

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

BZA 19207

**Appellant ANC 6C's Further Memorandum of Law
In Opposition to Motion to Dismiss**

Respondent DCRA has moved to dismiss this appeal on the grounds that it is allegedly moot. ANC 6C opposes the motion and urges that it be denied.

ARGUMENT

At bottom, DCRA's Motion to Dismiss makes two basic arguments. First, it asserts that a building permit may be lawfully voided through the permit holder's voluntary "surrender." Second, it argues that because the permits at issue here were "surrendered," this appeal is therefore moot. Neither argument holds up under scrutiny.

A. DCRA's "Surrender" Procedures Have No Basis in Law

As summarized in ANC 6C's initial memorandum in opposition,¹ Title 12A of the DCMR explicitly sets out the procedures for voiding a building permit through the issuance of a Notice of Revocation. DCRA concedes that fact (*see* Mot. To Dismiss at 2); concedes that the only reference to "surrender" in the relevant regulations appears in the section, 12A DCMR 105.6.1.1, dealing with summary revocations (*see id.*); and further concedes that this case does not and cannot involve a summary revocation under that section (*see id.*).

However, DCRA fails entirely to identify any provision of law expressly describing the supposed "surrender" process. Unable to cite any such authority, DCRA instead falls back on a

¹ ANC 6C provided that memorandum to the Board at the March 8, 2016 hearing in response to DCRA's oral motion to dismiss. *See* Case Exhibit 20.

recitation of the many times it has accepted such surrenders, in effect arguing “we’ve always done it that way.”

The Board should reject this flimsy argument. Where the regulations lay out a clear, unambiguous method for permit cancellation, DCRA is not at liberty to invent alternative methods out of whole cloth. For the same reasons, the Board should reject DCRA’s strained argument that the Code Official’s authority to interpret the regulations somehow confers plenary authority to invent such alternative procedures. As admitted in DCRA’s own motion, the Building Code says the opposite: that “[s]uch policies and procedures [adopted by the Code Official] *shall not have the effect of waiving requirements specifically provided for in the Construction Codes.*” 12A DCMR 104.1 (quoted at Mot. To Dismiss at 5; emphasis added).

DCRA claims that any rejection of its position would open a Pandora’s Box in the interpretation of the Building Code. That claim is false. The only inquiry before this Board is a purely factual one: in this case, has DCRA issued a Notice of Revocation as in countless past BZA cases? It has not, and for that reason the permits in question have not been legally voided.

B. Even If DCRA Were Correct that the “Surrender” Here was Legally Valid, DCRA’s Own Official Statements Demonstrate that the Permit Surrender Does not Moot This Case

Even if the Board accepts DCRA’s claims about the legal effect of “surrender,” the question remains whether that act renders this appeal moot. It does not.

A proceeding is not rendered moot merely because one party summarily declares it so. A case is moot only when the underlying controversy is definitively resolved, without risk that it may come back to life. But as the U.S. Supreme Court has held, “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.” *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Thus, a

case is not moot where “[t]he defendant is free to return to his old ways.” *Id.*; see also *Mallof v. District of Columbia Bd. of Elections & Ethics*, 1 A.3d 383, 396 (D.C. Ct. App. 2010) (“The usual rule, of course, is that a defendant’s voluntary cessation ... does not moot the case, because if it did, the defendant would be free to resume the practice.”).

As a result, “[v]oluntary cessation does not moot a case or controversy unless ‘subsequent events ma[ke] it **absolutely clear** that the allegedly wrongful behavior could not be reasonably expected to recur.’” *Parents Involved in Commun. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 719 (2007) (emphasis added). A defendant seeking to prove that the conduct cannot possibly recur bears “a heavy burden.” *Id.*; see also *W.T. Grant*, 345 U.S. at 633 (“The burden is a heavy one.”).

DCRA fails to carry that burden here. As stated in ANC 6C’s initial memorandum of law opposing the motion to dismiss, earlier this year DCRA made a formal statement to the Council of the District of Columbia that “[t]he Code Official may restore a permit” even after it has been surrendered. DCRA Response to FY15-16 Performance Oversight Hearing Questions at 39 (Response to Question 65), Case Exhibit 21.² Thus, DCRA’s position is exactly the opposite of what is legally required for this case to be moot: instead of establishing that the permits in question are permanently voided, DCRA claims it can revive those permits, apparently at any time for any reason.

Indeed, DCRA is undone by its own insistence that this Board may not question the positions taken by the DCRA Director as to interpretation of the Building Code. DCRA cannot have it both ways; if this Board must accept the Director’s interpretations of regulations outside

² As stated previously, the full set of DCRA oversight responses to the Council’s questions is available online at http://dccouncil.us/files/user_uploads/budget_responses/DCRAFY1516PerfRevQuestions.pdf. Although ANC 6C called attention to this policy statement at the March 8, 2016 hearing before this Board, DCRA’s Motion to Dismiss fails to address its legal significance or even to acknowledge its existence.

Title 11 of DCMR, then it must also accept her insistence—as declared to the Council in response to oversight questions—that permit surrender is neither final nor irreversible. That insistence is fatal to DCRA’s claim that this appeal is moot.

CONCLUSION

For all of these reasons, ANC 6C urges the Board to deny the motion to dismiss.

Respectfully submitted,



Mark Eckenwiler
Commissioner, ANC 6C04
(as authorized representative
for ANC 6C)

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, I served a copy of the foregoing Memorandum of Law in Opposition to Motion to Dismiss via email on

Maximilian Tondro
Ass’t General Counsel
DCRA
maximilian.tondro@dc.gov

Thomas Atkins & Edwin Rodriguez
520 6th St. NE
erodriguezcustodio@hotmail.com

Brian Craddock
Redux Properties LLC
13954 Valley Country Drive
Chantilly, VA 20151
brian.craddock@reduxproperties.com



Mark Eckenwiler