Before that District of Columbia
Board of Zoning Adjustment
441 Fourth Street, N.W., Suite 200
Washington, D.C. 20002

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In the Appeal of Diana deBrito and Jonathan Gottlieb	)	Appeal No. 17391

MOTION TO DISMISS BY THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

The Department of Consumer and Regulatory Affairs (DCRA or Appellee), respectfully requests that the Board of Zoning Adjustment ("Board" or "BZA") deny the appeal filed by Diana deBrito and Jonathan Gottlieb.[1] Briefly, as background, the two substantive arguments by the Appellants center on the issuance of Building Permit No. B472018 to Eugene and Carol Ludwig for construction of three seven-foot fences violates the height requirements of the Title 12 of the District of Columbia Municipal Regulations and the harmonious design requirements of the Wesley Heights Overlay, 11 DCMR § 1541.3 (2005). The Appellants also argue that three prior building permits, issued more than two years earlier for construction of the home and related structures, violates the zoning regulations.

The Appeal must be dismissed for the following reasons:

(1) The failure to allege a zoning error in the application review process of Building Permit No. B472018; and,

(2) The challenge to the Building Permit Nos. B455009, B451174, and B442735, is untimely.

[1] The Government agrees with the Motion to Dismiss filed by the Intervenor, Eugene and Carol Ludwig. In the government's view, the Appeal relies upon only one building permit - - the perimeter fences but attempts to include the house-related permits by bootstrapping an argument that the construction project is a "multi-million dollar" complex.

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Finally, as an aside, the Appellants' rely heavily on their assertion that the subject property located at 2620 Foxhall Road, N.W., Washington, D.C. lies within the Wesley Heights Overlay. The Overlay, they argue, governs the location of the fence and aspects of the earlier house permits. The property, however, is not within the Wesley Heights Overlay, and therefore, the zoning restrictions which govern the Overlay are not at issue here, and cannot properly be raised before the Board. For these reasons, more fully described below, the Appeal must be dismissed.

A. Statement of Facts

The subject property, located at 2620 Foxhall Road, N.W., Washington, D.C. (Square 1397, Lot 1032), is in an R-1-A zoned district. DCRA issued several permits to the property owners, Eugene and Carol Ludwig, to construct a home and related buildings. The relevant permits (collectively "house permits") are as follows:

(1) Permit No. B472018,[2] issued April 27, 2005, which authorized the construction of a new seven-foot (black vinyl coated) fence built entirely on the owner's land, a natural wood privacy fence and wrought iron fence ("fence permit");
(2) Permit No. B455009, issued September 15, 2003, that authorized the construction of a three-story wood frame house with stone veneer basement, new driveway, stone retaining walls, and bluestone terraces . . . ;
(3) Permit No. B451175, issued May 9, 2003 for site work and grading and construction of a "twelve foot retaining wall" and tennis court; and,
(4) Permit No. B452735, issued July 1, 2003, which revised Bldg. Permit No. B451175 to change structural design of tennis court as per plans.

On June 24, 2005, Diana DeBrito and Jonathan Gottlieb ("Appellants") filed an appeal alleging the Director erred in the issuance of building permits for the Foxhall property. Specifically, the Appellants contend:

a. The Fence Permit violates 12 DCMR § 3110.3.3 and 12 DCMR § 3110.1.3 since the permit allows the building of fences that exceed seven

[2] Attached as Exhibit

feet in height as measure from the natural grade of the property to the top of the fence Statement in Support of Appeal of Diana deBrito and Jonathan Gottlieb (Stat.) at 4;

b. The Fence Permit violates 11 DCNR(sic) 1541.3 since the permit allows the building of fences that block "access to air and light" and are in stark conflict with "the harmonious design and attractive appearance of the neighborhood," Stat. at p. 4.

c. The House, Tennis Court and Revised Permits violated the height limitation for fence wall pursuant to 12 DCMR 3110.3.3 and 12 DCMR 3110.1.3; *Id.*,

d. The House, Tennis Court and Revised Permits violate the requirements for side yard minimum pursuant to 11 DCMR 405.9; rear yard minimum pursuant to 11 DCMR 404.1; the four foot height limitation for structures pursuant to 11 DCMR 2503.2, and the air & light, harmonious design considerations of the Wesley Heights Overlay, pursuant to 11 DCMR 1541.3(c), *Id.*

Appellants also seek to treat the permits as interrelated and part of a complex project. That is to say, they argue the 2005 fence permits are a necessary component of the 2003 house/tennis permits, and therefore, both sets of permits must be treated together for the purposes of this appeal.

