GOVERNM T OF THE DISTRICT OF COLUM A
Board of Zoning Adjustment

Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B465646 dated September 9, 2004, Building Permit No. B468513 dated December 17, 2004, and Certificate of Occupancy CO9912 dated June 10, 2005 for the conversion and occupancy of an existing 3 unit apartment building to a 7 unit condominium, allegedly in violation of use and lot occupancy requirements of the Zoning Regulations in the R-4 zone, at premises 1636 Irving Street, NW (Square 2591, Lot 203).

HEARING DATES: September 13, 2005 and September 20, 2005
DECISION DATE: September 27, 2005

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on August 5, 2005 challenging DCRA's decisions to approve building permits dated September 9, 2004 and December 17, 2004, and a certificate of occupancy dated June 10, 2005. In response to a motion to dismiss filed by the property owner, the Board scheduled a hearing as to whether the appeal was untimely. At a special public meeting held September 27, 2005, the Board concluded that the administrative decision complained of was the grant of the second building permit (issued December 17, 2004) approving the proposed conversion of a three unit apartment building to a seven unit condominium and that the appeal from that decision was untimely filed. The Board therefore concluded it had no jurisdiction over the appeal and voted to grant the property owner's motion to dismiss. A full discussion of the facts and law that support this conclusion follows.

PRELIMINARY MATTERS

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO. 17411
EXHIBIT NO. 27

Notice of Public Hearing

The Office of Zoning scheduled a hearing on the motion to dismiss for September 13, 2005. In accordance with 11 DCMR § 3113.13, the Office of Zoning mailed notice of the hearing to the Appellants, ANC 1D (the ANC in which the subject property, is located), the property owner, and DCRA.

Board of Zoning Adjustment
District of Columbia
CASE NO. 17411
EXHIBIT NO. 27

Parties

The Appellants in this case are Paul Basken and Joshua Meyer. Appellants represented themselves during the Board proceedings, but were initially represented by the law firm of Kass, Mitek & Kass, PLLC.

The Madera Condominium Association, Inc. ("Madera") and 1636 Irving Street, LLC, the respective owner and developer of the subject property, were represented by the law firm of Holland & Knight. As the property owner, Madera was automatically a party under 11 DCMR § 3106.2 and will hereafter be referred to as the Owner.

ANC

ANC 1-D, as the affected ANC, was automatically a party in this Appeal. In a Resolution dated September 6, 2005, ANC 1-D voted to oppose the motion to dismiss filed by the property owner. The Resolution was submitted to the Board on September 12, 2005, following a regularly scheduled monthly meeting with a quorum present (Exhibit 18). Among other things, the ANC contends that a "hearing is necessary" to resolve the issues involved in the appeal.

FINDINGS OF FACT

The Property

1. The building is located at 1636 Irving Street, NW in the R-4 zone and was constructed prior to 1958.

2. The Owner obtained Building Permit No. B465646 on or about September 9, 2004. authorizing a three- story rear addition to an existing three- unit apartment building. It also provided for the interior remodeling of the existing three- unit apartment building into a four - unit apartment building.

3. The Owner obtained Building Permit No. B468513 (the revised permit) on or about December 17, 2004, authorizing the construction of seven apartment units at the property. The permit stated "Revision to 465646 – converting 3 units apt. into 7 units. Revision of interior for previously approved addition *subject to zoning approval of number of units in zone*" (emphasis supplied).

4. The revised permit was the first and only DCRA administrative decision that authorized the conversion of the existing structure into a 7-unit apartment use.

5. Appellants "repeatedly telephoned DCRA officials during the construction process, expressing concerns about all of [the] apparent zoning violations at the [property]"

(Exhibit 8, Appellants' Statement on Appeal, p. 6), and continued to complain to city officials even after the units were put up for sale, *Id.* at p. 2).

6. The converted building was under roof on or about January 15, 2005.

7. In a letter dated May 26, 2005, DCRA Director Patrick Canavan indicated to ANC 1-D that a zoning review error was made when DCRA issued the building permits, but that DCRA would nevertheless issue the certificate of occupancy. The letter also indicated that ANC 1-D had the right to appeal to the Board the Director's decision to issue the certificate of occupancy (Exhibit 4, Motion to Dismiss, Attachment. B).

8. On May 27, 2005, Mr. Basken e-mailed this letter to Mr. Meyer and others and requested in the e-mail that the ANC and the Mount Pleasant Historical Society file a "fee-free" appeal to the Board (Motion to Dismiss, Attachment C).

9. Appellants engaged in ongoing negotiations with the Owner and Developer between June 8, 2005 and July 30, 2005. (See e-mails appended to Exhibit 17, Response to Motion to Dismiss.)

10. In the above-referenced e-mails, the Appellants refer to the construction as "in violation of the zoning law;" they refer to the "zoning dispute" between the parties; and they submit draft settlement proposals to resolve the dispute.

