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

Appeal of the Georgetown Residents Alliance on behalf of adversely affected neighbors from the failure and refusal of the Department of Consumer and Regulatory Affairs Affairs to enforce the Zoning Regulations against the unlawful and un-permitted extension of the non-conforming use at 1531 31st St. NW.

BZA No. 17329
ANC2E

2005 JUL 12 PM 1:04
GOVERNMENT OF THE DISTRICT OF COLUMBIA
ZONING COMMISSION

**APPELLANTS' OPPOSITION TO THE PROPERTY OWNER'S MOTION TO DISMISS THE APPEAL AS UNTIMELY**

At 4:00 P.M. on July 11, 2005, less than 20 hours before the hearing in this case which is scheduled for July 12, 2005 at 1:00 P.M., the law firm of Holland and Knight served a "Motion to Dismiss" on behalf of the owner of the property at 1531 31st Street, NW, Mr. Reid A. Dunn. This belated motion should be denied for the following reasons:

1. The Board should not entertain the property owner's motion on the ground of basic unfairness and laches. This appeal was filed on March 25, 2005. Accordingly, the property owner has had more than 3 ½ months to review the appeal and file any appropriate motion. The only conceivable reason for waiting until the eve of this long-scheduled hearing to file a motion to dismiss is an attempt to unfairly surprise appellant and deprive it of sufficient time to respond to the motion. **Under no circumstances can 20 hours be deemed a**



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**reasonable time to respond to such a motion.** If the motion is not denied on the merits or for unfairness and laches, at the very least, any decision on the motion should be postponed until completion of the hearing and until appellant is provided a reasonable time to respond.

2. Section 3112.2 of the Board's Procedural Regulations, as maintained on the Board's official website, provides, as of July 11, 2005, as follows:

> Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the May or the District of Columbia, in the administration or enforcement of the Zoning Regulations **may file a timely appeal with the Board.**

Under this regulation and BZA and judicial precedent construing the term "timely," appellant's appeal was "timely" filed.[1]

Contrary to the property owner's characterization of this appeal, appellant does not ask the BZA to require the property owner to remove the access door and the "hatch" for which a building permit was issued on December 28, 2004.

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[1]The judicial construction of the BZA's rule was aptly summarized in *Georgetown Residents Alliance v. BZA,* 816 A.2d 41 49-50 (2003).

The property owner makes reference to section 3112.2(a) of the BZA's Rules of Practice and Procedure that was apparently adopted by the Zoning Commission Order date February 7, 2003. Appellant cannot be charged with knowledge of that amendment when it has not been incorporated into the BZA's Rules of Practice and Procedure provided to the public on the official website of the Office of Zoning as required by Section 1-1507 of the D.C. Administrative Procedure Act. In any event, the amendment has no effect on the timeliness of appellant's appeal from the continued failure of DCRA to enforce the Zoning Regulations in this case.

That characterization is nonsensical and without basis. To the contrary, as reflected by the caption of "Appellant's Statement in Support of Their Appeal," this is an appeal

> from the failure and refusal of the Department of Consumer and Regulatory Affairs to enforce the Zoning Regulations against the unlawful and un-permitted extension of the non-conforming use at 1531 31st St. NW.

By issuing permits for the alteration of work that was built without permits in defiance of an order by the Old Georgetown Board, the Zoning Administrator merely indicated that he would do nothing more to enforce the Zoning Regulations at this property.

The Zoning Administrator, however, was only one of the officials within DCRA who have authority to shut down the illegal exterior work at 1531 31st St. NW that was in violation of § 3202.1 of the Zoning Regulations (making alterations without a building permit); § 2000.2 of the Zoning Regulations (unlawful expansion of a nonconforming use); and D.C. Code § 6-1105 (unlawful alteration of a historic building).

Appellant had also asked ANC2E to intervene on its behalf and on January 10, 2005, the ANC issued a resolution requesting the Office of Historic Preservation to enforce compliance with the law and require the owner to restore the property to it condition before the unlawful demolition and construction.

Appendix p. 19.

Appellant next wrote to the Chairman of the HPRB on January 25, 2005 again asking the HPRB to take action to shut down this illegal project. The Chairman made no response but Mr. Dennee of the Historic Preservation Office E-mailed appellant stating:

> If Mr. Dunn replaces the stair structures with hatches, then he will be in compliance with the permits issued and with our guidelines and general practice. We have every reason to believe he will do so because **we have asked the chief building inspector to make certain that there is no certificate of occupancy issued for the units until the structures are removed**.

Appendix p. 25(emphasis added).

Because Mr. Dennee made no reference to the unlawful demolition of the turret, appellant wrote again on February 21, 2005, asking the Office of Historic Preservation to take the required action. Appendix pp 33-34. That letter concluded:

> Finally, it appears that neither the HPRB nor the OHP has reponded to the formal recommendation fo ANC2E that the turret be restored to its original condition, that the illegal construction be removed and replaced with a roof-level hatch, and that penalties be imposed for the developer's flagrant violation of the zoning and building laws and regulations. This is unacceptable bureaucratic behavior.
>
> The HPRB and the OHP should act immediately to impose the ANC's recommendation on this scoff-law developer and to strictly enforce our Zoning and Historic Preservation laws in Historic Georgetown.

After receiving no response to this final request, and the Director of DCRA and all of his subordinate officers having ultimately failed and refused to enforce the law, appellant concluded that any further attempts to obtain appropriate administrative relief would be futile. Moreover, because of Mr. Dennee's failure to respond to the February 21 letter, appellant also concluded that Mr. Dennee would not carry through with his promise that "no certificate of occupancy [would be] issued for the units until the structures are removed." Accordingly, appellant promptly filed the instant appeal on March 25, 2005, less than one month after a reply from Mr. Dennee would have been expected.

The BZA is vested with authority to take appropriate action in cases such as this where the expansion of a nonconforming use was undertaken without a permit, pursuant to § 3100.2 of the Zoning Regulations:

> The Board, pursuant to the Zoning Act, shall also hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision, determination, or refusal made by any administrative officer or body, including the Mayor, in the administration or enforcement of the Zoning Regulations, Title 11 DCMR. (Emphasis added).

Because the owner of 1531 31st Street NW demolished half of an ornamental turret and expanded the nonconforming apartment house use onto the roof for "residential recreation space" without a building permit, as required by § 3202.1, and as prohibited by § 2000.2 and DC Code § 6-1105, DCRA was legally obligated to require the owner to "restore the building or structure and its site to its

appearance prior to the violation" as specified by D.C. Code § 6-1110. After DCRA's ultimate refusal to act or even respond within a reasonable time to the February 21, 2005, letter, appellants' filed a timely appeal from this refusal on March 25, 2005.

For the foregoing reasons, appellants' respectfully request that the Board deny the Motion to Dismiss.

Respectfully submitted,

GEORGETOWN RESIDENTS ALLIANCE
On behalf of Don Crockett, Elaine Crockett, and Don G. Scroggin

Don W. Crockett

Don W. Crockett, Chairman

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Dismiss was served this 12th Day of July, 2005, via e-mail upon:

Norman M. Glasgow, Jr.
Carolyn Brown
Holland & Knight LLP
lynn.spach@hklaw.com

Don W. Crockett

Don W. Crockett