

441 4th Street, N.W.  
Washington D.C. 20001

Appeal No. 17482

EXHIBIT NO. 18

Board of Zoning Adjustment  
District of Columbia  
CASE NO. 17482  
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Electric, Plumbing, and Fire inspectors and a final review by the Office of the Zoning Administrator, Certificate of Occupancy Number CO-106898 was issued on November 1, 2005. The Certificate of Occupancy permitted Adams Family Restaurants to utilize the structure as a restaurant, seating up to forty-eight customers, doing business as Birdland 4Sisters Cuisine ("Birdland").

Birdland opened for business on November 2, 2005. On January 19, 2006, the ANC filed its appeal of the issuance of that Certificate of Occupancy.

### *ARGUMENT*

#### *A. The Board of Zoning Adjustment Does Not Have Jurisdiction Over This Matter.*

##### 1. The Appeal Was Untimely Filed.

In order to file a timely appeal, Advisory Neighborhood Commission 6A ("ANC") needed to file its appeal within sixty days of having notice or knowledge of the Zoning Administrator's decision to issue the Certificate of Occupancy. *See* 11 DCMR § 3112.2(a)<sup>1</sup> The District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") issued Certificate of Occupancy Number 106898 on November 1, 2005. Therefore, the ANC appeal needed to be filed by December 31, 2005, in order to be timely. Notwithstanding that deadline, the ANC filed this appeal on January 19, 2006, seventy-nine days later. The ANC was untimely by nineteen days.

The Board may extend the filing deadline, but only if the Appellant can meet two tests:

- (1) There are exceptional circumstances that are outside of 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

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<sup>1</sup> 11 DCMR § 3112.2(a): An appeal shall be filed 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.

- (2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.

11 DCMR § 3112.2(d).

The District of Columbia Court of Appeals has consistently held that, “[t]he timely filing of an appeal with the BZA is *mandatory and jurisdictional*.” *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994) (emphasis added); *see also District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police*, 593 A.2d 641, 643 (D.C. 1991) (“The time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters.”) (internal citations omitted); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980) (“question of timeliness is jurisdictional”). Dismissal would be consistent with this Board’s precedent. The Board dismissed *In re: Rodut Assoc. of DC*, Appeal No. 17430, as untimely even though that appeal was filed only three days after the deadline. As in the instant matter, the *Rodut* appellant blamed the untimeliness of the appeal on DCRA. That appellant stated, “I wrote a letter to Lenny Douglass, who is the Acting Head of BLRA, who controls the permitting process, asking for his assistance on obtaining the records. We never got a response to that request, or we never obtained a copy of the Certificate of Occupancy from the City.” *Id.*, Transcript at 193. The Board was not persuaded. In moving for dismissal, Vice-Chairperson Miller stated:

I would move to dismiss on grounds of timeliness. The Board lacks jurisdiction if the appeal is not filed within 60 days, unless there’s a showing of exceptional circumstances that are outside of the appellants control and could not have been reasonably anticipated, and substantially impaired the appellant’s ability to file an appeal to the Board, and I’m reading from our regulations, 3112.2.

In this case, it’s uncontested that the appeal was filed three days late, and the appellant failed to identify any exceptional circumstances that I heard that

were outside of their control, that impaired the appellant's ability to file the appeal. I think it's, basically, as simple as that.

*Id.*, at 207.

While the *Rodut* appellant filed an appeal that was untimely by three days, the ANC filed an appeal that was untimely by nineteen days. The ANC has not made a showing of exceptional circumstances that are outside of the ANC's control and could not have been reasonably anticipated, and substantially impaired the ANC's ability to file an appeal to the Board. Once again, "it's, basically, as simple as that."

The District respectfully requests this Board to follow stated by the Court of Appeals and dismiss the appeal as untimely.

## 2. No Exceptional Circumstances Existed.

No exceptional circumstances prevented the ANC from timely filing an appeal. *Cf. Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090 (D.C. 1994) *et al.* Attempting to justify the tardy filing, the ANC asserts two exceptional circumstances: (1) it needed time to observe the restaurant in actual operations, and (2) it couldn't determine whether the restaurant was in operation. Neither of these circumstances is exceptional or relevant.

The ANC first claims that it "could not anticipate or determine whether Birdland would actually operate as a fast food restaurant until several weeks after it was in operation." Summary of Appeal ("Appeal") at 4. There is nothing exceptional about that claim. The District concedes that the ANC could not make such an anticipation or determination. Neither could the Zoning Administrator; such evidence was not before him on November 1, 2005.

Moreover, any evidence regarding actual operations is irrelevant to the Zoning Administrator's November 1 decision. The ANC has come before this Board claiming that the Zoning Administrator was in error when he issued a Certificate of Occupancy on November 1,

2005. *Cf. id.* Therefore, the sole, broad evidentiary question raised by this appeal is, "What did the Zoning Administrator know on November 1, 2005?" By definition, any evidence regarding events or actions that transpired on November 2, 2005, or anytime afterward, cannot be relevant. This Board should not excuse the ANC for an untimely filing of its appeal because the ANC was waiting to acquire non-relevant evidence.

