BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA

Appeal by AMT-Varnum LLC ANC 4C
of Denial of Building Permit Application B1611940

STATEMENT OF APPELLANT

This Statement of Appeal is submitted on behalf of AMT-Varnum LLC ("Appellant") to the Board of Zoning Adjustment ("BZA" or "Board") in response to a Notice of Denial of its Building Permit Application B1611940 on August 23, 2017.

The Building Permit Application (the "Permit Application") is for a new three-story flat located at 1523 Varnum Street, N.W. In a letter to the Appellant dated August 23, 2017, the Zoning Administrator denied the Application, "on the basis that the applicant is simultaneously appealing the revocation of the original permit (B1411058) which would conflict with this permit application." That letter is attached as Exhibit A. The Zoning Administrator claims that the Appellant is in violation of 11-A DCMR § 301.2(a)(2), as the "Application did not include the structures proposed to be constructed with the original permit." Because the original permit (the "Original Permit") has been revoked, and this is an entirely new Application, the Appellant asserts that it is not required to include the structures proposed to be constructed with the Original Permit and is therefore appealing the decision of the Zoning Administrator to deny the Application.

I. JURISDICTION

The Board has jurisdiction over this appeal pursuant to 11-X DCMR §§ 1101.1 & 1101.2. This appeal is timely under 11-Y DCMR § 302.2(a) having been filed within 60 days from the

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date the Appellant had notice or knowledge of the decision being appealed, or reasonably should have had notice or knowledge of the decision being appealed.[1]

II. STANDING OF APPELLANT

The Appellant owns 1523 Varnum Street, N.W. (Square 2698, Lot 46) (the "Property"), which is the subject of Building Permit Application B1611940. The Zoning Administrator has denied Appellant's Application. Appellant is therefore "aggrieved" pursuant to 11-Y DCMR § 302.1 and has standing to file this appeal.

III. BACKGROUND

The Original Permit was originally issued on December 23, 2014. The adjacent neighbor, Mr. John Stokes, appealed the Original Permit to the BZA, and the BZA denied that appeal on September 29, 2015. In the meantime, the Original Permit was revoked by DCRA on August 7, 2015 (nine months after issuance) based on a claim that the owner had not received approval for MEP plans. That revocation was successfully appealed to the Office of Administrative Hearings ("OAH") and the revocation was then vacated, by Summary Judgment, on October 28, 2015.[2] DCRA then filed another revocation action against the Original Permit on December 7, 2015, now nearly one year after issuance. This revocation was based on a laundry list of minor items typically found in early review comments, if at all.

On December 18, 2015, the Appellant appealed the second notice to revoke to OAH. That appeal was ultimately dismissed by OAH on a technicality having to do with the name on

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[1] The decision was made on August 23, 2017. The Appellant knew of the decision or had reason to know on August 23, 2017.

[2] DCRA's claim that MEP plans were not filed and approved was patently false, and easily and conclusively proven. In fact, even after this fact was conclusively proven to DCRA, it continued to attempt to prosecute the revocation case, even filing a Motion for Reconsideration. At the hearing on DCRA's Motion for Reconsideration, DCRA officials commented that it would continue its actions to revoke the permit and would take additional steps to accomplish that goal.

the permit and then-owner of the subject property. The Appellant is now appealing that second OAH decision to the District of Columbia Court of Appeals. While the DCCA Appeal is pending, and unless and until the DCCA orders that the second revocation be vacated, the Original Permit remains revoked and is not in effect.

