

GOVERNMENT  
OF  
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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SPECIAL PUBLIC MEETING

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TUESDAY, SEPTEMBER 16, 2008

The Special Public Meeting convened in Room 220 South, 441 4<sup>th</sup> Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Ruthanne G. Miller, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

RUTHANNE G. MILLER Chairperson  
MARC D. LOUD Vice Chairman  
SHANE L. DETTMAN Board Member  
(NCPC)  
MARY OATES WALKER Board Member

OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY Secretary  
BEVERLEY BAILEY Sr. Zoning Spec.

D.C. OFFICE OF THE ATTORNEY GENERAL PRESENT:

MARY NAGELHOUT, ESQ.

This transcript constitutes the minutes from the Special Public Meeting held on September 16, 2008.

TABLE OF CONTENTS

WELCOME:

Ruthanne Miller . . . . . 3

STEPHANIE WALLACE

APPEAL NO. 17747: . . . . . 4

Exhibit 57 - Ms. Grumbine Affidavit . . . . . 5

Exhibit 58 - Affidavit Responses . . . . . 5

Exhibit 59 - DCRA Filing . . . . . 5

Exhibit 60 - ANC Filing . . . . . 5

Exhibit 61 - Grumbine/Simmons Filing . . . . . 6

Exhibit 62 - Mr. Lamont Filing . . . . . 6

Exhibit 63 - Ms. Wallace Filing . . . . . 6

Motion to Deny Appeal No. 17747 . . . . . 74

Vote to Deny Appeal No. 17747 . . . . . 74

ADJOURN:

Ruthanne Miller . . . . . 75

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P-R-O-C-E-E-D-I-N-G-S

9:51 a.m.

CHAIRPERSON MILLER: This is the September 16<sup>th</sup> Public Meeting of the Board of Zoning Adjustment. This morning we have a Public Meeting first and then it will be followed by a Public Hearing.

My name is Ruthanne Miller. I'm the Chair of the BZA. To my right is Mr. Marc Loud, he is our Vice Chair. To my left is Mary Oates Walker and Shane Dettman, Board Members. Mr. Clifford Moy from the Office of Zoning, Mary Nagelhout from the Office of Attorney General and Beverley Bailey from the Office of Zoning.

Copies of today's meeting agenda are available to you and are located to my left in the wall bin near the door. We do not take any public testimony at our meetings, unless the Board asks someone to come forward.

Please, be advised that this proceeding is being recorded by a Court

1 Reporter and is also webcast live.  
2 Accordingly, we must ask you to refrain from  
3 any disruptive noises or actions in the  
4 hearing room. Please, turn off all beepers  
5 and cell phones.

6 Does the staff have any  
7 preliminary matters?

8 MR. MOY: No, Madam Chair.

9 CHAIRPERSON MILLER: Okay. Then  
10 let's proceed with the agenda.

11 MR. MOY: The first and only case  
12 for the Special Public Meeting is the Appeal  
13 Application of 17747 of Stephanie Wallace,  
14 pursuant to 11 DCMR 3100 and 3101, from a  
15 September 28, 2007 decision of the Zoning  
16 Administrator, to deny the issuance of a  
17 building permit allowing the reconstruction of  
18 a portion of a pre-existing one-family  
19 dwelling in the R-1-B District at premises  
20 5013, that's 5013, Belt Road, N.W., that's in  
21 Square 1756, Lot 64.

22 On August 1, 2008, the Board

1 completed public testimony, closed the record  
2 and scheduled a Special Public Meeting on  
3 September 16<sup>th</sup>. The Board requested  
4 additional information to supplement the  
5 record, which included a filing from a party  
6 in opposition, Mary Grumbine, filed an  
7 affidavit. That is in your case folders  
8 identified as Exhibit 57. It is dated August  
9 14<sup>th</sup>.

10 The Board also allowed responses  
11 to this affidavit and that is also -- there is  
12 also that filing from the applicant, which is  
13 identified in your case folders as Exhibit 58.  
14 This is from the applicant dated August 21,  
15 2008.

16 Finally, the Board also requested  
17 draft findings of fact and conclusions of law.  
18 And those filings are also noted in your case  
19 folders. The first is from the appellee, the  
20 Department of Consumer and Regulatory Affairs,  
21 Exhibit 59. The second filing is from the ANC  
22 identified as Exhibit 60. Three, findings of

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1 fact and conclusions of law from the parties  
2 in opposition.

3 The first is from Ms. Grumbine and  
4 Mr. Simmons, Exhibit 61. The second is from  
5 Mr. John Lamont, Exhibit 62. And the third is  
6 from the appellant, Stephanie Wallace, which  
7 is identified as Exhibit 63.

8 The Board is to act on the merits  
9 of the appeal application. That concludes the  
10 staff's briefing, Madam Chair.

11 CHAIRPERSON MILLER: Thank you,  
12 Mr. Moy. I just want to start off by saying  
13 that the parties in this case filed extensive  
14 pleadings and they were very helpful and I  
15 would like to compliment them for doing such  
16 a good job in bringing to the Board all of the  
17 facts and the law in this case and note that  
18 there was a lot of emotion in this case.

19 At this point though, the Board is  
20 going to be evaluating it legally in the  
21 context of an appeal of the Zoning  
22 Administrator's decision. And I just want to

1 provide some context for our discussion via,  
2 you know, a short chronology of some of the  
3 case facts and the law that we will be looking  
4 at.

5 But I want to state this, I'm not  
6 going to be giving an exhaustive discussion of  
7 the facts in this case. We did get that in  
8 proposed findings and the Board has considered  
9 them. I'm just going to layout a few things  
10 to set the stage for discussion.

11 This is an appeal of the September  
12 20, 2000 decision of the Zoning Administrator.  
13 And in that decision, the ZA denied a building  
14 permit, known as the fifth building permit  
15 that would have allowed the reconstruction of  
16 a pre-existing portion of a nonconforming  
17 structure.

18 The appellant alleged that the  
19 Zoning Administrator erred in that decision  
20 because the reconstruction was allowed under  
21 the Zoning Regulations pursuant to 2001.6 and  
22 405.8 and the appellant further argued that

1 the ZA is barred under the equitable doctrines  
2 of estoppel and laches from denying the fifth  
3 permit and thereby disallowing the  
4 reconstruction.

5 DCRA and the neighbors support the  
6 ZA decision and argue that the action is not  
7 barred by estoppel or laches. Basically, this  
8 is a very short, as I said, condensed kind of  
9 chronology. I want to remind the Board  
10 Members of some of the history of the permits.

11 This began on April 9, 2004 when  
12 the appellant purchased the house that was  
13 built, approximately, in 1933 or earlier in as  
14 is condition without a termite inspection.  
15 And the appellant did not conduct a termite  
16 inspection either before purchasing or  
17 afterwards.

18 DCRA issued first building permit  
19 December 9, 2004. It has been referred to as  
20 the original permit. It authorized  
21 construction of an addition to the existing  
22 single-family home. In March 2005, in the

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1 process of the demolition work connected with  
2 the first permit, appellant discovered termite  
3 damage.

4 A second building permit was  
5 issued October 5, 2007, which revised the  
6 original permit, to allow removal and  
7 replacement of damaged wood in accordance with  
8 plans to preserve the structural integrity of  
9 the project.

10 VICE CHAIRMAN LOUD: Madam Chair,  
11 I'm sorry. I think you misspoke. I just want  
12 to correct it.

13 CHAIRPERSON MILLER: Okay.

14 VICE CHAIRMAN LOUD: You said the  
15 second permit was issued October 5, 2007.

16 CHAIRPERSON MILLER: Okay.

17 VICE CHAIRMAN LOUD: I just want  
18 to make a quick factual correction. The  
19 second permit was issued October 4, 2005,  
20 which I think is what you meant to say.

21 CHAIRPERSON MILLER: Oh, okay.

22 Thank you. And I'm also going to say here I'm

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1 not putting in, in this little chronology,  
2 here just to refresh our memory about the  
3 sequence of permits stop work orders that were  
4 issued and all sort of other things, but thank  
5 you for correcting the date.

6 So it was the second building  
7 permit then that revised the original permit  
8 that allowed removal and replacement of  
9 damaged wood in accordance with plans to  
10 preserve the structural integrity of the  
11 project.

