

**APPELLANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**
**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal No. 17657 of 1231 Morse Street, Inc., pursuant to 11 DCMR §§3100 and 3101, from the March 6, 2007 decision by the Zoning Administrator to deny a building permit application for the revision of Building Permit B477039, dated September 6, 2005, allowing for the reconstruction of collapsed walls for a single-family dwelling with addition and a conversion to an 11-unit apartment building; and as amended, the July 19, 2007 decision of the Department of Consumer and Regulatory Affairs to revoke Building Permit B477039 and Emergency Demolition Permit Number B478240, dated February 14, 2006. The subject property is located in the R-4 District at premises 1231 Morse Street, N.E. (Square 4069, Lot 130 (formerly Lots 810, 812 and 816)).

HEARING DATES: October 2, October 16, and October 30, 2007
DECISION DATE: December 4, 2007

DECISION AND ORDER

INTRODUCTION

**BOARD OF ZONING ADJUSTMENT
District of Columbia**
CASE NO. 17657
EXHIBIT NO. 39

1231 Morse Street, Inc. ("Appellant") filed the original appeal with the Board of Zoning Adjustment ("BZA" or "Board") on April 20, 2007, pursuant to 11 DCMR § 3112, challenging the March 6, 2007 administrative decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs ("DCRA"), to deny a building permit application for the revision of Building Permit No. B477039, (dated September 6, 2005, authorizing an addition to a single-family dwelling and a conversion to an 11-unit apartment building) allowing for the

reconstruction of collapsed walls of an existing structure. The Zoning Administrator denied the building permit application pursuant to 330.5(c), on the grounds that because the existing structure on the property had been razed, the construction could no longer be considered a reconstruction as required by 330.5(c) for the conversion of a single-family home to an apartment building in the R-4 District.

On August 9, 2007, the Appellant filed a request to amend the original Appeal to include a directly related appeal of the July 19, 2007 decision of DCRA to revoke Building Permit No. B477039 and Emergency Demolition Permit No. B478240, dated February 14, 2006. DCRA issued the Notice to Revoke Building Permit B477039 and Emergency Demolition Permit Number B478240 pursuant to 12A DCMR §105.6(1), on the grounds that the Applicant made a false statement or misrepresentation of the facts in the permit applications, and to 105.6(6), on the grounds that the building permits were issued in error. DCRA alleged that the Applicant did not intend to build an addition to an existing single-family home as represented in its plans, and intentionally and deliberately razed the existing single-family home so that it could build a entirely new building, relied on the Zoning Administrator's March 6, 2007 denial of the revised building permit and alleged violations of the Zoning Regulations.

A public hearing on the appeal was duly noticed and held on October 2, 16 and 30, 2007.

Upon hearing from the parties to the matter, the Board rendered its decision at its December 4, 2007, public meeting, voting to GRANT the appeal.

An explanation of the facts and law that support that conclusion follows:

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing.

The Notice of Appeal was filed on April 20, 2007 by 1231 Morse Street, Inc. The Office of Zoning scheduled a public hearing for October 2, 2007. In accordance with 11 DCMR § 3112.4, the Office of Zoning mailed notice of the hearing to the Appellant, ANC 5B, and DCRA. The Office of Zoning advertised the hearing notice in the D.C Register at *54 D.C. Reg. 6662* (July 6, 2007).

Notice to Amend Appeal.

On August 9, 2007, the Appellant filed a Notice of Related Appeal and Motion to Amend Pending Appeal to Incorporate Directly Related Revocation of Permits by DCRA. The Motion was heard on October 2, 2007. The Board, upon determining that the proposed revocation of Building Permit No. B477039 and Emergency Demolition Permit No. B478240 by DCRA were directly related to the pending Appeal, granted the Motion to Amend the Pending Appeal.

Motion for Summary Judgment.