IV. BURDEN OF PROOF

A. Case Law

Consistent with decisions of the District of Columbia Court of Appeals, when interpreting a statute or regulation, the Board will first look to the language of the act, and when the language is unambiguous and does not produce an absurd result, the Board will not look beyond its plain meaning. *Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment*, 642 A.2d 125, 128 (D.C. 1994) (citations omitted); see also, e.g., *BSA 77 P Street LLC v. Hawkins*, 983 A.2d 988, 995 (D.C. 2009). Regulations, like statutes, are interpreted according to their plain language. *Walter Reed Mews Ltd. Ptnr. v. Wilkins*, 2006 WL 3043114, 5 (D.C.Super. 2006). The Board will not add language to a regulation, because "[t]o supply omissions transcends the judicial function." *District of Columbia v. Brookstowne Community Development Co*., 987 A.2d 442, 447 (D.C. 2010), quoting *Allman v. Snyder*, 888 A.2d 1161, 1169 (D.C. 2005). "At bottom, this case is one of statutory interpretation, and 'we begin with the statute's plain language. If the statutory language is unambiguous, we may as well end there.'" *Tangoren v. Stephenson*, 977 A.2d 357, 360 (D.C. 2009), quoting *1836 S Street Tenants Ass'n v. Estate of B. Battle*, 965 A.2d 832, 838 (D.C. 2009).

B. Decision Not Supported by the Regulations

The Zoning Administrator erred in denying the Application because he looked beyond the plain meaning of 11-A DCMR § 301.2(a)(2), and created an entirely new requirement that

effectively attempts to deny the Appellant its due process rights and/or its right to mitigate its damages resulting from the second permit revocation (by filing a subsequent permit application). In his denial of the Application, the Zoning Administrator argues that "the Application did not include the structures proposed to be constructed under the Original Permit, and so violates Section A-301.2 of the Zoning Regulations, unless and until the Original Permit is withdrawn or its revocation upheld by the Court of Appeals." However, Subtitle A § 301.2(a)(2) simply states that an "application for a building permit shall be accompanied by any of the following that is deemed necessary: . . . (2) Plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures." Surely the Zoning Administrator does not believe that his review must incorporate the details of a previously revoked application and that the Applicant must "overlay" that previously proposed work onto the newly proposed work under the Permit Application.[3]

This ruling creates a new requirement out of whole cloth, not written anywhere in the Zoning Regulations or Building Code, and the result is the denial of the Appellant's right both to receive a building permit and/or the denial of the Appellant's right to appeal the revocation of the Original Permit. According to 11-A DCMR § 301.2(a)(2), the Appellant must include the "Plan, elevation, and location by dimensions of all existing and proposed structures, and the proposed use of those structures."As this Application is unrelated to the Original Permit, "all" structures simply includes any existing structure on 1523 Varnum Street and the proposed structure. In this case, the proposed structure is a new three-story flat. As those plans and elevations have been

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[3] Indeed, six (6) other disciplines within DCRA accepted and approved the Permit Application, apparently not finding it appropriate to consider the revoked Original Permit.

sufficiently provided in the Application, the Application is not in violation of the Zoning Regulations. [4]

Further, the Original Permit cited in the Zoning Administrator's denial of the Application is no longer active, as it has been revoked. While there is a pending appeal, the Original Permit is no longer pending. There is nothing in the regulations that would require an owner of a building to cease all pending litigation against DCRA prior to the issuance of a building permit. The current Permit Application is a completely separate application from that in the Original Permit and nothing in the Regulations state that an owner cannot apply for a new permit once a previous permit has been revoked, regardless of whether or not an appeal of that revocation is pending.

If the DCCA Appeal is granted and the Court orders DCRA to again vacate the revocation, then at that time the property owner will withdraw this Permit Application, and the Original Permit will be back into effect. The Zoning Administrator claims that the Permit Application "conflicts" with the revoked Original Permit, although he does not explain how a current application could conflict with a revoked permit. As noted above, there will never be a conflict. The Owner may have to withdraw one of the two actions at such time as a conflict may appear imminent, as noted above, but until that time, there simply is no conflict, and the Zoning Administrator does not have the power to limit the Appellant's rights as he has done in this case.

For the reasons stated above, the appeal should be GRANTED and the decision of the Zoning Administrator should be REVERSED, and Building Permit Application B1611940 should be granted.

Respectfully submitted,

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[4] 1523 Varnum was subdivided from the larger property which was the subject of the Original Permit.

Martin P. Sullivan