construction. Having made that decision, he alone

bears the risk for having not obtained the required approvals in advance. Demolition on an "emergency" basis occurred on Saturday, February 8, 2003, not Friday as claimed in its Motion. From the photographs provided, it appears that construction was taking place during the period between February 8 and March 10, 2003. See Intervenor's Exhibit H. Not only was a Stop Work Order in effect until March 24, 2003, but during that period Logan had not received at least four (4) required permits or approvals, including the March 20 Sheeting and Shoring Permit, the March 31 Subdivision Plat, the May 20 in-ground swimming pool permit, and the June 13 pervious surface and accessory structure access permit. It is undisputed that Brian Logan actually knew or should have known that each of these permits were required to complete his development project.

C. Logan Knew That CBUT Overlay Was Applicable, But Proceeded Without Ensuring Compliance

Beginning in at least January 2001, Brian Logan knew that the CBUT Overlay was applicable to the property and went to great lengths to at least nominally to ensure compliance. He provided the required Tree and Slope Information Form, Tree and Slope Protection (TSP) Overlay Affidavit and supporting documentation from an arborist. While this information appears to be incomplete and lack credibility, Logan clearly knew of the applicability of the CBUT Overlay not only as it relates to tree removal, but also the other elements, including impervious surface restrictions. Although clearly aware of the CBUT Overlay, he obtained permits and proceeded to complete work based on permits which made no reference to the CBUT Overlay and apparently were not subject to review and approval based on the CBUT restrictions. In addition to the original January 29, 2003 Permit, The March 4, 2003 Sheeting and Shoring Permit and the May 20, 2003 in ground swimming Pool Permit make no reference

to the CBUT Overlay and contain no evidence that the CBUT Overlay restrictions were applied in reviewing and approving those permits.

D. <u>All of The Building Permits Should Have Been Reviewed For Compliance With The CBUT Tree Removal Restrictions</u>

Under 11 DCMR 1568.1, provides that "constructing a building, accessory building, or an addition to building, creating any impervious surface area, subdividing any improved lot so as to increase the number of principal structures thereupon, shall only be permitted as a matter-of-right subject to the following tree removal limitations..." While the record is clear that Logan knew of the tree removal restrictions, there is no record or other evidence that the permits for construction of a building and/or accessory building or creating any impervious surface area were subjected to the required review and determination of compliance. In fact, the timing and circumstances of the tree removal permits being obtained long in advance and separate from the building permits indicates that no such review occurred or such review was not completed in the context of the work which was actually going to be undertaken. As set forth in the Appellants' Supplemental Prehearing Statement, permits were issued for limited tree removal, but the tree removal or fatal damage went far beyond the maximum permitted and/or beyond the scope approved. As a result, protected trees were removed and the CBUT Overlay protections were undermined and ignored causing harm to the Appellants and the entire neighborhood.

E. <u>Brian Logan Real Estate Is Not the Property Owner and Has No Right To Intervene</u>

The Motion to Intervene and Dismiss was submitted by counsel on behalf of "Brian Logan Real Estate." However, Brian Logan Real Estate is not the property owner and has provided no reasonable basis for being allowed to intervene. In fact, all the documentation and discussion provided indicates that Brian Logan Real Estate has no direct interest in the property or these proceedings. The Motion provides a copy of the Deed (Exhibit B) which shows Brian

Logan, individually, as the property owner. All of the permits were applied for and issued in the name of Brian Logan personally. In the voluminous records provided by counsel, the Appellants can find no mention of Brian Logan Real Estate. Further, the Motion states that Brian Logan occupied, as his personal residence, the house that was demolished pursuant to an "Emergency" Demolition permit on February 8, 2003. Finally, the Motion is unequivocal that the new house under construction is "his [Brian Logan's] new home."

IV. Conclusion

For the foregoing reasons, the Appellants respectfully request the Board to DENY the Motion to Intervene and Dismiss submitted by Brian Logan Real Estate.

Respectfully submitted,

By: Henry P. Sailer

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October 14, 2003

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Appellants' Opposition to Intervenor's Motion to Intervene and Dismiss was served by first-class mail, postage prepaid, this 14th day of October, 2003, upon:

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