12 Now, if my data is right, April  
13 21, 2006 a third permit was issued. It  
14 revised the original permit to update  
15 foundation, basement and structural drawings  
16 to respond to raise the house by 4 feet. They  
17 encountered other problems and they needed to  
18 raise the house. And the appellant said that  
19 that was really the two unforeseen ground  
20 water problems.

21 And then February 14, 2007, a  
22 fourth permit was issued which allowed

1 demolition of a portion of a single-family  
2 dwelling due to structural integrity and  
3 possible collapse of the house, which is  
4 dangerously unsound.

5 And that permit authorized the  
6 appellant to rebuild the structure to current  
7 building code specifications per existing  
8 permits and plans. And this permit was not  
9 referred to Zoning for a review for approval.

10 Between March 12<sup>th</sup> through 15,  
11 2007, the front portion, meaning all that was  
12 remaining of the original 1933 house was  
13 demolished pursuant to the authorization of  
14 the fourth permit.

15 On April 17, 2007, the appellant  
16 applied for a fifth permit to reflect new  
17 footers and new two story structure replacing  
18 existing and it has in parens structural only.  
19 The second part of this permit, apparently,  
20 had been approved by the fourth permit and was  
21 placed in this fifth permit.

22 The application for the fifth

1 permit was put on hold for zoning review. And  
2 on September 28, 2007, the Zoning  
3 Administrator denied approval of the fifth  
4 permit as set forth in his decision that is on  
5 appeal before us now.

6 I just want to put forth that  
7 basic chronology. It certainly is not  
8 exhaustive and I think as we get into  
9 discussing elements of the law, we will be  
10 pulling other facts. I just thought it was  
11 helpful to have the chronology of the permits,  
12 in general.

13 Okay. And then also, in general,  
14 I want to layout the issues that we will be,  
15 legal issues, addressing. 405.8 side yard,  
16 did the ZA err in not approving the permit to  
17 reconstruct the nonconforming single-family  
18 house on grounds of noncompliance with side  
19 yard requirements?

20 Two, 2001.6, did the ZA err in  
21 determining that the damage from termites was  
22 not a casualty or act of God, and therefore

1 appellant could not reconstruct the single-  
2 family dwelling under this provision?

3 And then finally, is appellant  
4 entitled to reconstruct the front of the  
5 single-family dwelling, even if the ZA was  
6 correct in his decisions on those provisions  
7 of law, based on equitable theories of laches  
8 and estoppel?

9 I don't know if anyone wants to  
10 add anything at this point, otherwise, I think  
11 we should take on each of the legal issues,  
12 beginning with 405.8. Okay.

13 405.8 provides "In the case of a  
14 building existing on or before May 12, 1958  
15 with a side yard less than 8 feet wide, an  
16 extension or addition may be made to the  
17 building, provided that the width of the  
18 existing side yard shall not be decreased and  
19 provided further that the width of the  
20 existing side yard shall be a minimum of 5  
21 feet."

22 So I think I'm just going to open

1 this one up for discussion, at this point.  
2 I'm sorry, we're dealing with new microphones.  
3 Can you hear me? Okay. So I guess I would  
4 like to put the question to my fellow Board  
5 Members, at this point. Is any Board Member  
6 of the opinion that the ZA was incorrect in  
7 determining that, at that point, the appellant  
8 can proceed with a nonconforming side yard  
9 pursuant to 405.8?

10 VICE CHAIRMAN LOUD: Madam Chair,  
11 I'm not sure I understand your question.

12 CHAIRPERSON MILLER: Okay.

13 VICE CHAIRMAN LOUD: You're asking  
14 us if the ultimate conclusion or --

15 CHAIRPERSON MILLER: Well, yes.  
16 Well, I don't think that there was a lot of  
17 argument on this particular legal issue. I  
18 think it was somewhat straightforward. The ZA  
19 said that he couldn't approve the permit to  
20 reconstruct the nonconforming single-family  
21 house, because there was no longer any part of  
22 the structure existing, the nonconforming

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1 structure and that that needed to be there in  
2 order to take advantage of 405.8.

3 So I'm asking if anyone believes  
4 that that was incorrect for any reason, that  
5 the ZA's determination was incorrect? I'll  
6 just say I think by the end of the hearing, it  
7 was undisputed that no part of the  
8 nonconforming pre-1958 house, structure  
9 existed at all. And that there needed to be  
10 some part of the structure in order to take  
11 advantage of that provision.

12 MEMBER DETTMAN: Madam Chair, I  
13 think the Zoning Administrator's determination  
14 pursuant to 405.8 would be correct, an  
15 accurate interpretation of that provision.  
16 And it is certainly consistent with the way  
17 the Board ruled in the Morse case when it came  
18 to the pre-1958 requirement for, I believe  
19 that regulation was, 330.

20 So it's a different regulation,  
21 but it's sort of the same requirement and a  
22 similar exemption that is sort of laid out in

1 that provision. So I would agree with the  
2 Zoning Administrator's determination with  
3 respect to 405.8.

4 CHAIRPERSON MILLER: Does anyone  
5 disagree? I mean, I think it's pretty basic  
6 that if the facts show that there was no  
7 structure still existing, then you can't take  
8 advantage of that. All right. I think that  
9 was probably our easiest issue.

10 The second issue arises under  
11 2001.6 and the definition of casualty. This  
12 one was quite extensively briefed by the  
13 parties, because as we started this hearing,  
14 there were several motions for summary  
15 judgment filed and motion to dismiss. And the  
16 Board looked at this one in the context of  
17 whether or not we could decide this as a  
18 matter of law.

19 And I think there were two series  
20 of submissions on this. So I think that that  
21 is the first thing that we ought to look at,  
22 at this point. Can we decide as a matter of

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1 law that and do we agree with the Zoning  
2 Administrator that termite damage is not  
3 included as a casualty or considered a  
4 casualty under 2001.6?

5 And 2001.6 reads "If a casualty or  
6 act of God results in damage to an extent of  
7 75 percent or less of the cost to reconstruct  
8 to the entire structure, the structure may be  
9 restored or reconstructed to its previous  
10 condition, provided that the reconstruction or  
11 restoration shall be started within 24 months  
12 of the date of the destruction and continued  
13 diligently to completion."

14 Basically, the Zoning  
15 Administrator determined that termite damage  
16 that appellant noted as having made the  
17 building structurally unsound is neither a  
18 casualty nor act of God. The Zoning  
19 Administrator stated that the damage resulting  
20 from the termite activity is a lack of  
21 maintenance, not either a sudden occurrence  
22 resulting from a casualty or a natural

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1 disaster, such as an act of God.

2 My impression, my memory from the  
3 hearing on this, was that I think that the  
4 appellant almost conceded that this was not an  
5 act of God, that this was fully -- this issue  
6 was fully briefed in the papers and that act  
7 of God really referred to natural disasters,  
8 such as hurricanes or tsunamis or things like  
9 that. And that the focus then became on the  
10 word casualty and what does that mean.

11 So as casualty is not defined in  
12 our regulations, that's the first thing we did  
13 was go look in our definitions, it's not  
14 defined. There were two places that I think  
15 we started looking at. One was we looked at  
16 the 2001.6 and the context of 2001, in  
17 general. And our regulations at 2001.4 refer  
18 to fire, collapse or explosion or act of God.  
19 And that that's possibly what casualty refers  
20 to.

21 And though, I think we needed to  
22 go to Webster's Dictionary for the definition

1 on meaning of casualty, because that's what  
2 our regs direct when we don't know, when it's  
3 not defined, go to Webster's. And of course,  
4 Webster's has a series of definitions and, I  
5 think, the appellant chose a definition that  
6 was most favorable to the appellant's view.  
7 And then DCRA argued other aspects of that  
8 definition.

9 Appellant argued, I believe, the  
10 definition said, it was the sixth definition,  
11 "A person or thing that has failed, been  
12 injured, lost or destroyed as a result of an  
13 uncontrollable circumstance or some action."  
14 And with respect to this definition, appellant  
15 has made the argument that the termite damage  
16 was uncontrollable, because it happened before  
17 the appellant even bought the house. And so  
18 it was beyond appellant's control.