On September 18, 2007, the Appellant simultaneously filed a Pre-Hearing Statement and Motion for Summary Judgment, claiming that the Appellant was entitled to Judgment as a matter of law because: a) Building Permit No. B477039 complied with the Zoning Regulations and the approved and substantially built addition to the single-family dwelling and conversion to an 11-unit apartment was a conforming use and conforming structure in the R-4 zone; b) the single-family dwelling is a conforming use and conforming structure in the R-4 zone and may be rebuilt as a matter-of-right following a casualty or Act of God; c) Building Permit No. B477039 and

Demolition Permit No. B478240 were at all times validly obtained and in compliance with the Zoning Regulations and Appellant is entitled to complete the authorized work; and d) the Zoning Administrator and/or DCRA are estopped from denying the revised permit application and/or revoking Building Permit No. B477039 and Demolition Permit No. B478240 based on the doctrine of equitable estoppel and laches. DCRA did not respond to the Appellant's Motion for Summary Judgment, but instead chose to file a Motion to Dismiss. The Board deferred action on the Appellant's Motion for Summary Judgment until after the conclusion of the hearing. Having granted this Appeal based on the evidentiary hearing, it is not necessary for the Board to act on the Motion for Summary Judgment, although granting such Motion is appropriate and supported by the record presented by Appellant, and largely uncontested by DCRA.

Standard for Motion for Summary Judgment

Summary judgment is appropriate if there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56 (2005); *see also, Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). Only disputes over facts, viewed in the light most favorable to the non-moving party, which might legitimately affect the outcome of a trial, are "material" under Rule 56. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250; 106 S. Ct. 2505 (1986). Disputed material facts are those that might affect the outcome of the suit under governing law. *Clayton v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995)

The United States Supreme Court has articulated a policy favoring the summary judgment procedure. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v.*

Liberty Lobby, Inc., supra; Matsushita Electric Industrial co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986). In *Celotex*, the U.S. Supreme Court stated:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [Court Rules] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Celotex, 477 U.S. at 327.

The District of Columbia Court of Appeals has also noted that summary judgment is a valuable tool, and that public policy favors disposing of issues summarily, where possible. *Hercules & Co., Ltd. V. Beltway Carpet Services, Inc.*, 592 A.2d 1069, 1075 (D.C. 1991); *Vessels v. District of Columbia*, 531 A.2d 1016, 1019 (D.C. 1987). In administrative proceedings, summary judgment is also a well-accepted practice. *District of Columbia Department of Consumer and Regulatory Affairs v. Vu*, CR-C-06-100009 (OAH, October 16, 2006.)

Motion to Dismiss.

On October 2, 2007, DCRA filed a Motion to Dismiss alleging that the Appeal, as amended, failed to state a claim. The Board notes that DCRA's Motion to Dismiss was "very untimely" having been filed on the day of the hearing. Based on the record, the Board denies DCRA's Motion to Dismiss, finds that the Appellant has stated a valid appeal involving 11 DCMR § 350.5(c) and other provisions of the Zoning Regulations, and hereby grants this Appeal.

Motion to Disqualify and Strike Testimony of Mr. Olutoye Bello. In support of the Appeal, the Appellant offered former the Zoning Administrator, Mr. Olutoye Bello, as an expert witness

and submitted testimony and an affidavit by Mr. Bellow into evidence. DCRA readily, if not enthusiastically, accepted Mr. Bello as an expert witness. After Mr. Bello testified at the October 2, 2007 hearing, DCRA on October 26, 2007 filed a Motion to disqualify Mr. Bello and to exclude his testimony. DCRA claimed that Mr. Bello's routine approval of a Subdivision Plat for the Property on February 23, 2005 and unspecified confidential information obtained during that process disqualified him from participation as an expert witness for the Appellant in these proceedings. The Appellant opposed this Motion and the Board left the record open for DCRA to submit a ruling from the DC government on this matter. DCRA has not filed any additional information on this matter.

