DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington, D.C. 20001

Appeal of Advisory Neighborhood Commission 4C — BZA Appeal 19067

DCRA'S REPLY TO APPELLANTS' RESPONSE OF JANUARY 29

In their Response to the District of Columbia Department of Consumer and Regulatory Affairs' ("**DCRA**") Motion to Strike, Appellants fail to address the issues relevant to their introduction of Exhibit 71 in favor of a misguided polemic. As Appellants have not provided any persuasive basis for the introduction of Exhibit 71 and the incorporation of their appeal of Building Permit No. B1603100 ("**December Permit**" or Exhibit 71), DCRA reiterates its request that the Board strike Exhibit 71 from the record and render a decision in this appeal on the basis of the Proposed Findings of Fact and Conclusions of Law submitted on January 12, 2016. Should the Board admit Exhibit 71 in spite of this, DCRA requests that the Letter Confirming Cancellation of Permit #B1603100 be admitted into the record.

Appellants fundamentally mischaracterize the disposition of the record in this appeal at the time of its motion to introduce Exhibit 71, claiming that "[t]he record was open when Appellant submitted the December Permit." In actuality, the record was closed except for the submission of the approved plans for Building Permit No. B1505734 (the "**May Permit**") by DCRA and of Proposed Findings of Fact and Conclusions of Law by all parties. The Board of Zoning Adjustment ("**Board**") Rules of Practice and Procedure state that "[t]he record shall be closed following the public hearing, except that the record may be kept open for a stated period for the receipt of specific exhibits, information, or legal briefs, as may be directed by the presiding officer." 11 DCMR § 3121.5. At the December 1, 2015 public hearing, the Board sought to conclude the hearing and thereby close the record except for the submission of Proposed Findings of Fact and Conclusions of Law by all parties. BZA Case No. 19067, Transcript of December 1, 2015 Public Meeting & Hearing, p. 173, lines 17-20. DCRA then specifically requested that the record be left open only for DCRA to submit the approved plans for the May Permit. *Id.* at p. 175, lines 18-20. This request was granted by the Board. *Id.* at p. 176, lines 3-5. The Board then specified that the record was to remain open until January 12,

2016 for the purpose of submitting Proposed Findings of Fact and Conclusions of Law by all parties and separately decided that the record was to remain open until the same date for the purpose of DCRA's submission of the approved plans for the May Permit. *Id.* at p. 178, lines 13-14; p. 179, lines 15-18; and p. 180, lines 5-7. Appellants' representation that the record was still open as of Appellants' letter, not a motion, requesting the introduction of Exhibit 71 into the already closed record is therefore an inaccurate one. The record had been closed on December 1, 2015 except for the specific exhibits and filings provided for by the Board Chairperson, who was the presiding officer at that public hearing.

When Appellants filed their motion to introduce Exhibit 71 although the record had been closed, Appellants failed to serve DCRA with this motion and so provided no notice or opportunity for DCRA to attend and contest its motion at the public meeting of January 19, 2016, which had been publicized as the date for a decision in this appeal and not the date for a hearing at which a motion would be ruled on. Appellants' choice to not serve DCRA deprived DCRA of notice that Appellants intended to appeal the issuance of the December Permit and to request the incorporation of that appeal into the present action. DCRA explained in its earlier filing why Exhibit 71 should not be accepted and why the appeal of the December Permit, to which Appellants were independently entitled, should not be incorporated.

In addition, however, Appellants' assertion in their Response of January 29 that a permit sought in December by a property owner who purchased the property in October and for whom Appellants cannot identify any connection to the property before July (that connection being the commencement of negotiations for the subsequent purchase) somehow "proves" the intent of an earlier owner as to a permit secured in May is so self-evidently absurd so as to beggars belief. Appellants, who bear the burden of proof in this appeal, have not even asserted (much less proven) any such connection to 1117 Allison Street N.W. ("**Property**") prior to July, 2015 and yet have claimed that the existence of the December Permit, the application for which was submitted by the new owner, self-evidently "proves" the intent of a different owner in applying for the May Permit, which application Appellants have not shown the new owner to have had any knowledge of or influence over. Even so, Appellants would have this Board impute to the previous owner some intent of the new owner – which DCRA speculated about, but did not assert (contrary to the claims of Appellants) – that they have divined from the existence of the December Permit.