19 DCRA said that the definition in  
20 Webster's that was more reasonable for zoning  
21 analysis was "An unfortunate occurrence,  
22 something that happens unexpectedly and

1 without design, serious or fatal accident,  
2 disaster."

3 So I also want to review also that  
4 in addition to looking at Webster's and then  
5 the context of 2001.6 and 2001, the parties  
6 also briefed other cases that interpreted the  
7 word casualty and cited Black's Law  
8 Dictionary. And then the other thing we  
9 consider is the intent of the Zoning  
10 Regulations, what makes the most sense how to  
11 interpret this word.

12 So I think that's a good start, a  
13 review of the kind of information that was  
14 provided to us that we considered. Does  
15 anyone want to address if they think this, the  
16 termite damage, is a casualty? And  
17 specifically whether the ZA erred in  
18 determining that termite damage is not a  
19 casualty under 2001.6?

20 VICE CHAIRMAN LOUD: Madam Chair,  
21 I thought that was an excellent articulation  
22 of the casualty briefing that the parties put

1 on as well as the conclusion that you have  
2 reached. I also agree with the Zoning  
3 Administrator that termite damage is not a  
4 casualty.

5 I think the only thing that I  
6 would add to your discussion is that even if  
7 we use the appellant's definition, which I'm  
8 going to just sort of paraphrase, I'm not  
9 going to repeat the whole thing, but a thing  
10 destroyed as a result of an uncontrollable  
11 circumstance, I haven't been persuaded that  
12 termite damage is an uncontrollable  
13 circumstance.

14 The argument advanced by appellant  
15 is that because appellant happened on the  
16 scene, onto the scene after the damage had  
17 occurred, that it was uncontrollable. But I  
18 think that there -- and certainly, DCRA  
19 brought this up in their opposition pleadings,  
20 there is the counter argument, which to me  
21 makes more sense, that a casualty is not  
22 governed by when it is discovered, but more by

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1 the nature of the event itself.

2 And they even, DCRA even, cites a  
3 case to back that up. It's Craven vs. United  
4 States and I don't have the citation for it,  
5 but it's in the pleadings. But the point  
6 being that there is no -- appellant didn't  
7 make the case that a casualty is defined or  
8 governed by when it is discovered by the  
9 victim of the casualty or something like that.

10 So that was not persuasive for me.  
11 I think everything else that you have said, I  
12 certainly affirm and agree with in terms of  
13 the casualty being defined by how sudden it  
14 is, if it's foreseeable and thinking along  
15 those lines as articulated in DCRA's  
16 opposition and argumentation at the hearings  
17 that we held.

18 MEMBER WALKER: Madam Chair, I  
19 will also point out that the structural damage  
20 to the original house was not only caused by  
21 the termite infestation, but also exposure to  
22 the ground water.

1 CHAIRPERSON MILLER: Right.

2 MEMBER WALKER: And then let me  
3 echo Mr. Loud. I agree that some degree of  
4 suddenness needs to be present and both of  
5 these issues are progressive. The damage was  
6 caused by a prolonged exposure to water and we  
7 have had lots of briefing about how termite  
8 infestation is progressive.

9 MEMBER DETTMAN: Madam Chair, I  
10 guess in this situation, I'm more inclined to  
11 disagree with the Zoning Administrator with  
12 respect to the issue of casualty and whether  
13 one happened or not. But I think I ultimately  
14 get to the same place that I believe the Board  
15 is at with respect to 2001.6.

16 The regulations point the Board to  
17 Webster's and I guess that after reading the  
18 definition of Webster's, if you are clear that  
19 Webster's gets you there, that the answer to  
20 casualty if it's not ambiguous whatsoever,  
21 which is that's where I'm at, that one would  
22 be convinced that a casualty did occur.

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1                   Reading the definition of  
2           casualty, particularly 2 and 6, "An  
3           unfortunate occurrence and then a person or  
4           thing that has failed, been injured, lost or  
5           destroyed as a result of an uncontrollable  
6           circumstance or of some action," it's that or  
7           that sort of gets me. I think that No. 6  
8           could be read, sort of dissected and read two  
9           ways or some action, to me, I think, could be  
10          applied to the damage caused by prolonged  
11          exposure to moisture as well as termites.

12                   DCRA, to their credit, does a  
13          very, very good job of sort of dissecting  
14          Webster's definition and including a footnote  
15          in Exhibit 42. They define occurrence, which  
16          is a word that shows up in the sixth  
17          definition of casualty. They define occurrence  
18          as something that takes place, especially  
19          something that happens unexpectedly, and they  
20          rely upon that to sort of bring in this  
21          element of suddenness.

22                   But I'll point out that it says

1 especially something that happens  
2 unexpectedly. It doesn't close the door. It  
3 doesn't require it to be unexpected. It just  
4 says an occurrence is especially something  
5 that happens unexpectedly.

6 So with respect to the Webster's  
7 definition, I get there. I get my answer on  
8 whether or not termite damage could be  
9 considered a casualty. Where I think the  
10 appellant fails with respect to 2001.6 is the  
11 75 percent threshold.

12 As the regulation reads it says  
13 that "If a casualty or act of God occurs and  
14 the extent of the damage is less than or equal  
15 to 75 percent of the cost of reconstructing  
16 the entire structure, that one could  
17 reconstruct it," the nonconforming structure,  
18 "as is."

19 I think in the beginning when the  
20 rear portion of the house dropped, as they  
21 say, or collapsed, I think it was the  
22 appellant's responsibility to do that

1 assessment and apply that assessment to the  
2 entire structure, not just the rear portion or  
3 the back 50 percent.

4 I think if that assessment had  
5 been done, I think eventually we find out  
6 through the structural engineer's report that  
7 damage had been done to 100 percent of the  
8 structure. We find out that the front portion  
9 of the building was too far gone. It could  
10 not be lifted and it was in danger of  
11 collapse.

12 If that had been done, and again  
13 we hear from the appellant in their briefing  
14 on casualty, that the damage had been done  
15 well before 2004 when the appellant bought the  
16 property, I think if that assessment had been  
17 done, it would have been found that they  
18 failed on the 75 percent threshold and lost  
19 their rights under 2001.6.

20 So again, I get to, I think, where  
21 the Board is standing with respect to 2001.6,  
22 but it's that second, I'll say, prong of

1 2001.6 that makes me say that -- where the  
2 applicant fails.

3 CHAIRPERSON MILLER: Thank you. I  
4 mean, I think, first, I want to address your  
5 point on the 75 percent and then go back and  
6 discuss a little further why I think that  
7 termite damage is not included under the  
8 casualty meaning in 2001.6.

9 But the ZA never considered any  
10 real figures to determine the 75 percent. And  
11 I understand that applicant -- that the  
12 appellant made that case before us. However,  
13 I'm not really sure that that's actually even  
14 before us. I would think that the ZA would  
15 need to make that determination in the first  
16 instance.

17 But I don't need to get to that,  
18 either, as the ZA didn't, because I think that  
19 termite damage should not be considered a  
20 casualty under our regulations. And I was  
21 pretty much setting the stage before, but I  
22 want to say a little bit more why I come to

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1 that conclusion.

2 One is, and I think Mr. Loud said  
3 this as well, I think termite damage is  
4 controllable. We talked about this at the  
5 hearing, you know, that there is a whole  
6 industry out there that controls termites. So  
7 I don't even think under the first definition  
8 in Webster's that it fits.

9 And I also agree with Ms. Walker  
10 that there is a suddenness and unexpectedness  
11 in the definition, in other definitions that  
12 are offered in Webster's that I think make  
13 more sense in the context of our regulations,  
14 which refer, at least in 2001.4, to fire,  
15 collapse, explosion. They are all kind of  
16 sudden things. So I don't know why we would  
17 go beyond that context.

18 I think in deciding what casualty  
19 means, I would tend to say that it would  
20 include fire, collapse or explosion that is  
21 referenced in 2001.4 for destruction of a  
22 nonconforming structure. But I think when the

1 word casualty is used that we could then  
2 interpret it as possibly including something  
3 else in the same category that might be  
4 unforeseeable, uncontrollable or sudden.