The Board denies Motion to Disqualify Mr. Bellow as expert witnesses. Mr. Bello's routine approval of the Subdivision was both in time and substance not substantially related to the matters under this appeal. Mr. Bello approved the Subdivision on February 23, 2005 and the Subdivision was completed and recorded on March 3, 2005. In routinely approving the Subdivision Mr. Bello had no confidential knowledge or information on the subsequent events involving the Property. The Appellant filed the application for Building Permit No. B477039 on April 12, 2005. Mr. Bello left his position as Zoning Administrator on May 15, 2005 and had no role or knowledge about the building permit application, its approval by Zoning on July 16, 2005 or the issuance of the permit on September 6, 2005. Based on the clear facts and timing of events, Mr. Bello had no involvement, knowledge or confidential information involving the subsequent events and actions by DCRA which are the subject of this Appeal.

FINDINGS OF FACT

1. The Appellant is the owner of 1233 Morse Street, N.E. (Square 4069, Lot 130 (formerly Lots 810, 812 and 816)) (the "Property"). The Subdivision creating Lot 130 was recorded in the Office of DC Surveyor on March 3, 2005 after routinely being approved by Mr. Bello as Zoning Administrator on February 23, 2005.
2. The Property is zoned R-4 and has a lot area of 10,443 square feet.
3. The Appellant acquired the Property in April and November 2004, which was at that time improved with a vacant single family dwelling constructed in 1940. The acquisition of the Property was originally financed by a mortgage with an interest rate of 18% which was to be replaced by construction financing at a lower interest rate.
4. The matter-of-right provisions for the R-4 District permit "the conversion of a building or other structure existing before May 12, 1958, to an apartment house as limited by ... [§] 401.3" 11 DCMR § 330.5(c).
5. On April 12, 2005, the Appellant applied for a Building Permit to construct an addition to the single family dwelling and convert the single family dwelling to an eleven (11) unit apartment building in accordance with the applicable Zoning Regulations. The building permit application was accurate, submitted in good faith and did not misrepresent the Appellant's plans and/or true intentions for the project.
6. On September 6, 2005, DCRA issued the Building Permit No. B477039 authorizing the Appellant to "BUILD ADDITION TO SFD/CONVERT SFD TO 11-UNIT APT."

7. On or about September 7, 2005, the Appellant began construction of the addition to the single family dwelling at the rear of the Property.
8. On or about February 7, 2006, during the construction of the addition, the Appellant became concerned about the structural integrity of the single family dwelling and notified DCRA of the concern and requested an inspection of the Property.
9. DCRA inspectors confirmed that the existing single family dwelling was unsafe and instructed the Appellant to obtain an emergency demolition permit. Mr. Lennox Douglass, Deputy Director for Licensing and Permitting at DCRA approved issuance of the demolition permit based on a photograph showing the structural instability of the two-story walls of the existing single-family dwelling. Mr. Douglass did not visit the property and was unable to recall when the emergency demolition permit was issued.
10. On February 14, 2006 [a typographical error shows the permit dated December 14, 2006], DCRA issued Emergency Demolition Permit No. B478240 authorizing the emergency demolition. Appellant, in good faith, complied with the demolition permit and instructions from DCRA to bring the structure to a "safe height" to prevent structural failure and collapse. Mr. Vincent Ford, the former DCRA Chief Building Inspector, testified as an expert construction witness on behalf of the Appellant that emergency demolition permit and DCRA's instructions were appropriate under the circumstances.
11. On or about February 15, 2006, the Appellant began the authorized emergency demolition using manual labor and hand tools to carefully and gradually reduce the height of the walls.