B. *Argument*

Dismissal of an Appeal is proper under the zoning regulations, Title 12 DCMR, and applicable rules of the court.

1. Appellants have failed to allege a zoning error in the issuance of the Fence Permits.

The Appellants have a two-pronged argument to support their claim that the fence permits were erroneously issued by the Director. First, they allege the permits violate the height considerations of 12 DCMR §§ 3110.1.3 and 3110.3.3. The Board, however, does not have jurisdiction to hear appellants' claims. The jurisdiction of the Board is set out in the statute and the zoning regulations. The statute provides in pertinent part:

> Appeals to the Board of Zoning Adjustment may be taken by any person aggrieved . . . by any decision of the Inspector of Buildings granting or refusing a building permit . . . or any other administrative decision *based in whole or in part upon any zoning regulation or map* adopted under this chapter. (Emphasis added)

Id., at § 6-641.07(f)(2005).

Similarly, the Zoning Regulations also describe the scope of the Board's jurisdiction:

> 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 and enforcement of the Zoning Regulations, 11 DCMR

Id., 11 DCMR § 3100.2 (2003).

The source of the Board's authority and the scope of its jurisdiction lie with zoning review errors and its affect on the issuance of building permits and certificates of occupancy. Appellants' argument that the fence permits violate 12 DCMR is not a proper basis for Board review. Title 12 of the DCMR contains the District of Columbia Building Code.[3] The appellants' contention that the fence permits violate 12 DCMR §§ 3110.1.3 and 3.3 - height requirements of structures, fences or the like - - raise building code issues not zoning review issues. The Board as noted above is charged with the administration of the zoning regulations. A challenge to the height of a fence, particularly after it is constructed, does not establish a claim for an error in the review phase of the permit application process. It is not, therefore, a proper appeal to be heard by the Board.

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[3] The building code governs, among other things, the construction, alteration, or repair of buildings and structures.

In the Board's review of the appeal at issue, dismissal[4], is proper, when a party has failed to state a claim upon which relief can be granted under subdivision (b)(6) (which is substantially the same as Rule 12(b)(6) of the Federal Rules of Civil Procedure). As in this case, dismissal is also appropriate where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *McBryde v. Amoco Oil Co., App. D.C., 404 A.2d 200 (1979).* Here, the appellants' failure to identify an error in the zoning review process and their reliance on an alleged post-design problem (e.g., the actual height of the fence *after* it is constructed) supports the appropriateness of a dismissal. Even if the height of the fence is incorrect, the post design error is not subject to Board's review but an enforcement matter for the agency.

The zoning regulations, however, do provide guidance on the location of the fence in a yard. A fence, the regulations provide, if constructed in accordance with the D.C. Building Code may occupy any yard required. 11 DCMR § 2503.3 (2003). Given the facts about the fence and the applicable law, the plaintiff here cannot show a set of facts upon which relief can be granted by the BZA.

Similarly, the Appellants' argument that the fence permits violate the restrictions set out in the Wesley Heights Overlay ("Overlay") under 11 DCMR § 1541.3 (2004) is also unfounded. The subject property is located at 2420 Foxhall Road, N.W., Washington. When reviewing the property and comparing it to the zoning map, the

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[4] While the zoning regulations do not state a legal standard for review of motions to dismiss, the District of Columbia Superior Court rules provide a helpful source for analysis. The Superior Court rules provide that a complaint may be dismissed if it fails to state a claim for relief and it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See* Super. Ct. R. 12(b)(6); *See also*, Owens v. Tiber Island Condominium Ass'n, App. D.C., 373 A.2d 890 (1977); Atkins v. Industrial Telecommunications Ass'n, App. D.C., 660 A.2d 885 (1995).

property is not within Overlay. The Overlay restrictions, whether or not it governs fence placement in a yard, is not applicable. Given the faulty factual basis of this argument, the appeal must be dismissed.