5 I understand we did pay attention  
6 to that "and any other action," but I think if  
7 you just look at that, then the regs kind of  
8 lose their meaning. An interpretation of  
9 casualty is not including something like  
10 termite damage, which is kind of slow and  
11 progressive, is consistent with Webster's  
12 interpretation of casualty in insurance law,  
13 tax law, Black's Law Dictionary and I think  
14 also the intent of the Zoning Regulations.

15 It is consistent with the Toga  
16 Case that was mentioned by appellant. In that  
17 case, that was an act of God, that was a  
18 hurricane situation. I think if you were to  
19 read this as to include gradual deterioration,  
20 then I don't know why you would use the words  
21 "act of God" or "casualty." To me, they need  
22 to take on a separate meaning.

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1 I think it might encourage  
2 individuals to abandon and let deteriorate  
3 structures, so that they could then take  
4 advantage of this provision, where if you have  
5 something that is so catastrophic and sudden,  
6 you don't have that issue.

7 The appellant also addressed the  
8 Zoning Commission Order No. 43 stating that we  
9 are not supposed to look at the cause. I  
10 think they said "In completing Order No. 43,  
11 the Zoning Commission also provided important  
12 instructions for the Board governing its  
13 interpretation and application of that  
14 casualty or act of God provision.

15 Specifically, the Zoning  
16 Commission included the determination of a  
17 casualty as beyond the scope of the Commission  
18 and the Board's authority. As a result, the  
19 Zoning Commission has defined casualty based  
20 on the result, not the cause or origin of any  
21 concept of fault or blame.

22 I think that this is somewhat

1 distorted. In fact, the Zoning Commission in  
2 this discussion was referring to that the  
3 Board would not have to look at a  
4 determination or cause of the origin of a  
5 fire, for instance, whether it was caused by  
6 arson or something like that.

7 Specifically, the regs talk about,  
8 you know, as a result of an act of God or a  
9 casualty. So we are looking at, you know,  
10 what caused it. So I think that covers my  
11 reasons. So I just want to see where we are,  
12 at this point. Is it the view that there was  
13 not -- that termite damage does not constitute  
14 casualty? I think that perhaps three of us  
15 were at the view, in any event, unless Mr.  
16 Dettman has changed his mind.

17 MEMBER DETTMAN: Well, it  
18 certainly looks that way. And again, I guess,  
19 I do remain in the minority.

20 CHAIRPERSON MILLER: Good.

21 MEMBER DETTMAN: But just a couple  
22 of points. I agree with you on your

1 observations with respect to Order No. 403.  
2 With respect to the 75 percent threshold, you  
3 are right, the Zoning Administrator never made  
4 that determination, because he didn't need to,  
5 because he felt a casualty didn't occur.

6 And the appellant did briefly  
7 address the 75 percent threshold. But I think  
8 the information that was in the record,  
9 Exhibit No. 18, the motion for summary  
10 judgment and prehearing statement, the  
11 appellant uses the 2008 assessment, which is  
12 180,000 in order to do that calculation and  
13 whether or not the 75 percent threshold was  
14 met.

15 However, at that point, half of  
16 the original structure was gone. So I don't  
17 think it's accurate to use the 2008 assessment  
18 to decide whether or not the cost of  
19 reconstructing simply half of the house would  
20 meet the 75 percent threshold.

21 So I think, at a minimum, the  
22 applicant just didn't meet the responsibility

1 that is required under 2001.6. If you wanted  
2 to draw an observation from the information  
3 that's in the record that I did, it's not  
4 \$180,000 any more, it's \$90,000. But I know  
5 that's a stretch that I'm -- an observation  
6 that I'm making.

7 And the last point with respect to  
8 controllability or foreseeability, again, I  
9 believe that a casualty did occur. And I  
10 think this because I put a lot of weight in  
11 this 75 percent threshold. If a house sits  
12 there vacant, I think we found out that the  
13 former owner moved to Florida, so it sort of  
14 sat there vacant for quite some time.

15 And we assume that over this time,  
16 termite damage was being, you know, caused.  
17 And then the owner purchases the property and  
18 finds out that there is damage. I'm not sure  
19 how we can say the owner loses their rights  
20 under 2001.6, when they didn't own the  
21 property and it was just sitting there vacant.

22 What I think 2001.6 does is it

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1 provides a little bit of flexibility. If a  
2 homeowner discovers some termite damage in  
3 their house, that's to an extent that exceeds  
4 what would be considered a minor repair and it  
5 occurs in a nonconforming section of their  
6 house, they are allowed to reconstruct it, if  
7 it's below 75 percent.

8 At a time where the homeowner  
9 discovers the damage and it's in excess of 75  
10 percent, they lose their rights to reconstruct  
11 their nonconforming section of that house.

12 And with respect to your comment  
13 about it encourages abandonment, it might if  
14 someone so chooses to do that. But it only  
15 encourages that to a point of 75 percent. If  
16 someone leaves their house abandoned, because  
17 they want to tear down a nonconforming  
18 structure and rebuild it and they let it sit  
19 there and rot up to 50 percent, they are still  
20 covered under 2001.6, as unethical as that  
21 might sound.

22 But there is that controlling

1 factor of 75 percent, which I tend to put a  
2 lot of weight in.

3 CHAIRPERSON MILLER: Okay. I just  
4 want to say that I think, and other Board  
5 Members can correct me if I'm wrong, that we  
6 would disagree with your conclusion that if a  
7 homeowner found termite damage, they could  
8 proceed under 2001.6. But I -- because I  
9 think that the consensus of the three of us is  
10 that that's not a casualty, and casualty and  
11 act of God are what allows a homeowner to  
12 proceed under this provision.

13 I would also say that, and correct  
14 me if I'm wrong, I think it's my understanding  
15 that all four of us agree, though we come in  
16 at different ways, that this particular  
17 appellant could not take advantage of 2001.6,  
18 the three of us, because there wasn't a  
19 casualty and you because under your -- under  
20 the facts that were presented in the record  
21 and your assessment of them, they wouldn't  
22 have met that 75 percent threshold.

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1           Okay. I also want to say that I  
2           don't necessarily agree with the Zoning  
3           Administrator's decision to the extent that  
4           it, I think, alleged that the damage was due  
5           to a lack of maintenance. I don't know that  
6           we have any -- that in the record, but I don't  
7           think that that's a necessary finding.

8           I think it's only that it wasn't a  
9           casualty and/or that they just didn't fall  
10          within the provisions of 2001.6.

11          VICE CHAIRMAN LOUD: I just wanted  
12          to add some parting shots on the whole issue  
13          of casualty and I'm in agreement with the  
14          majority in terms of the definition of that.  
15          It seems to me that an underlying sort of  
16          common thread to both act of God, which is an  
17          act of God, and casualty, which is not, it's  
18          human planned or something like that, is that  
19          there is this uncontrollable aspect to it.

20          For example, with science now, the  
21          suddenness is taken out of the equation in a  
22          lot of cases. Hurricane Ike was not sudden,

1 because with science we knew it was coming for  
2 a couple of weeks. But there is this aspect  
3 of it that is still very, very uncontrollable  
4 even though we know about it.

5 And I think that that's the common  
6 thread that ties acts of God with casualties  
7 and makes a casualty a casualty. Even in  
8 situations where you may know that it is  
9 coming, so it's not as sudden, it's still  
10 going to be very uncontrollable.

11 In the case that we are talking  
12 about, there is nothing about the termite  
13 damage, I think, that the evidence would  
14 suggest was uncontrollable with proper  
15 inspections and proper remediation, etcetera.  
16 So again, I'm really buoyed in our sort of  
17 articulation that termite damage is not a  
18 casualty, because there is nothing about it  
19 that would be uncontrollable.

20 I think, so this is just sort of  
21 further speculation on casualty and the  
22 definition of casualty and bolstering that

1 whole controllable aspect of the definition of  
2 casualty.

3 CHAIRPERSON MILLER: I think it's  
4 also how quickly it might happen to the  
5 particular like structure. For instance, even  
6 if we know that a hurricane is coming, it  
7 seems like that is something that strikes, you  
8 know, the structure without much opportunity  
9 to protect it.

10 So anyway, I mean, it just takes  
11 on a whole different order than some kind of  
12 a prolonged slow moving whatever.