12. On Saturday, February 18, 2006, the Appellant ceased demolition activities mistakenly believing that construction activities were limited to Monday through Saturday, from 7:00 am to 7:00 pm.
13. Mr. Demurren testified in detail and persuasively about the condition of the structure at the time emergency demolition ceased on February 18, 2006. Specifically, Mr. Demurren testified that: a) the front wall of the single-family dwelling was at a height of 3 or 4 feet above the foundation which remained; b) the exterior wall of the “sitting room” remained; c) the exterior wall of the single-family dwelling was at height of 3 or 4 feet running to a depth of 20-25 ft.; and d) the rear wall of the existing single-family dwelling was reduced to the foundation wall.
14. During the course of that President’s Day weekend, heavy rains and wind caused the collapse of the remaining walls of the single-family dwelling and “sitting room” into the hole which caused damage and destruction to the remaining foundation walls.
15. Several neighbors, including Ms. Laniese Lee at 1235 Morse Street, Ms. Camille Parker at 1235 Morse Street and Mr. Scott Jones at 1229 Morse Street, gave conflicting and incomplete testimony about the collapse and the condition of the structure immediately prior to the collapse.
16. After the collapse, DCRA instructed the Appellant to stabilize the Property by placing block foundation walls to grade to prevent collapse of the excavated area of the single-family dwelling and damage to the adjacent properties. Mr. Ford testified that this was an appropriate method for stabilizing the site and that Appellant was justified in following DCRA’s instructions.

17. Mr. Demurren testified that at the time of the collapse, the rear addition/apartment conversion was about 75% framed.
18. On February 22, 2006, DCRA issued the Appellant a written notice of a Stop Work Order to be post dated to February 28, 2006 to allow Appellant to back fill and brace the ground in order to stabilize the Property and prevent damage to the adjoining property.
19. On February 24, 2006, DCRA inspection reported that the existing structure had been razed.
20. On February 28, 2006, DCRA posted the Property with a Stop Work Order ("First Stop Work Order").
21. Until construction was halted, Appellant had spent approximately \$775,000.00 in construction costs in addition to the land acquisition financing. Construction was approximately thirty percent (30%) completed.
22. On January 16, 2007, the Appellant filed a building permit application to revise Building Permit No. B477039 to "reconstruct collapsed walls of an existing structure" based on the settlement discussions Appellant had with DCRA, including Mr. Lennox Douglass, concerning the First Stop Work Order.
23. On January 18-19, 2007, the Revised Permit Application was processed as a "walk-through" permit. A Zoning Review Technician notated approval on the revised permit application on January 18, 2007.

24. On March 5, 2007 the former Zoning Administrator overruled the Zoning Technician's January 18, 2007 approval of the revised permit application.
25. On March 6, 2007, the former Zoning Administrator, Bill Crews, issued a denial letter for the Revised Permit Application alleging that existing structure had been intentionally razed and that as such, the application violated the terms of 11 DCMR 330.5(c) and no conversion to an apartment building could occur.
26. Mr. Matthew LeGrant, as then Acting Zoning Administrator, testified that the collapse of the building constituted a raze of the existing single-family structure which acted to prevent approval of the revised building permit application under § 330.5(c) because of conversion was no longer possible.
27. Mr. LeGrant testified that Building Permit No. 477039 complied with the Zoning Regulations, including § 330.5(c) at the time the permit was issued. On October 1, 2007, Mr. LeGrant visited the property and concluded that the substantially completed addition and conversion to an 11-unit apartment was "equivalent" to the approved building permit plans.
28. Mr. LeGrant stated that the addition and conversion to an 11-unit apartment approved by Building Permit No. B477039 was both a conforming use and conforming structure in the R-4 zone.
29. Mr. LeGrant also concluded that a single-family dwelling is both a conforming use and conforming structure in the R-4 zone and that the provisions of § 2001.4 limiting the reconstruction of a non-conforming structure do not apply.