11. DCRA issued Certificate of Occupancy CO9912 (the C of O) for the building on or about June 10, 2005.

12. On or about July 21, 2005, Mr. Basken e-mailed Frederic Press, Esq., a Maryland attorney who represented the Owner, and expressed concern about "wait[ing] past the date[s] of a legally allowable appeal to the [Board]".

13. Mr. Press responded by email the next day and stated, among other things, that the Appellants had until August 10, 2005 to file their appeal. Appellants' counsel, Brian Kass, was "copied" on this e-mail as well as the other e-mails between Mr. Basken and Mr. Press.

14. August 10, 2005 was the 61st day after the C of O was issued.

15. The ANC decided at a public meeting on July 22, 2005 not to appeal the decision to issue the certificate of occupancy.

16. Appellants filed this appeal on August 5, 2005, 231 days after the revised permit was issued, 70 days after they became aware of DCRA's May 26, 2005, letter, and 56 days after the C of 0 was issued.

CONCLUSIONS OF LAW

Merits

Appellants have appealed two building permits and a certificate of occupancy on grounds that they unlawfully allowed for the expansion of four rental properties into a seven-unit condominium complex in violation of certain zoning regulations, including 11 DCMR § 401.3. Subsection 330.5 (c) of the Zoning Regulations allows, within an R-4 District, the conversion of a pre-1958 building to an apartment house. Subsection 401.3 provides that such converted structures must have a minimum lot area of 900 square feet for each apartment. Appellants contend that the Owner's lot is too small to allow for seven apartments of this size. Accordingly, Appellants assert that the permit was based upon an erroneous zoning determination.

Motion to Dismiss

The owner and developer filed a motion to dismiss the appeal for lack of jurisdiction on grounds of timeliness. Accordingly, the Board was bound to consider the jurisdictional question first, prior to consideration of the merits. The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994).

The rules governing the timely filing of an appeal before the Board are set forth in 11 DCMR § 3112.2. Subsection 3112.2(a) provides that an appeal must be filed within sixty (60) days from the date the person filing the appeal had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge, whichever is earlier. Because this appeal involves the erection of a building, § 3112.2 (b) also applies. That provision states that no appeal shall be filed later than 10 days after the structure or part thereof in question is under roof. [1] However, § 3112.2(c) provides that notwithstanding § 3112.2(a) and (b), an appellant shall have a minimum of sixty (60) days from the date of the administrative decision complained of in which to file an appeal. Finally, § 3112. 2 (d) provides that the Board may extend the 60 - day time limit only if the appellant demonstrates that: (1) There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) The extension of time will not prejudice the parties to the appeal.

Pursuant to the Zoning Act, the Board has jurisdiction to hear_appeals alleging "error in any order, requirement, decision, determination, or refusal made by ... any [District] administrative officer or body in the carrying out or enforcement of" the Zoning Regulations. D.C. Official Code 6-641.07(g) (1) (2001). Therefore, the threshold

[1] The subsection goes on to define "under roof as "the stage of completion of a structure or part thereof when the main roof of the structure or part thereof, and the roofs of any structures on the main roof or part thereof, are in place".

question in this motion to dismiss is the Board's determination of the error being alleged and the decision in which that error was made.

Appellants clearly identified in their appeal the error complained of as "the decision that the existing structure....be allowed to expand from four rental properties into a seven-unit condominium complex.... Developer 1636 Irving St. LLC. received building permits for seven units "subject to zoning approval of number of units in zone" (B468513) and later, certificate of occupancy for seven units." Accordingly, the error complained of - that the existing structure....be allowed to expand from four rental properties into a seven-unit condominium complex - was made in the issuance of the referenced permit, i.e. the revised permit, issued December 17, 2004.

Applying the rules set forth in § 3112.2, the time limit for filing an appeal of this decision is determined as follows: This project was under roof on January 15, 2005. Pursuant to § 3112.2(b) (1) an appeal should have been filed by January 25, 2005. However, because this date is less than 60 days from when the revised permit was issued (December 17, 2004), pursuant to § 3112.2 (c) the last date for a timely appeal was February 15, 2005. Finally, the Board may extend this deadline pursuant to § 3112.(d) upon a finding of exceptional circumstances beyond appellants' control impairing their ability to file a timely appeal, provided the extension of time will not prejudice a party to the case. Appellants argue that the language - "subject to zoning approval of number of units in zone" on the building permit was confusing and reasonably led the appellants to the conclusion that the decision was not final.