13 VICE CHAIRMAN LOUD: Sort of the  
14 gradual creep of termites.

15 CHAIRPERSON MILLER: Right, right.

16 VICE CHAIRMAN LOUD: But even, for  
17 example, a satellite, a satellite that may  
18 fall on someone's home, we will know through  
19 science, approximately, when it is going to  
20 fall and where it is going to fall and we  
21 might know a month a head of time. So it's  
22 not necessarily, in that sense, sudden. But

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1 when it falls, it is uncontrollable. There is  
2 not a whole lot you can do in terms of  
3 remediating the potential impact. So there is  
4 that element again. I think you just said it,  
5 Madam Chair, being uncontrollable.

6 CHAIRPERSON MILLER: And I think  
7 also actually in this case, I really don't  
8 think that this definition at all encompasses  
9 something -- some damage that existed before  
10 you bought your home and then you discover it  
11 later. I don't see that in the legislative  
12 history or in the use of these kind of words.

13 Anything else? Okay. That moves  
14 us into the issue of whether or not the Zoning  
15 Administrator would be barred from denying the  
16 fifth permit and denying the reconstruction of  
17 the original portion of the home that still  
18 existed on grounds of the equitable doctrines  
19 of estoppel and laches.

20 I think we should start with  
21 estoppel, because I think that's probably the  
22 most relevant. Estoppel has been addressed in

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1 several Court of Appeals' cases dealing with  
2 zoning decisions. And this is a tough one.  
3 The courts almost always start off their  
4 discussion of the estoppel saying that it is  
5 judicially disfavored in a zoning context,  
6 because of the public interest in enforcing  
7 zoning laws.

8 Not to say that someone can't meet  
9 the elements, but that it is judicially  
10 disfavored. And so we have to consider that.  
11 The elements of estoppel most recently have  
12 been set forth in the Economides case, but it  
13 was also set forth in the Bannum case.

14 Basically, they are as follows:  
15 "Expensive and permanent improvements made in  
16 good faith and in justifiable and reasonable  
17 reliance upon affirmative acts of the District  
18 Government without notice that the  
19 improvements might violate the Zoning  
20 Regulations" and finally, the equities  
21 strongly favor petitioners.

22 All six elements have to be met in

1 order to succeed on this defense. This is not  
2 one in which we are balancing elements. This  
3 is one where we have to find that they all are  
4 met.

5 So I think that we can start with  
6 No. 1, expense of permanent improvements. And  
7 I think we have to determine initially --  
8 well, no, let me see. I think you have to  
9 read some of these together. So expense of  
10 permanent improvement made in good faith and  
11 in justifiable and reasonable reliance upon  
12 affirmative acts of the District Government.

13 So which affirmative acts of the  
14 District Government are we looking at, first  
15 of all, that the appellant has justifiably  
16 relied on in making expensive and permanent  
17 improvements and then was not able to follow  
18 through on those, basically?

19 So I just want to start with which  
20 affirmative actions are we talking about? And  
21 I believe that we are looking at the fourth  
22 and fifth permits. Because the fourth permit

1 authorized the appellant to demolish the  
2 remaining portion of the original house and  
3 then to reconstruct it, basically.

4 And the fifth permit, basically,  
5 took away permission to reconstruct. Now, I  
6 guess, the first point I would make is if you  
7 look at the elements here, the first one is  
8 expensive and permanent improvements that were  
9 made relying on a decision. And I think you  
10 look at what expensive and permanent  
11 improvement did the appellant make in reliance  
12 on the fourth permit?

13 And the facts show that the  
14 appellant demolished the front portion of that  
15 structure that was remaining, that was -- so  
16 she incurred expenditures by doing that.  
17 However, I don't believe that there was an  
18 improvement, a permanent improvement made in  
19 reliance upon that permit.

20 VICE CHAIRMAN LOUD: I would  
21 agree, Madam Chair. I think, and we sort of  
22 talked about it a little earlier, that had the

1 appellant rebuilt the front portion of the  
2 existing single-family dwelling in reliance on  
3 the fourth permit, that had not DCRA  
4 intervened and self-corrected in that period  
5 and the appellant was able to rebuild, and  
6 then the appellant was being asked to either  
7 tear it down or something like that, that  
8 would have been a very clear example of  
9 detrimental reliance on affirmative act of the  
10 Government with respect to the fourth permit.

11 But in this case, what happens is  
12 that DCRA did correct itself before the  
13 structure was rebuilt. And so there was no  
14 improvement to speak of in terms of cash  
15 outlay or expense outlay to create it. So I  
16 don't think that they have met that prong of  
17 the estoppel test, yeah.

18 MEMBER WALKER: Madam Chair, let  
19 me also add that the fourth permit was sought  
20 because of the report of the structural  
21 engineer that talked about the problems of the  
22 house in the first place. And so here we're

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1 not talking about a situation where the  
2 appellant was relying on the Government's  
3 determination here. It was their own  
4 structural engineer who said, you know, this  
5 building can't stand and that is when they  
6 sought to obtain the fourth building permit.

7 CHAIRPERSON MILLER: I would  
8 agree. And I think that the evidence in the  
9 record shows that the demolition was sought by  
10 the appellant because of the extensive termite  
11 damage and structural damage that I think we  
12 heard evidence that almost that they had no  
13 choice, but they had to do this for safety  
14 reasons.

15 So it wasn't like they did this  
16 because DCRA approved something. I mean, it  
17 really came from them. I think is basically  
18 what Ms. Walker is saying. And I know that  
19 there is conflicting evidence in the record.  
20 I think at the hearing Ms. Wallace said that  
21 oh, if I knew it was going to come to this, we  
22 wouldn't have demolished it.

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1           But the rest of the evidence  
2 points to showing that it was demolished  
3 because it had such extensive damage. But in  
4 any event, I think that the estoppel defense  
5 goes to improvements and not demolition. And  
6 there weren't any improvements that were made  
7 in response to relying on DCRA's order.

8           MEMBER DETTMAN: Madam Chair, I  
9 agree with everything that the Board is saying  
10 with respect to the fourth building permit and  
11 the estoppel argument. Just to give the Board  
12 an idea of where my mind is at with something  
13 is that I'm troubled that with the denial of  
14 the fifth building permit, the idea that DCRA,  
15 essentially, rendered the improvements that  
16 they had approved by the first and the second  
17 and the third building permit, by denying the  
18 fifth building permit, they rendered those  
19 improvements invalid and not in compliance  
20 with the Zoning Regulations.

21           CHAIRPERSON MILLER: I don't think  
22 so. The first three permits allowed the

1 addition. Well, at least the addition to be  
2 built. They didn't change their mind on that.  
3 The addition is built. Their decision only  
4 went to reconstructing the front portion of  
5 the original structure.

6 MEMBER DETTMAN: And at this  
7 point, the appellant is not able to  
8 reconstruct that portion of the house, which  
9 essentially means that the addition, which has  
10 nonconforming side yards, is now in  
11 noncompliance with the Zoning Regulations.

12 CHAIRPERSON MILLER: I don't think  
13 so. I don't know that that was exactly before  
14 us, but it would be my opinion that the  
15 addition was built when the front part of the  
16 nonconforming structure existed. And pursuant  
17 to 405.8, it was allowed to do that, because  
18 it was attaching to that pre-1958  
19 nonconforming structure.

20 There is nothing -- and the ZA  
21 didn't make a determination that that addition  
22 was illegal. He only said that the original

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1 part couldn't be put back now, because under  
2 405.8, as we just said, there is no longer a  
3 pre-1958 nonconforming structure to attach to  
4 by which they could avail it. You know what  
5 I'm saying?

6 MEMBER DETTMAN: So is the idea  
7 there that simply the front part of the house  
8 loses the side yard exemption under 405.8 and  
9 that the appellant now has to build the front  
10 part of the house that is in full compliance  
11 with the Zoning Regulations or is it that it's  
12 the Board's interpretation of 405.8, which I  
13 thought was similar to our interpretation in  
14 the Morse case, is that since the pre-1958  
15 structure is now gone, the project cannot be  
16 brought to completion?

17 And I guess I just assumed that it  
18 renders the addition now noncompliant with the  
19 Zoning Regulations, because in order for this  
20 addition to have nonconforming side yards,  
21 there must be the existence of a pre-1958  
22 structure.