30. Mr. LeGrant admitted on cross-examination under Building Permit No. 477039, the “ultimate result was an 11-unit apartment building” and that the single-family dwelling was “subsumed” within the 11-unit apartment building and no longer existed independently.
31. Mr. LeGrant testified that although the conversion to 11-unit apartment building was a conforming use and conforming structure, he made the subjective determination that the work had not progressed sufficiently to vest the Appellant’s rights to complete the project under Building Permit No. B477039 and the provisional certificate of occupancy established under § 3203.11(c).
32. Mr. Olutoye Bello, as an expert zoning witness, testified on behalf of the Appellant that Building Permit No. B477039 as issued by DCRA complied with the Zoning Regulations, including § 330.5(c) and that the conversion to an 11-unit apartment building is both a conforming use and conforming structure.
33. Mr. Bello also testified that a single-family dwelling in the R-4 zone is both a conforming use and conforming structure.
34. Mr. Bello concluded that the partially constructed 11-unit apartment building, as conforming use and conforming structure, may be rebuilt after the collapse.
35. Finally, Mr. Bello also concluded that the issuance of Building Permit No. B477039 vested the Appellant’s right to complete the project as authorized based on the provisional certificate of occupancy under § 3203.11(c), as well as §§ 3203.11(d) and 3202.5

CONCLUSIONS OF LAW.

An appeal may be taken by any person aggrieved by, or District agency affected by, any decision of a District official in the administration or enforcement of the Zoning Regulations. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799); D.C. Official Code § 6-641.07(f)(2001 ed.).

The Zoning Administrator denied the Appellant's revised building permit application to rebuild the collapsed walls of the approved and substantially constructed conversion to an 11-unit apartment building and DCRA has attempted to revoke the original building permit for the apartment conversion and the emergency demolition permit. In both instances, the Zoning Administrator and/or DCRA are incorrect factually and legally and the Board grants this Appeal.

Building Permit No. B477039 authorized an addition to an existing single-family and conversion to an 11-unit apartment building. The building permit was properly issued and fully in compliance with the applicable Zoning Regulations, including § 330.5(c), in the R-4 zone. The Appellant's building permit application was truthful and complete and justifiably relied upon the building permit in beginning construction and incurring substantial costs without knowledge of any alleged zoning violations. As approved, the conversion to an 11-unit apartment building is a conforming use and conforming structure and the Appellant's rights vested to complete the approved construction pursuant to § 3203.11(c). Although, the existing single-family dwelling was "subsumed" into and ceased to exist independently of the converted 11-unit apartment building, the single-family dwelling is also a conforming use and conforming structure which can be rebuilt as a matter-of-right.

It is beyond dispute that the Zoning Regulations authorize the reconstruction, in whole or part, of a conforming use and conforming structure, regardless of how the collapse, casualty or Act of God occurred. In this situation, the evidence is clear that the collapse that occurred was not the willful or intentional act of the Appellant who went to extraordinary lengths to act responsibly, notify DCRA and comply with the law, follow DCRA's instructions and prevent the damage. The Appellant has obtained no advantage, zoning or otherwise, from these unforeseen circumstances and has the right to complete this project in accordance with Building Permit No. B477039 and the requested revision to that Permit.

Building Permit No. 477039 was based on accurate and truthful information, cannot be judged against subsequent and unforeseen events, and remains valid and in compliance with the Zoning Regulations. DCRA's too long-delayed attempt to revoke this building permit is without any reasonable basis or purpose and the Board is warranted in granting this Appeal.

Emergency Demolition Permit No. 478240 also is valid, based on truthful information from the Appellant. Also, the Appellant acted in accordance with the demolition permit and instructions from DCRA and DCRA has established no reasonable factual or legal basis for this too long-delayed attempt to revoke the permit.

For the reasons discussed above, it is hereby **ORDERED** that:

The appeal of the denial of the Revised Permit Application and the Notice of Revocation are GRANTED.

Vote taken on _____.

VOTE: ____ - ____ - ____ (Ruthanne G. Miller, Marc D. Loud, Shane Dettman, Michael G. Turnball to grant.

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Five Board members have approved the issuance of this Decision and Order and authorized the undersigned to execute the Decision and Order on his or her behalf.

ATTESTED BY: _____

JERRILY R. KRESS, FAIA

Director, Office of Zoning

FINAL DATE OF ORDER: _____

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.