

BOARD OF ZONING ADJUSTMENT
FOR THE DISTRICT OF COLUMBIA

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Appeal by Jeffrey Schonberger and Geraldine Rebach)
of the Zoning Administrator's August 13, 2003 Decision)
Permitting Matthew and Amy Epstein to Construct a) BZA No. 17414
Detached, Two-Story Garage on the premises 5362 27th)
Street, NW (Square 2292, Lot 27).)
_____)

Opposition of Appellants To Motion to Dismiss

Introduction

Appellants Jeffrey Schonberger and Geraldine Rebach hereby respond to the motion to dismiss filed by The Michael Sears Trust and Matthew and Amy Epstein, the owners of the property that is the subject of the above captioned appeal (hereinafter "Owners"). The Owners argue that the instant appeal is not timely because the appeal, which challenges the Owners' construction of a second story addition to their existing one-story garage, was not filed within 60 days of the issuance of a building permit to prior owner of the subject property. The motion is not well-taken.

This Appeal Was Timely Filed

The Zoning Regulations provide that an appeal of a building permit or other administrative decision must be filed "within 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 or knowledge of the decision complained of, whichever is earlier." 11 DCMR § 3112.2(a). The Owners' motion to dismiss is predicated on the assumption that the Appellants should have filed their appeal within 60 days of the issuance of a Permit No. B456380, issued on October 30, 2003, which authorized the previous owner of the property, 27th Street, LLC, to "const new SFD,

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Detached Garage & Site Retaining Walls as per plat & Plans.” *See* Appellants’ Pre-hearing Submission, Exhibit 1. This argument is without merit.

I. Appellants Were Not Required to Appeal Within 60 Days of the Permit Issued to the Prior Owner, Since that Permit Conferred No Rights to Construct a Two-Story Garage on the Present Owner.

As the Appellants’ pre-hearing submission makes clear, Appellants were not obligated to file their appeal within 60 days of the issuance of Permit No. B456380, the permit issued on October 30, 2003, to 27th Street, LLC, the prior owner, 27th Street, LLC. Neither the permit application nor the building permit itself authorize the construction of a two-story garage. *See* Appellants’ Pre-hearing Submission, Exhibit 1. Nonetheless, when Appellants were made aware that the plans associated with that permit authorized the construction of a two-story garage in July 2004, Appellants promptly objected to the prior owner that the garage was not zoning compliant. *Id.* Exhibit 3.

Appellants promptly reached an agreement with the prior owner, who conceded that a two-story garage was not zoning compliant, and agreed to construct only a one-story garage. The prior owner then constructed the garage only as a one-story garage and sold the property. When the prior owner sold the property to the current owners, there was no longer any need for Appellants to appeal the permit issued to the prior owners, which became moot.

As a result of these actions, the permit issued to the prior owners conferred no rights to the present owners to construct a two-story garage. The owners therefore acted unlawfully in relying on the permit issued to the prior owners in commencing construction of the addition to the garage in July 2005. The unauthorized nature of the Owners’ reliance on the prior permit was communicated forcefully by the D.C.

Department and Consumer and Regulatory Affairs (“DCRA”), which subsequently issued Stop Work order on August 8, 2005, directing the current owners to halt construction of the second story. Likewise, the current owners, by then filing, on August 10, 2005, an application for a new building permit to construct a “garage with domestic living quarters” effectively concedes that the October 30, 2003, is no longer at issue. *See* Appellants Pre-hearing Submission, Exhibit 2.

The new permit, issued on August 10, 2005, supersedes the building permit issued to the prior owner,. Accordingly, the Owners are wrong in asserting that Appellants should have filed their appeal within 60 days of the issuance of the building permit to the prior owner.

II. Appellants Filed Their Appeal Within 60 Days of Being Placed on Notice of the Zoning Violation.

As noted above, any authorization granted to the prior owner to construct a two-story garage expired when the prior owners constructed only a one-story garage, and then sold the property. Therefore, Appellants were under no obligation to appeal this permit, which conferred no rights to the Owners.