1                   CHAIRPERSON MILLER: Well, no, I  
2                   don't think so. I think there must have been  
3                   the existence of the pre-1958 structure when  
4                   it was built. I mean, you can't start tearing  
5                   down houses later when the old part comes down  
6                   or whatever, it doesn't mean the new part is  
7                   illegal. I think it goes to when it was  
8                   built.

9                   And so what the Zoning  
10                  Administrator's decision goes to though, you  
11                  know, if people aren't clear, is replacing the  
12                  pre-1958 structure, the rest of it in front.  
13                  And I think what is unfortunate about this is  
14                  that that part is not necessarily  
15                  objectionable, even to the neighbors. That if  
16                  you replaced it they -- as Ms. Wallace said,  
17                  all they wanted to do was put back the front  
18                  part, which apparently was quaint or whatever,  
19                  that's all they want to do.

20                  But under the regs, I don't see  
21                  where they are entitled to do that, as a  
22                  matter of law, under these provisions.

1                   MEMBER DETTMAN: Okay. I'm in  
2 agreement with you, because otherwise it would  
3 require -- if the 405.8 exemption is lost,  
4 that also applies to the addition, which we  
5 are saying the opposite --

6                   CHAIRPERSON MILLER: Right.

7                   MEMBER DETTMAN: -- if we were  
8 saying that it does apply to the addition, it  
9 would require the appellant -- it could  
10 potentially require the appellant to have to  
11 tear down this addition or seek zoning relief.

12                   CHAIRPERSON MILLER: But it  
13 doesn't.

14                   MEMBER DETTMAN: Okay.

15                   CHAIRPERSON MILLER: The Zoning  
16 Administrator didn't say that.

17                   MEMBER DETTMAN: Well, when we  
18 questioned the Zoning Administrator about  
19 this, and I didn't actually get a clear  
20 answer, but it -- we were asking to what level  
21 of completion, to what extent the completion  
22 must be attained in order for this addition?

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1 I don't exactly remember the exact question,  
2 but I thought the Zoning Administrator had  
3 said that the addition, and we were pointing  
4 to that picture, did not reach a certain level  
5 of completion. And I may be understanding  
6 that incorrectly.

7 MEMBER WALKER: I believe he said  
8 it was not under roof. Does that help you?

9 VICE CHAIRMAN LOUD: If I could  
10 jump in just for a couple of seconds. I think  
11 this is a very, very appropriate discussion  
12 and it's very interesting, too, because it's  
13 something that probably occurred to all of us  
14 in deliberating on the case.

15 I think the pleadings and some of  
16 the evidence would suggest, however, that it  
17 was brought under roof around November of '06.  
18 And that the framing was completed in November  
19 of '06. The front part of the structure,  
20 however, was not demolished until March of  
21 '07. So that when it was brought under roof  
22 and when the framing was completed, there was

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1 this existing single-family dwelling that was  
2 nonconforming to attach to.

3 And that would get us, I think,  
4 beyond the issue that you raised, the  
5 chronologies that we are talking about. Had  
6 it been different, had the property been  
7 demolished say in November of '06 or October  
8 of '06, we would have had an entirely  
9 different scenario on our hands.

10 But I do think that the key  
11 question is was it completed in November of  
12 '06? And I think from the record, at least,  
13 as I recall, that it was brought under roof  
14 and the interior framing for the addition was  
15 completed several months before the  
16 demolition.

17 MEMBER WALKER: Does it impact  
18 your analysis at all that the addition was  
19 never attached to the original structure?

20 CHAIRPERSON MILLER: Let me just  
21 say something. First of all, when we started  
22 off, we were talking about 405.8. And we said

1 that it was undisputed that there was no part  
2 of the original house left. In order for  
3 405.8 to apply, you have to have that  
4 original, some part of the original, structure  
5 left to attach to.

6 Okay. Just bear with me. So as  
7 far as the structure that we are talking about  
8 that is related to what's on appeal, the front  
9 part, there was no pre-1958 nonconforming  
10 structure to attach to, at that point, after  
11 demolition of the front part. So he couldn't,  
12 the appellant couldn't take advantage of  
13 405.8.

14 However, your question, I believe,  
15 Ms. Oates, goes to, you know, whether the  
16 addition was ever attached to the front part,  
17 correct? Which I think is not before us. I  
18 think that goes to, you know, whether the  
19 addition was legally built, you know.

20 MEMBER WALKER: That's correct.

21 CHAIRPERSON MILLER: Okay.

22 MEMBER WALKER: That was

1 responding to Mr. Dettman's question about --

2 CHAIRPERSON MILLER: Yes.

3 MEMBER WALKER: -- the propriety  
4 of leaving up the addition. And I only posed  
5 the question --

6 CHAIRPERSON MILLER: Okay. I  
7 would --

8 MEMBER WALKER: -- whether it  
9 impacts your analysis that they were never  
10 attached.

11 CHAIRPERSON MILLER: Oh, okay.  
12 Would we agree though that the legality of the  
13 addition is not before us? Even though it may  
14 be an issue out there that some of the parties  
15 may be concerned about, that is not -- that  
16 was not subject to the Zoning Administrator's  
17 decision, which is on appeal, which is what we  
18 are looking at, did the ZA err in making his  
19 decisions?

20 And it did not relate to the fifth  
21 permit.

22 MEMBER DETTMAN: Well, I agree

1 with you, Madam Chair, but I simply brought it  
2 up, because I'm left with the question then  
3 that what's to stop someone from taking  
4 advantage of a nonconforming structure,  
5 building a very big addition and then simply  
6 demolishing the existing house and building  
7 that portion of the house that exists that is  
8 in compliance with the Zoning Regs? Which is  
9 the situation that we are going to have here.

10 I understood it in the Morse case  
11 what we said is that there is no 1958  
12 structure left, which means you cannot build  
13 an apartment house in an R-4. If you  
14 remember, the large portion of the apartment  
15 house, the 11 unit portion was already built.  
16 It was up and under roof.

17 With the direction of 405.8, that  
18 I believe we are going, would mean that that  
19 apartment house can still be built. It's just  
20 that the pre-existing structure could not be  
21 rebuilt. It's a little bit different of an  
22 animal, but what we are saying here is that

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1 you can build your big addition with  
2 nonconforming side yards.

3           However, you just can't build the  
4 remaining front portion of it. And I am just  
5 thinking in the future what kind of precedent  
6 that might set. It's just the question I'm  
7 left with. Again, I do agree with you in the  
8 direction that we are going with 405.8.

9           VICE CHAIRMAN LOUD: Yeah, I think  
10 in response to Commissioner Walker and again  
11 I agree it's an excellent question and I'm  
12 glad the question is not before us, but I  
13 think it depends on the definition of  
14 extension and/or addition and how well we  
15 parse that, to what level of analysis we parse  
16 that.

17           But since it's not before us, we  
18 won't have the challenge of trying to do that  
19 today.

20           CHAIRPERSON MILLER: I don't think  
21 it's a perfect regulation and I think that  
22 having seen these, you know, the two cases

1 that we are talking about, I think it's  
2 possible, you know, for either of them perhaps  
3 to have occurred if some portion of the  
4 original structure had remained and they  
5 didn't in either of these cases.

6 So I guess, I don't think that --  
7 you know, it's not necessarily -- it doesn't  
8 affect our decision in this case. I think it  
9 just would affect when the Zoning Regulations  
10 are under review that this is something that--  
11 that's something that they might look out for.

12 I think I would say that the --  
13 any improvements that were made in this case  
14 were made prior to the fourth permit. And  
15 they were made at the appellant's own risk for  
16 not having done a termite inspection or  
17 structural damage inspection. And what  
18 happened was later she found she had -- that  
19 the property did suffer termite damage.

20 And so I think that the demolition  
21 actually of the front part was certainly in no  
22 way a result of anything DCRA did, except to

1 authorize it, based on her representations,  
2 but, we talked about this, was the result of  
3 the termite damage, which she would have had  
4 to do anyway.