2. An Appeal of the House Permits is Untimely.

The Appellants also appeal the 2003 house permits, the three permits issued for construction of various structures on the subject property, as improper. The appeal as to the 2003 permits is untimely.

The applicable rule governing timeliness of appeals provides that an appeal regarding the administration or enforcement of the zoning regulations must be filed within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice of knowledge of the decision complaint of, whichever is earlier. 11 DCMR § 3112.2(a)(amended by Zoning Commission Order 02-01, dated September 9, 2002). The rule also provides that if a "decision complained of involves . . . reconstruction, conversion, or alteration of a structure . . [n]o appeal shall be filed later than ten (10) days after the date on which the structure or part thereof in question is under roof." *Id.*, at § 3112.2(b)(1)(citations omitted)("under roof" rule). In certain circumstances, the Board may grant and extension of the deadline if there are "exceptional circumstances" which "substantially impart the Appellant's ability to file an appeal to the Board." *Id.*, at § 3112.2(d).

Clearly, the Appellants have not filed an appeal within 60 days of the date the permits were issued. The 2003 permits are part of this appeal filed in June 2005. In addition, the appellants have failed to meet the "under roof" rule. The house and its

related structures, the tennis court and pool, have been under roof since April 2004, as represented by counsel.[5] A 2005 appeal that challenges those permits is untimely. The record does not support a determination by the Board that exceptional circumstances exist that substantially impaired the Appellants' ability to file an appeal earlier. The Appellants note that they live near the subject property - - adjacent to the north side. Stat. at 1. They argue the fence permit adversely and irreparably effect their enjoyment of their property and create an 'eyesore' that will loom over their property. Stat. at 3. It is clear from the record the Appellant had first-hand knowledge and an opportunity to observe the construction of the house on the subject property. Nothing impaired their opportunity to file this appeal timely and there is no evidence in the record to suggest a reason for the delay.

Given then record, the government urges the Board to deny the appeal for the reasons discussed above.

Respectfully submitted,

Lisa A. Bell, Esquire
Doris Parker Woolridge, Esquire
Assistants Attorney General
Office of the General Counsel
Department of Consumer
and Regulatory Affairs
(202) 442-8475

Attorneys for the Department of
Consumer and Regulatory Affairs

Date: December 20, 2005

[5] *See*, Intervenor's Motion to Dismiss, pg. 4.

Certificate of Service

The undersigned hereby certifies that on December 20, 2005, a copy of the foregoing Motion to Dismiss by D.C. Department of Consumer and Regulatory Affairs was served upon the parties, postage prepaid, by first class mail, to:

Geoffrey Griffis, Chair
c/o Ms. Jerrily Kress, Director
Office of Zoning
441 Fourth Street, N.W.
Washington, D.C. 20001

Diana de Brito, Esquire
Cadwalder
1201 F Street, N.W.
Washington, D.C. 20004

Jonathan Gottlieb
4610 Dexter Street, N.W.
Washington, D.C. 20007

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Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Advisory Neighborhood Commission
c/o Alma Gates, Chair
Post Office Box 40846
Palisades Station
Washington, D.C. 20016

Lisa A. Bell, Assistant
Attorney General

EXHIBIT
A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/91)

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

D.C. GOVERNMENT
Rec'd 04/29/05 at B472018
Rec. #t# 165391 Amount $******33.00
EB22001215 BUILD STRUCTURE & EQUI

BUILDING PERMIT

PERMIT NO. B472018

Date 7/05 **(Type)** FENCE

Address of work 2620 FOXHALL RD. NW.

