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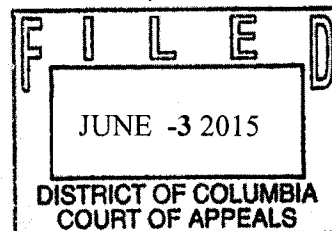
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-334

NORTHEAST NEIGHBORS FOR RESPONSIBLE GROWTH, INC., PETITIONER,

v.

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT, RESPONDENT.



On Petition for Review of Decisions and Orders
of the District of Columbia
Board of Zoning Adjustment
(Appeal No. 18241)

(Argued April 29, 2015)

Decided June 3, 2015)

Before FISHER, *Associate Judge*, NEBEKER, *Senior Judge*, and KRAVITZ,
Associate Judge of the Superior Court of the District of Columbia.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner challenges the decision of the Board of Zoning Adjustment (BZA) which dismissed its appeal based on the lack of subject matter jurisdiction, pursuant to D.C. Code § 6-641.07 (g)(1) (2012 Repl.). Petitioner contends that its appeal to the BZA asserted a violation of the zoning regulations, by the Department of Consumer and Regulatory Affairs' (DCRA) withdrawal of the notice of revocation for Permit No. B1010205. We hold that petitioner's appeal to the BZA was untimely filed. Accordingly, we affirm the dismissal of the case on these grounds.

I. BACKGROUND

On February 9, 2006, Appletree Institute for Education (Appletree), intervenors, applied for a building permit, which would allow it to perform

* Sitting by designation pursuant to D.C. Code § 11-707 (a) (2012 Repl.).

building expansions on an existing building located at 138 12th Street, Northeast. Appletree's expansion would "increase the total gross floor and cellar floor area to 8,975 sq. ft. and would occupy a portion of the paved area at the rear of the lot." On February 13, 2006, the Zoning Commission issued emergency rule 53 DCR 2017, which "increased the minimum lot area for public schools from 4,000 to 9,000 sq. ft., and the minimum lot width from 40 ft. to 120 ft.; and created a parking formula for pre-elementary and pre-kindergarten schools." As a result of the new rule, Appletree's permit was denied by DCRA. Appletree appealed the decision to the BZA arguing that it was exempt from the rule under 11 DCMR § 401.1 (2006), as a building located on property on or before May 12, 1958. BZA ruled that Appletree's permit should have been approved. Subsequently, the Zoning Commission conducted a second rulemaking, which amended the rule by preventing the use of the "1958 exemption." DCRA approved Appletree's application and Building Permit No. 89587 was issued on October 26, 2007. Advisory Neighborhood Commission 6A (ANC-6A) appealed the issuance of Permit No. 89587 to the BZA arguing that Appletree's construction was not authorized under the second rulemaking. The BZA ruled that Appletree was permitted to conduct its desired construction per the order from the first appeal.

Thereafter, Appletree received three building permit extensions, each one-year in duration, the last being Building Permit No. B1010205, valid September 17, 2010-September 17, 2011. On November 15, 2010, ANC-6A appealed to the BZA challenging the issuance of Permit No. B1010205 as a violation of 11 DCMR § 3202.4 (2005) because Appletree had not begun construction within two years of the issuance of Permit No. 89587. On December 3, 2010, DCRA issued a Notice to Revoke Building Permit No. B1010205, which stated that the permit was extended beyond the eighteen month limitation of the construction code, 12 DCMR § 105.5.1 (2009). ANC-6A withdrew its appeal on December 9th. Appletree appealed the notice of revocation to the Office of Administrative Hearings (OAH). On February 24, 2011, DCRA issued a Withdrawal of Notice to Revoke Building Permit No. B1010205, which stated that the permit was "valid and ha[d] not lapsed, *nunc pro tunc*." On April 25, 2011, petitioner appealed DCRA's withdrawal of the notice of revocation to the BZA arguing that Permit No. B1010205 violated 11 DCMR § 3202.4 and 12 DCMR § 105.5.1. The BZA dismissed the appeal for a lack of subject matter jurisdiction finding that DCRA's decision was based on "the construction codes, not the zoning regulations."

II. DISCUSSION

Petitioner argues that the BZA had subject matter jurisdiction to decide the case because its appeal of the withdrawal of the notice of revocation presented the question of whether Permit No. B1010205 violated zoning regulations; and that DCRA's decision to withdraw the notice of revocation was an error.

"[T]his court will grant particular deference to the BZA's interpretation of its own governing statute and regulations." *Bannum, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 894 A.2d 423, 429 (D.C. 2006) (citations and internal quotation marks omitted). "[A]lthough we accord weight to the agency's construction of the statutes which it administers, the ultimate responsibility for deciding questions of law is assigned to this court." *George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment*, 831 A.2d 921, 931 (D.C. 2003) (citing *Harris v. District of Columbia Office of Worker's Comp.*, 660 A.2d 404, 407 (D.C. 1995)).

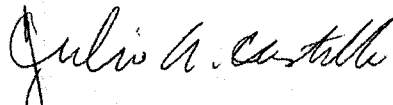
We reject petitioner's argument on the basis that its appeal to the BZA was untimely filed. The timeliness of an appeal is a jurisdictional matter and "if the appeal was not timely filed, the Board was without power to consider it." *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). According to 11 DCMR § 3112.2 (a), any person aggrieved by a decision regarding zoning regulations may file an appeal "within sixty (60) days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier." *Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 435 (D.C. 2008) (citing 11 DCMR § 3112.2 (a) (2007)). The crux of petitioner's argument, before the BZA and in this appeal, is that Permit No. B1010205 was issued in violation of zoning regulations 11 DCMR § 401.1 and § 401.3 because the previous permits had lapsed due to Appletree's failure to begin construction pursuant to 11 DCMR § 3130.3 and § 3202.4. Petitioner's argument also asserts that Permit No. B1010205 was issued in violation of 12 DCMR § 105.5.1, which allows for the issuance of three permit extensions, not to exceed six months each. However, Permit No. B1010205 was issued on September 17, 2010, but petitioner appealed to the BZA on April 25, 2011, seven months later. When the permit was issued there were sixty days in which to appeal, until November 17th, but petitioner failed to timely exercise that right. Nonetheless, DCRA later revoked the permit. Even assuming that the notice of withdrawal was an appealable decision, the September 17th issuance of the permit became a final decision when petitioner failed to timely appeal. Its finality

having been reinstated by the withdrawal notice, the BZA did not err in concluding that there was no subject matter jurisdiction.

Furthermore, petitioner does not dispute that it had knowledge of the issuance of the permit, but contends that prior to the notice of withdrawal there was no reason to appeal because DCRA had issued the notice of revocation on December 3, 2010. Petitioner's argument is without merit since the notice of revocation was issued nearly three months after the permit was issued. *See Economides, supra*, 954 A.2d at 437 (affirming BZA decision that appeal was timely filed within sixty-days of appellant receiving constructive knowledge of issuance of permit); *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 365 (D.C. 2008) (issuance of revised building permit failed to provide notice of the zoning decision, thus "did not trigger the sixty-day appeal period"). Nor did the appeal filed by ANC-6A affect petitioner's right to appeal the earlier order. We conclude that petitioner's appeal was not filed within the requisite sixty-day period, thus BZA lacked subject matter jurisdiction to hear the appeal. For the foregoing reasons we

Affirm.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO
Clerk of the Court

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