5 So I mean, I think if -- because  
6 it has to meet all six, it fails on this one.  
7 But I think that -- this element, but I think  
8 that the courts want us to go through all six  
9 elements and perhaps if this were to be  
10 appealed, the court might see differently on  
11 any of these elements. So I think that we  
12 need to go through them. That was No. 1.

13 Is it the consensus of the Board  
14 that there was not expensive and permanent  
15 improvements, as a result of relying on  
16 permanent, No. 4? Okay.

17 VICE CHAIRMAN LOUD: I would  
18 agree.

19 CHAIRPERSON MILLER: Okay. I  
20 think everyone is in agreement. But, okay,  
21 next we get into made in good faith. Made in  
22 good faith and justifiable and reasonable

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1 reliance upon the affirmative acts of the  
2 District Government. Okay.

3 VICE CHAIRMAN LOUD: Madam Chair,  
4 it seems to me that, you know, along the  
5 analysis lines that we are proceeding, the  
6 first element has driven all of the rest.  
7 That is that since we have, by consensus,  
8 found that there were not expensive and  
9 permanent improvements, then we have also  
10 determined that these improvements were not  
11 made in good faith. These improvements were  
12 not justifiable and reasonable -- reasonably  
13 based on affirmative acts of the District  
14 Government.

15 I'm assuming that we are still  
16 going to walk through all of the elements, but  
17 it just seems like the first one drives all of  
18 the rest.

19 MEMBER WALKER: I would agree.  
20 They don't apply. If there were no  
21 improvements, then we cannot make any  
22 determination about whether they were made in

1 good faith.

2 CHAIRPERSON MILLER: No, I don't  
3 know. What I was saying was they certainly  
4 took action in response to the fourth permit.  
5 And we have determined that that action does  
6 not constitute an improvement. That the  
7 demolition is not an improvement and nothing  
8 was built.

9 I'm saying that if this were to go  
10 on appeal and the court disagreed with us and  
11 said no, you're wrong, demolition is an  
12 improvement per se, that we need to have in  
13 the record our findings on all of these  
14 elements.

15 So for instance, I think, good  
16 faith would go to the point of when they went  
17 for the fourth permit, did they submit plans  
18 that were submitted in good faith? Were they  
19 misleading? You know, those kind of issues  
20 that came up in our hearing.

21 And I just think we need to  
22 address some of them. You could have an

1 improvement, but find that it wasn't -- the  
2 permit wasn't relied on in good faith.

3 And I have a question whether this  
4 good faith element goes to the whole  
5 construction period, in which we heard a lot  
6 of testimony about, you know, concerns of the  
7 neighbors with respect to damage to their  
8 property, but I think that we need to address  
9 it.

10 And you know, we can qualify it  
11 however, because I mean, if we could stop  
12 right at improvement, I think that would be  
13 great, but I don't think for the record and  
14 for, as how I understand, the court's review  
15 of our decisions, I think we need to address  
16 it.

17 So with respect to good faith, I  
18 think that there are two aspects that I was  
19 referring to. One is the good faith with  
20 respect to the application for the fourth  
21 permit. And then good faith with respect to  
22 the history, construction history in general.

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1 Do people have comments on that?

2 VICE CHAIRMAN LOUD: I think that,  
3 to me anyway, the evidence showed that the  
4 appellant acted in good faith trying to get  
5 the fourth permit and, taking it further,  
6 acted in good faith demoing the front of the  
7 structure after getting the fourth permit.  
8 there was a very elaborate demo sequence  
9 protocol that was established and then the  
10 fourth permit authorized partial demo.

11 There were some ambiguity at least  
12 from an argumentation standpoint about what  
13 partial demo meant, but from a common sense  
14 standpoint, it could not have meant the newly  
15 installed rear addition. It had to mean the  
16 part of the property that the January 2007  
17 report said needed to be replaced, because you  
18 couldn't lift it 4 feet and so on and so on.

19 I think the steps were taken in  
20 good faith. But again, it doesn't make a  
21 whole lot of sense to walk through the  
22 analysis when we're saying that there was no

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1 improvement.

2 But since we have to walk through  
3 the analysis to satisfy the Court of Appeals,  
4 I think that the demolition was taken in good  
5 faith. There was a permit. There was this  
6 dialogue between the appellant and the  
7 appellee. There was this January 2007 report.  
8 Remember, all of this, I think, was driven by  
9 the fact that they couldn't lift the front of  
10 the structure 4 feet after discovering all of  
11 the rotten termite damage.

12 So this demolition was the  
13 solution that they came up with. The engineer  
14 came up with it. It was presented to DCRA.  
15 DCRA signed off on it. I think all of that  
16 was in good faith. There was no evidence that  
17 this was part of some elaborate ruse to create  
18 some new front part of the structure, in my  
19 opinion.

20 CHAIRPERSON MILLER: Other  
21 comments? I think that if we are limited to  
22 the fourth permit, that it certainly wasn't

1 clear that the appellants were acting in bad  
2 faith. And I know there was allegations that  
3 they tried to mislead DCRA with respect to the  
4 drawings that were shown and the use of the  
5 word existing and things like that, but I  
6 don't think that it was clear enough to rise  
7 to the level of finding any bad faith.

8 The neighbors, the ANC, DCRA point  
9 to the appellant, how the appellant kept the  
10 property and damages from the appellant's  
11 construction to neighboring property and  
12 certain violations, a standing water violation  
13 and trash and debris and overgrown vegetation  
14 violation, certain stop work orders, which  
15 supposedly went beyond the scope of permits.

16 All of that was before the fourth  
17 permit, so I don't -- I'm not sure that that  
18 is necessarily relevant to the analysis as we  
19 are pursuing it. So I just wanted to raise  
20 that for the record. But I wouldn't make a  
21 finding, at this point, that the appellant  
22 acted in bad faith with respect to the fourth

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1 permit, which I think is what is at issue.

2 Just a question of the next -- are  
3 we in agreement on that? Okay. The next  
4 question is whether -- it says "in justifiable  
5 and reasonable reliance upon the permit."  
6 Whether or not she should have known that she  
7 couldn't reconstruct that front portion of the  
8 house as a matter of law.

9 And the opposition states that she  
10 should have known of 405.8. And there is  
11 evidence in the record that she knew they had  
12 a side yard issue in the process of Building  
13 Permit 2. Actually, I think she said at the  
14 hearing, the architect never told her and, you  
15 know, like I said nobody at the Building  
16 Department told me that until Permit No. 2.

17 So that shows that she had notice  
18 that there could be a side issue, side yard  
19 issue at 405.8 at Building Permit No. 2 stage  
20 and, therefore, when she applied for the  
21 permit for No. 4, was it justifiable and  
22 reasonable for her to rely on that permit, you

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1 know, as being in accordance with the law or  
2 should she have known that this -- she was  
3 proceeding at risk here, too?

4 I guess my view would be that she  
5 was on notice of this issue, so that her  
6 reliance may not have been what I would  
7 consider justifiable. What do others think?

8 MEMBER WALKER: I would agree,  
9 Madam Chair. While I don't think the evidence  
10 is such that I'm ready to conclude that she  
11 acted in bad faith, I don't think that it was  
12 necessarily a reasonable reliance upon this  
13 fourth permit, given all the discussion about  
14 the need to preserve the original structure in  
15 order to get the side yards.

16 CHAIRPERSON MILLER: Actually, I  
17 just want to say I've kind of parsed these as  
18 to 1, 2, 3, 4, 5, 6 as the courthouse, but it  
19 says "without notice that the improvements  
20 might violate the Zoning Regulations." And I  
21 think that that statements shows that she had  
22 some notice that they might violate the Zoning

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1 Regulations.

2           And 6 is so we're in -- are we in  
3 -- okay, we're in agreement that she has  
4 notice. Okay. 6 is that the equity strongly  
5 favored petitioners. I don't think so in this  
6 case. I think in some cases, you know, there  
7 are equities where they really had no idea or  
8 whatever and they totally relied on DCRA. I  
9 think this is not a clear case of equities  
10 being in favor of petitioner in light of our  
11 finding that she was on notice that it might  
12 be in violation of the regulations and all the  
13 other.

14           I guess I don't see a record for  
15 all this equity in the appellant's favor. I  
16 think that the -- it's unfortunate, I think,  
17 what has happened to the appellant. I think  
18 that the appellant has suffered in this case.  
19 I found the appellant a somewhat compelling  
20 witness, but on the other hand, I think that  
21 this comes down to proceeding at her own risk  
22 with respect to that termite damage.