Even if the Board were to find that Appellants' confusion was both reasonable and an extenuating circumstance beyond their control that impaired their ability to file an appeal that circumstance ended on May 26, 2005, when the Director of DCRA in a letter to ANC 1-D specifically admitted to a "zoning review error". Appellants had actual knowledge of that letter as indicated by Mr. Basken's e-mail of May 27, 2005 to Mr. Meyer, Council member Jim Graham and others, requesting that the ANC and the Mount Pleasant Historical Society file a "fee-free" appeal to the Board. Accordingly, there can be no doubt that by May 27, 2005, Applicants knew that it was time to appeal.

The question then becomes what amount of time should be allowed for an appeal to be filed after the extenuating circumstances end. Subsection 3112.2 is silent on this issue, but certainly the rule could not be reasonably interpreted as permitting more than the 60 days permitted in the absence of a reasonable basis for delay. The Board therefore concludes the deadline for filing this appeal was 60 days from when the appellants had notice or knowledge of the decision complained of. That date is July 26, 2005, 60 days from May 27, 2005. (D.C. 2001).

The Board finds that as of May 27, 2005, there were no exceptional circumstances outside of appellants' control that could not have been reasonably anticipated and

substantially impaired the appellants' ability to file an appeal to the Board.[2] On May 27th DCRA disclosed that – despite the zoning error-- the C of O would be issued. At that point, Appellants, who since the time of permit issuance had all the information needed to file an appeal (including now a confession of error), also now knew that it was time to do so. Instead they waited 70 additional days to file this appeal. There are no exceptional circumstances that would excuse this further delay.

During this 70-day period, Appellants pursued other avenues to resolve their dispute and even sought to have the ANC appeal in their place. Appellants may very well have wished to avoid the difficulty and expense of prosecuting an appeal. However, a party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal. *Waste Management, supra.*; *Woodley Park Community Ass'n v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628 (D.C. 1985). The Board need "not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision. *Waste Management, supra.*

Nor may exceptional circumstances be found in DCRA's statement that the C of O may be appealed or Mr. Press's statement that Appellant had until August 10th to do so. Neither statement constituted exceptional circumstances that impaired appellants' ability to file the appeal. The Appellants were represented by counsel who were not hindered from researching beyond these statements and determining the deadlines for filing a timely appeal. Accordingly, Applicants' August 5, 2005 filing of the appeal was untimely.

Finally, Appellants contend that the C of O, issued on June 10, 2005, is the decision being appealed and therefore the appeal is timely. They maintain that DCRA's letter of May 26, 2005 invited them to appeal the C of O and, at a minimum, created "uncertainty" regarding their appeal rights (Response to Motion to Dismiss, p. 3.)

The Board finds to the contrary. DCRA made no additional zoning decisions when it issued the C of O. Rather, the issuance of the C of O reflects only an administrative judgment of what was fair and equitable in light of the zoning error that had been made.[3] The only decision that can be associated with the zoning error

---

[2] Because the appeal is being dismissed, and the condominium may remain in place, the Board need not reach the issue of whether there was any prejudice to the Owner as a result of any extension of the time to appeal... Nevertheless, the Board notes that the Owner was on notice that Appellants had serious concerns about the legality of the conversion and knew that an appeal was being considered.

[3] The Appellants did not appeal the validity of that determination. The Board therefore expresses no view with respect to the validity of that decision or even whether the issuance of this C of O was "based in whole or in part upon any zoning regulation", D.C. Official Code § 6-641.07 (d).

complained of (the inadequate lot size) is the revised permit and therefore that is the only decision that can be appealed on that ground.

Moreover, Appellants' argument does not give effect to § 3112.2 (b) (1) and (c), which bars an appeal of a decision involving "the erection, construction, reconstruction, conversion, or alteration of a structure or part thereof", if the appeal is "filed more than ten days after a structure is "under roof" or "sixty (60) days from the date of the administrative decision complained" whichever is the last to occur. Even if Appellants correctly characterize the building permit as representing an incomplete decision, it clearly involved and authorized the construction complained of here. And indeed the construction proceeded under the revised permit and the project was under roof approximately a month later. To permit an appeal to be filed based upon events that occur more than ten days after a structure becomes "under roof" is contrary to the Zoning Commission's "intent in paragraph (b) ... to establish a firm deadline beyond which no appeal could be filed". Order No. 0201, Case No. 02-0, (50 DCR 1200 (February 7, 2003.)

ANC

The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code § 1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC's recommendations. ANC 1-D voted to oppose the Motion to Dismiss, but stated only that it wanted the Board to consider the merits of the appeal. As stated in this Decision and Order, because the appeal was untimely filed, the Board lacks jurisdiction to do so.

For reasons discussed above, the Board must grant the motion to dismiss the appeal. It is hereby **ORDERED** that the motion to dismiss the appeal as untimely is **GRANTED.**

Vote taken on September 27, 2005
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and Kevin Hildebrand in support of the motion)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

ATTESTED BY: _____
JERRILY R. KRESS, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 23 2006

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.