Lot 1031 **Square** 1397

Permission is hereby granted to

(Owner) KENNIC

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions statec on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

NEW FENCE - 7' FENCE ENTIRELY ON OWNER'S LAND.
BLACK VINYL COATED C/L 7' FENCE.
(NATURAL) WOOD PRIVACY FENCE
WROUGHT IRON (BLACK) FENCE

TOTAL PERMIT FEE $

FILING FEE $

NO. **DATE**

FEE PAYABLE $ 33.00

FOR INSPECTIONS CALL 727-7562

Builder

Value $ **No. of Bldgs.**

Width of Bldgs. **Length** **Height** **No. of Stories** 2

Zone WHOP/A-1-A **To be occupied as**

Height of terrace above grade **Projections:** SFD

Address of owner

Deposit No. SAME **Amount $**

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

PATRICK CANAVAN ACTING DIRECTOR

DIRECTOR

Chief, Permit Issuance Branch

By E. KING

Permit Clerk

PERMIT

EXHIBIT
B

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/9[illegible]

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B452735

Date 7/1/0[illegible] **(Type)** MISC.

Address of work 2620 FOXHALL RD. N.W.

Permission is hereby granted to
LUDWIG RESIDENCE
(Owner)
who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

REVISE BLDG .PERMIT #B451175 (NEW CONSTRUCTION/NEW SFD) TO CHANGE STRUCTURAL DESIGN OF TENNIS COURT AS PER PLANS.

Lot 1031 Square 1397
TOTAL PERMIT FEE $
FILING FEE $
NO. DATE
FEE PAYABLE $ 150.00
FOR INSPECTIONS CALL 727-7562

Builder—
Value $ No. of Bldgs.
Width of Bldgs. Length Height No. of Stories 2
Zone R1SD/R-1-A To be occupied as SFD(FUTURE)
Height of terrace above grade Projections:
Address of owner : SAME
Deposit No. Amount $
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Chief, Permit Issuance Branch

By E. DIE[illegible]
Permit Clerk

D. CLARK
DIRECTOR

32301

P E R M I T

Cashier# 0001 D.C. GOVERNMENT
RCPT# 0 07/01/03 AT 14:12 CSR# 11
Receipt# 015349 Amount $$$$150.00
BUILDING, STRUCTURE & EQUI

EXHIBIT
C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Form BLRA-15
(Rev. 9/30/9-

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
BUILDING AND LAND REGULATION ADMINISTRATION

BUILDING PERMIT

PERMIT NO. B451175

Date 5/9/03 **(Type)** NEW BLDG./RET. WALL MISC.

Address of work 2620 FOXHALL ROAD N.W.

Lot 1031 **Square** 1397

Permission is hereby granted to

(Owner) LIVING RESIDENCE

who is authorized to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

Authorized work and conditions of performance thereof:

NO.

TOTAL PERMIT FEE $

FILING FEE $

DATE

FEE PAYABLE $ 2,858.00 ********

FOR INSPECTIONS CALL 727-7562

SITEWORK AND GRADING FOR FURTURE SINGLE FAMILY DWELLING.
CONSTRUCT NEW 12' BLOCK RETAINING WALL ENTIRELY ON OWNER'S LAND.
AT REAR OF PROPERTY. FILL AND CONSTRUCT TENNIS COURT AS PER PLANS.
PRIVATE PROPERTY ONLY. CLEARED FOR BIS.

Builder **Value $** **No. of Bldgs.**

Width of Bldgs. **Length** **Height** **No. of Stories**

Zone WHOD/R-1-A **To be occupied as** VACANT LAND

Height of terrace above grade **Projections:**

Address of owner SAME

Deposit No. **Amount $**

DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS

Chief, Permit Issuance Branch

By: _____ Permit Clerk

L. CLARK 32301
DIRECTOR

PERMIT

Store# 0001 D.C. GOVERNMENT
Rest 0 05/09/03 at 13:05 Clk# 11
Receipt# 001884 Amount $**2,858.00
CHECK 20001215 BUILD.STRUCTURE & EQUI

EXHIBIT
D