District of Columbia Court of Appeals
500 Indiana Avenue N W
Washington, D C 20001-2138
(202) 879-2700

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TO: Richard Nero
Deputy Director BZA

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FROM: Rich Gantt

TELEPHONE NUMBER: (202) 879-2749

COMMENTS OR MESSAGES:

Per your request!

BOARD OF ZONING ADJUSTMENT
District of Columbia
CASE NO.
EXHIBIT NO. 30

Board of Zoning Adjustment
District of Columbia
CASE NO.17411
EXHIBIT NO.30

District of Columbia Court of Appeals
500 Indiana Avenue, N.W.
Washington, D.C. 20001

GARLAND F. PINKSTON
CLERK OF COURT

Telephone: 879-2700
Area Code 202

April 24, 2006

06-AA-379 Paul A. Basken, et al vs. D.C. Board of Zoning Adjustment

District of Columbia Zoning Adjustment
Jerrily Kress, Director
441 4th Street, N.W.
Suite 210S
Washington, D.C. 20001

Dear Sir/Madam:

Pursuant to the rules of this Court I am transmitting, herewith, a copy of the petition for review filed April 21, 2006, in the above-entitled case.

Yours very truly,

Garland F. Pinkston
Clerk of Court

By: _____
Information Center Supervisor

cc: Todd Kim, Esq./Edward Schwab, Esq.

APR 21 2006

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Paul A. Basken **1638 Irving St., NW** **Washington, DC 20010** **and** **Joshua S. Meyer** **1640 Irving St., NW** **Washington, DC 20010** **and** **Historic Mount Pleasant** **c/o Jim Barnett, Treasurer** **1827 Park Rd., NW** **Washington, DC 20010** **Petitioners,** **V.** **DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT** **One Judiciary Square** **441 4th Street, N.W.** **Suite 210** **Washington, D.C. 20001** **Respondent.**	**Case No.** 06-AA-379 **(BZA Appeal No. 17411)**

RECEIVED
APR 21 2006
DISTRICT OF COLUMBIA
COURT OF APPEALS

PETITION FOR REVIEW OF AN ORDER OF THE DISTRICT OF COLUMBIA BOARD OF ZONING ADJUSTMENT

Petitioners, Paul A. Basken, Joshua S. Meyer and Historic Mount Pleasant. respectfully petition this Court for review of a Final Order of the District of Columbia Board of Zoning Adjustment (the "Board"), dated March 23, 2006, dismissing Appeal No. 17411. Appeal No. 17411 challenged the issuance of Building Permits No. B465646 issued September 9, 2004,

Building Permit No. B468513 issued December 17, 2004, and Certificate of Occupancy CO9912 issued June 10, 2005, which collectively authorized the conversion and occupancy of an existing three unit apartment building at 1636 Irving Street, N.W. to a seven unit condominium, in violation of the use and lot occupancy requirements of the D.C. Zoning Regulations, 11 DCMR. In support hereof, Petitioners state as follows:

1. The Board applied the wrong legal standard;

2. The Board's rulings on procedural and jurisdictional motions were erroneous;

3. The Order's findings are conclusory, incomplete and unsupported by the evidence and its conclusions do not flow rationally from the findings;

4. The Order was adopted without compliance with the procedures and processes required by law, and deprived the Petitioners of due process of law; and

5. The Board's actions were arbitrary, capricious, an abuse of discretion, in excess of its statutory authority, and otherwise not in accordance with applicable law.

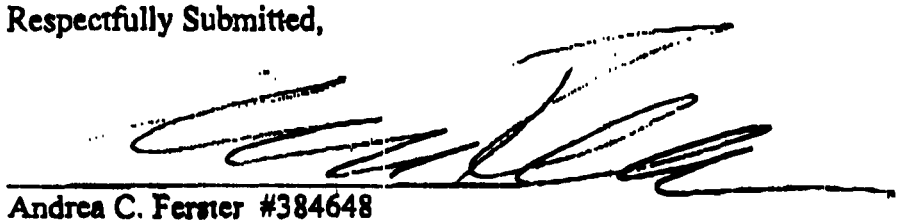
WHEREFORE, Petitioners respectfully request that this Court of Appeals

(a) Hold unlawful, reverse and set aside Decision and Order No. 17411 issued March 23, 2006; and

(b) Grant such other relief as this Court may deem just and proper.

A copy of Order No. 17411 is attached.

Respectfully Submitted,



Andrea C. Ferster #384648
1100 17th Street, N.W., 10th Fl.
Washington, D.C. 20036
(202) 974-5142

Attorney for Petitioners

Dated April 20, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Review from Order No. 17411 of the District of Columbia Board of Zoning Adjustment was served by first-class mail, postage prepaid, this 20 day of April, 2006, upon:

Geoffrey Griffis, Chair
D.C. Board of Zoning Adjustment
441 4th Street, N.W.
Suite 210
Washington, D.C. 20001

Paul J. Kiernan, Esq.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
for
The Madera Condominium Association, Inc.
and 1636 Irving LLC

Chairperson
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, DC 20010

Single Member District Commissioner 1D05
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, DC 20010

Bill Crews
Zoning Administrator
Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capital Street, NE, Suite 2000
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

David Rubenstein, Deputy General Counsel
941 North Capital Street NE, Suite 9400
Washington, D.C. 20002

Andrea C. Ferster

GOVERNMENT OF THE DISTRICT OF COLUMBIA
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

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.

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 O was issued.

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

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[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).

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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

★ ★ ★

BZA APPEAL NO. 17411

As Director of the Office of Zoning, I hereby certify and attest that on MAR 23 2006, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Paul Basken
1638 Irving Street, N.W.
Washington, D.C. 20010

Joshua Meyer
1640 Irving Street, N.W.
Washington, D.C. 20010

Paul J. Kiernan, Esq.
c/o The Madera Condominium Association, Inc
& 1636 Irving LLC
Holland & Knight
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006

Chairperson
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, D.C. 20010

Single Member District Commissioner 1D05
Advisory Neighborhood Commission 1D
P.O. Box 43529
Washington, D.C. 20010

Bill Crews
Zoning Administrator
Dept. of Consumer and Regulatory Affairs
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, D.C. 20002

Councilmember Jim Graham
Ward One
1350 Pennsylvania Avenue, N.W.
Suite 105
Washington, D.C. 20004

Ellen McCarthy, Interim Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, D.C. 20001

David Rubenstein
Deputy General Counsel
941 North Capitol Street, N.E.
Suite 9400
Washington, D.C. 20002

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning

TWR