Furthermore, the process by which Appellants sought to bring and incorporate this appeal into the present action without serving DCRA only further demonstrates that Exhibit 71 should be stricken from the record and Appellants' appeal of the December Permit, which has already been canceled, should not be incorporated into the present action so as to not reward Appellants for their deliberate choice to serve DCRA with their Proposed Findings of Fact and Conclusions of Law at 11:31 PM on January 12, 2016 and to not serve DCRA with their request to include the December Permit also submitted to IZIS in the next twenty-nine minutes. This had the effect and apparent intent of eviscerating the proper proceedings of the Board by depriving DCRA of a reasonable opportunity to respond and leaving the Board to rule on the Appellants' motion without an adversarial presentation of its merits (or lack thereof) by the interested parties. The adversarial system is fundamental to the rule of law in the United States, because we believe that we can come to something closer to the truth by asking conflicting, interested parties to each make their case for adjudication than by allowing one purportedly aggrieved party to make its case before an arbitrator tasked with ruling on this claim, as commonly occurs in other jurisdictions that we, as a society and as a nation, rightly criticize for this practice. This is why service of process, however much it may be derided as "a technicality" in circles unfamiliar with the jurisprudential foundations of the American legal system, is so essential to its efforts to render justice in its judgments. Practices calculated to circumvent such procedures, which are there to safeguard the interest of our legal system in providing all parties the opportunity to be fairly heard in matters which concern them, are therefore anathema. As a licensed and practicing attorney, the representative for Appellants should know better than to use such practices.

Although Appellants sought to incorporate their appeal of the December Permit into the present action, they were entitled to appeal the issuance of that permit independently. Although any appeal of the December Permit is moot because it has been canceled, Appellants will similarly be entitled to appeal any new permit that the new owner of 1117 Allison Street N.W. or any successor in interest may, by right or by leave of this Board (as the case may be), seek in the future. In spite of this, Appellants have even advanced an incoherent "judicial estoppel" argument predicated on their refusal to distinguish between (1) a building permit to revise scrivener's errors and provide improved clarity and consistency in the parameters to which the permit holder will be bound in constructing the planned project on the Property for the sake of the Board's review and (2) a building permit that, on its face, seeks to make substantive changes

to a construction project authorized under an existing permit. However much Appellants might wish otherwise, a building permit sought by a successor purchaser in twenty years to conduct roof repairs will not provide a basis for reopening and challenging the permit at issue in this appeal. The canceled December Permit should, likewise, provide no such basis.

If, however, the Board declines to strike the December Permit from the record, although it has been canceled and can no longer serve as the basis for construction or an appeal, DCRA requests that the Board admit the Letter Confirming Cancellation of Permit No. B1603100, presently listed as Exhibit 79 in the Interactive Zoning Information System ("**IZIS**").

Appellants' intent in seeking to incorporate their appeal of the December Permit becomes clear where their Response of January 29 advances a misreading of 11 DCMR § 3202.4(b) in their attempt to deprive the holder of the May Permit, which gave rise to this appeal, of its vested property rights. In citing this provision, Appellants added emphasis to the words "shall comply" in an attempt to distract the Board from the relevant language, which provides that "[a]ny *amendment* of the permit shall comply with the provisions of this title in effect on the date the permit is amended." 11 DCMR § 3202.4(b) (emphasis added). The plain language of the Zoning Regulations addresses only an amendment and requires that the amendment itself, not the base permit, comply with any new regulations. The misreading advanced by Appellants is not supported by the text and does not even make sense. Appellants' misreading of the regulation would bar a permit holder from revising a permit to accomplish the same end goal as if the permit holder instead were to complete construction of a project and then, totally separately, seek a second matter-of-right permit to demolish a section authorized under the original permit and rebuild it in a different manner. The purpose of 11 DCMR § 3202.4(b) is simply to ensure that any work authorized after the regulations have changed must comply with the new regulations. An amendment approved under new regulations does not reauthorize the entire original permit, which was already authorized under the earlier regulations. Instead, such an amendment would only affect that portion of the existing permit that it revised – that revised portion would be subject to the new regulations. The unchanged portion of the original permit, however, was already approved and remained approved under the prior regulations.

Accordingly, DCRA reiterates its request that the Board strike Exhibit 71 from the record and render a decision on the basis of the Proposed Findings of Fact and Conclusions of Law

submitted on January 12, 2016. In the alternative, DCRA requests that the Board admit the Letter Confirming Cancellation of Permit #B1603100 into the record.

Respectfully submitted,
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Date: 2/1/16

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February 2016, a copy of the foregoing DCRA's Reply to Appellants' Response of January 29 was served via electronic mail to:

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