Appellants were not placed on notice that the current Owners intended to unlawfully commence construction of an second story onto the garage until July 2005, when the prior Owners actually commenced construction of the addition relying on the prior owners’ permit. *See* Appellants’ Pre-hearing Submission, Exhibits 4 and 5. Upon observing that the Owners were unlawfully constructing the second story addition on the garage, the Appellants promptly filed the instant appeal on August 8, 2005. (Since the building permit itself does not, on its face, authorize a two-story garage, Appellants appealed the Zoning Administrator’s hand-annotated approval of the building plans

depicting the two story garage.). Accordingly, this appeal was filed within 30 days of being placed on notice that the new owners intended to rely on the prior building permit to construct an addition on their garage.

The Owners thereupon filed an application for a revised building permit on August 10, 2005, which was retroactively granted by DCRA on August 10, 2003. *See* Appellants Pre-hearing Submission, Exhibit 2. Appellants have now amended their appeal to encompass Permit No. B476241, issued by DCRA on August 10, 2005, which retroactively authorized construction of the second story of the garage. As this Board has previously noted, “[t]he Board has broad discretion to allow amendments to appeals, derived from its power to control its docket.” *Appeal of Kalorama Citizens Association*, BZA Appeal No. 17109, at 6 (Nov. 8, 2005)

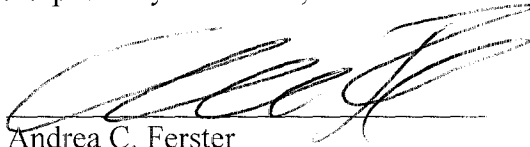
In *Appeal of Kalorama Citizens Association*, the Board allowed the appellants to amend their appeal where the original appeal was timely, and the amended appeal alleges “the same errors alleged in the original.” *Id.* Here, the original appeal of was unquestionably timely, since it was filed within 60 days of Appellants being placed on notice of the Owners’ intention to rely on the permit issued to the prior owner. Indeed, this appeal was filed *within* 60 days of the issuance of Permit No. B476241 on August 10, 2005. Permit No. B476241 on its face relies on the same zoning authorization made on the prior owners’ plans --- “complete construction in accordance with approved plans,” and therefore relates back to the zoning authorization that was the subject of the original appeal. *See* Appellants Pre-hearing Submission, Exhibit 2. Since the original appeal was timely filed, all parties were placed on notice of the substance of the allegations. The

owners therefore cannot (and indeed, do not) claim any prejudice as a result of allowing Appellants to amend their appeal to include the retroactive building permit.

Conclusion

The Owners' motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrea C. Ferster', written over a horizontal line.

Andrea C. Ferster
1100 17th Street, N.W. 10th Fl.
Washington, D.C. 20036
(202) 974-5142

February 17, 2006

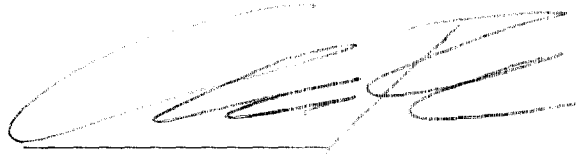
CERTIFICATE OF SERVICE

I hereby certify that, on February 17, 2006, a copy of the Opposition of to Motion to Dismiss was served by mail on:

Thomas J. Carrolll
Holland and Knight, LLP
2099 Pennsylvania Ave., N.W. Suite 100
Washington, D.C. 20006

Alan H. Bergstein, Esq.
D.C. Attorney General's Office
441 4th Street, N.W. 4th Floor
Washington, D.C. 20001

Mr. William Crews
Zoning Administrator
DCRA
441 N. Capitol Street, N.E.
Washington, D.C. 20001



Andrea C. Ferster

From the desk of
Jeffrey A. Schonberger

February 17, 2006

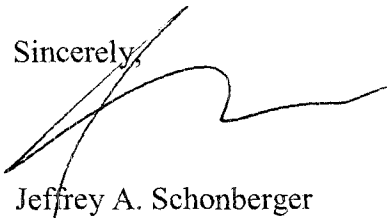
Geoffrey Griffis, Chairman
Board of Zoning Adjustment
441 4th Street, N.W. Suite 210
Washington, D.C. 20001

RE: BZA Application No. 17414

Dear Chairman Griffis:

This is to inform the Board of Zoning Adjustment that the Appellants will be represented by Andrea Ferster, Esq. in connection with the above-referenced application.

Sincerely,

A handwritten signature in black ink, appearing to be "Jeffrey A. Schonberger", written over the word "Sincerely,".

Jeffrey A. Schonberger