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1           And that what has happened has  
2           been a result of that and the equities favor  
3           compliance with the Zoning Regulations.  
4           Others?

5                       VICE CHAIRMAN LOUD: I would agree  
6           with you, Madam Chair. Sort of looking back  
7           at the case and reflecting on it, what really  
8           seems to have happened is that as the project  
9           progressed, there were all of these  
10          discoveries of things that certainly were not  
11          any of DCRA's doing, but were just incidental  
12          to the property and the project. The  
13          discovery of the termites. Then the discovery  
14          of the water table. Then the discovery that  
15          you couldn't lift it 4 feet.

16                      And most of these discoveries were  
17          natural consequences of this property having  
18          been infested at some point with termite  
19          damage. And it wouldn't be appropriate, in my  
20          mind anyway, to suggest that the appellant was  
21          somehow in a relationship with DCRA or with a  
22          Government agency where she was in one

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1 incident followed by the other, followed by  
2 the next, followed by the next, the victim of  
3 some misinformation or misrepresentation by  
4 that agency.

5           These were things that were  
6 happening on her property. Arguably, she  
7 might have been able to discover these  
8 earlier. Mr. Primo testified that he went to  
9 the site and took a look at it before she went  
10 to closing, maybe he should have brought a  
11 pest control company. But the point being  
12 that whether he did or he didn't, it doesn't  
13 make her the victim of the Government's over-  
14 reaching or misrepresentation or negligent  
15 processing of permit applications, because of  
16 this water table and the termite damage on her  
17 property.

18           And even after it was discovered  
19 and we don't want to get into the sort of, I  
20 guess, whether she was culpable in any  
21 respect, but even after the termite damage was  
22 discovered the first time in the rear, there

1 was no termite inspection. So it's a stretch  
2 to some how attribute that to DCRA misconduct.

3 CHAIRPERSON MILLER: Anything else  
4 on this, the equity? I mean, we are really  
5 talking about, you know, as a matter of law  
6 the appellant cannot proceed and only whether  
7 their equities were so in her favor that we  
8 should disregard, you know, the normal  
9 application of the law for that reason. And  
10 I don't think that that's the case here.

11 And so I don't want to dismiss,  
12 you know, the allegations of the neighbors  
13 with respect to, you know, damage to their  
14 properties, etcetera, but, in general, I just  
15 see this as she proceeded at her own risk and  
16 there is nothing right that the District  
17 Government did that would require us to not  
18 apply the law.

19 We also have to look at the  
20 equitable doctrine of laches, that's the final  
21 defense that the appellant raises. In the  
22 Week case, Week v. BZA, the court stated

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1 "Laches is a species of estoppel being defined  
2 as the omission to assert a right for an  
3 unreasonable and unsatisfactorily explained  
4 length of time under circumstances prejudicial  
5 to the party asserting laches.

6 Like estoppel, laches is not  
7 judicially favored in a zoning context, except  
8 in the clearest and most compelling  
9 circumstances."

10 In Gatto the court said "Delay  
11 must be unreasonable and result in a  
12 substantial prejudice to the party asserting  
13 the defense." The appellant said that the  
14 District took too long to deny that fifth  
15 permit and the time period, I think that the  
16 chronology, is February 2007. The appellant  
17 secured the fourth building permit March 2007.  
18 DCRA issued a stop work order April 2007.  
19 Appellant applied for the fifth building  
20 permit September 2007. The ZA issued a  
21 decision denying the fifth building permit.

22 So I think it was a period of

1 about five months from the application for the  
2 fifth building permit and the ZA's denial.

3 We heard testimony, I think also,  
4 that during that period there was a chance in  
5 Zoning Administrators. I would not find that  
6 that's an unreasonable amount of time that  
7 would rise to the level of laches. I think  
8 many of the cases talk in terms of many years  
9 that the District kind of sat on its rights.

10 And certainly the appellant, you  
11 know, offered some compelling testimony with  
12 respect to, you know, the passage of time, her  
13 financial considerations and interests on  
14 loans and things like that. But I don't think  
15 that that rises to the level here to support  
16 a defense of laches.

17 Again, I think that most of what  
18 the appellant has suffered was a result of, it  
19 seems to be a result of, proceeding at her own  
20 risk with respect to the termite damage.

21 Comments?

22 VICE CHAIRMAN LOUD: I would

1 agree, Madam Chair. I think from the issuance  
2 of the fourth permit, February 14, '07, to the  
3 denial of the fifth permit application, six  
4 and a half months later, to me would not be an  
5 unreasonable delay. Moreover, though within  
6 about six weeks of the issuance of the fourth  
7 permit, DCRA issued the stop work order, which  
8 effectively prevented the appellant from  
9 incurring all of these additional costs of  
10 trying to rebuild it until the fifth permit  
11 application was worked out.

12 So that was five to six weeks  
13 after the February 14<sup>th</sup> fourth building  
14 permit. That was I think March 2<sup>nd</sup> stop work  
15 order. So I don't think that's unreasonable--  
16 an unreasonable delay, I'm sorry.

17 CHAIRPERSON MILLER: Would others  
18 agree? Okay. So I think in sum that we would  
19 be denying the appeal of Stephanie Wallace and  
20 finding that the Zoning Administrator did not  
21 err.

22 And just in concluding, I would

1 note that, you know, the Zoning Administrator  
2 did not err that the appellant would be able  
3 to proceed as a matter of law under the  
4 provisions that she cited and that she is not  
5 entitled to the defenses of -- no, he didn't  
6 get into the stop order or whatever that's  
7 here.

8 We are determining that the  
9 appellant is not entitled to the defenses of  
10 estoppel and laches to meet those elements.  
11 And the appellant is not without total  
12 recourse as the Zoning Administrator stated,  
13 she can apply to proceed by applying to the  
14 Zoning Board, to us, for relief.

15 So not as an appeal, but as an  
16 application. So any other comments?

17 VICE CHAIRMAN LOUD: Just to echo  
18 what you said, Madam Chair, that I think what  
19 I'm saying with my vote is that, as a matter-  
20 of-right, this project could not be built. It  
21 doesn't mean that there are some other --  
22 there are not other avenues to be explored and

1 we don't know what the outcome of that  
2 exploration would be, but clearly we're saying  
3 as a matter-of-right the project could not be  
4 built.

5 CHAIRPERSON MILLER: Right. And  
6 the ZA correctly interpreted the regulations,  
7 basically, in finding she could not prevail  
8 under those. And you know, estoppel is a very  
9 -- and laches are very, very difficult to  
10 prevail on. So okay, any other comments?

11 Then at this point, I would move  
12 denial to Appeal No. 17747 of Stephanie  
13 Wallace of the Zoning Administrator decision  
14 to deny a building permit for construction to  
15 an existing one-family dwelling at 5013 Belt  
16 Road, N.W. Do I have a second?

17 VICE CHAIRMAN LOUD: Second.

18 CHAIRPERSON MILLER: Further  
19 deliberation?

20 All those in favor say aye.

21 ALL: Aye.

22 CHAIRPERSON MILLER: All those

1       opposed? All those abstaining? And would you  
2       call the vote, please?

3               MR. MOY: Yes, Madam Chair. Staff  
4       would record the vote as 4-0-1. This is on  
5       the motion of the Chair, Ms. Miller, to deny  
6       the appeal, seconded by Mr. Loud. Also in  
7       support of the motion Ms. Mary Oates Walker  
8       and Mr. Dettman. And also, we have a Zoning  
9       Commissioner not present, not voting. So  
10      again, the vote is to deny the appeal 4-0-1.

11              CHAIRPERSON MILLER: Thank you.  
12      Do we have any other items on our agenda for  
13      Special Public Meeting this morning?

14              MR. MOY: No, Madam Chair, that  
15      completes the Special Public Meeting.

16              CHAIRPERSON MILLER: Okay. Then  
17      that meeting is adjourned. The Board will  
18      take a short break and then we will return for  
19      the Public Hearing.

20              (Whereupon, the Special Public  
21      Meeting was concluded at 11:15 a.m.)

22