Second, the ANC claims that it "has been unable to obtain documents necessary to evaluate whether Birdland was in operation because of DCRA's delay." Appeal at 5. Similarly, the ANC's excuse that it couldn't evaluate whether the restaurant was in operation because DCRA failed to provide the ANC with sufficient documents does not rise to the level of an exceptional circumstance. The excuse also defies credibility. Birdland is located within the ANC's district. The ANC had the ability to walk up to the restaurant and check to see if the door opened. As of Birdland's opening for business on November 2, 2005, no government paperwork could have provided as reliable evidence as that of simply looking.

Moreover, whether the restaurant was in operation at any given time is irrelevant to the question of whether the Zoning Administrator properly issued a Certificate of Occupancy on November 1, 2005. As with its first excuse for a tardy filing, the ANC is requesting to be excused from the filing regulations because it was waiting to collect non-relevant evidence. This Board should not reward such dalliance by categorizing it as an exceptional circumstance.

Acknowledging that its filing was untimely, the ANC has put forward two purported exceptional circumstances which allegedly prevented the timely filing of this appeal. However, those circumstances are exceptional only for the fact that they are irrelevant to the issue being appealed. This Board should dismiss the appeal as untimely. In conclusion, any delays were the result of the ANC sleeping on its rights.

### 3. An Extension of Time in This Matter Would Prejudice Parties.

Even if this Board finds that exceptional unforeseeable circumstances prevented the ANC from filing a timely appeal, that finding alone is not sufficient grounds for the Board to grant the ANC an extension of time to file. The Board must also find that no party would be prejudiced by an extension of time to file before it grants such an extension. *See* 11 DCMR § 3112.2(d)(2). However, an extension would prejudice the District of Columbia and DCRA.

The ANC offers one reason in support of its statement that DCRA would not be prejudiced by the Board hearing this appeal. The ANC states, "An extension would not prejudice DCRA because the Zoning Administrator had notice that ANC 6A was interested in Birdland's compliance with the zoning regulations since late November 2005." Appeal at 5. The ANC's reason is specious and must fail. The instant appeal is not challenging Birdland's compliance with its Certificate of Occupancy; rather, the instant appeal is challenging the Zoning Administrator's decision to issue that Certificate of Occupancy. The Zoning Administrator is concerned with the operations of all businesses conforming with the scope of the issued Certificates of Occupancy. The concern regarding operations is ongoing. However, this appeal is not challenging those operations.

The District has an interest in knowing that at a certain point in time its administrative decisions are final.<sup>2</sup> The prejudice inherent in an untimely filing is well-settled in this country's jurisprudence. As the United States Court of Appeals for the District of Columbia Circuit has stated, "One of the principal purposes of a statute of limitations is to bring repose." *International Assoc. of Machinists v. National Labor Relations Bd.*, 264 F.2d 575, 583 (D.C. Cir. 1959). They prevent people from "being brought to book upon stale charges." *Id.* (quoting *National Labor*

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<sup>2</sup> This statement also holds true for the restaurant operator, Adams Family Restaurants, Inc., which would be equally prejudiced by this Board extending the allowable time for the ANC to file this appeal.

*Relations Bd. v. Pennwoven, Inc.*, 194 F.2d 521, 524 (3rd Cir., 1952). The Zoning Commission, acting upon the guidance of the District of Columbia Court of Appeals has determined that after sixty days, an appeal of the issuance of a Certificate of Occupancy becomes stale. The District deserves the repose contemplated by the timeliness rule, and would be prejudiced by the disturbance of that repose.

In conclusion, this appeal is challenging one decision made at one fixed point in time. The District should be able to rely on the repose brought by this finality instead of having to constantly look over its shoulders in perpetuity. By regulation, that repose is to begin sixty days after the issuance of the Certificate of Occupancy.

The District respectfully requests this Board to acknowledge the prejudice and dismiss this untimely appeal.

*B. The ANC Has Not Stated A Claim For Which Relief Can Be Granted.*

The ANC alleges that the Zoning Administrator should have categorized Birdland as a fast food restaurant and implemented the procedures necessary for issuance of a fast food Certificate of Occupancy in a C-2-A zoning district. *See* Appeal at 1. In spite this allegation, the ANC has not identified one procedural or evidential error on the part of the Zoning Administrator in reaching his decision.

Case law dictates that the appropriate evidence for reviewing an agency decision is the record before the decision-maker. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Comm'n*, 425 F.2d 583, 588 (D.C. Cir. 1970); *Young v. District of Columbia*, 865 A.2d 535, 540 (D.C. 2005). If the agency decision is supported by substantial evidence in that record, the reviewer should uphold the decision. *See Young v. District of Columbia*, 865 A.2d 535, 540 (D.C. 2005). In this

context, the District of Columbia Court of Appeals has defined "substantial evidence" as, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*; *see also Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995); *James v. District of Columbia Dep't of Employment Servs.*, 632 A.2d 395, 397 (D.C. 1993) (internal citations omitted).

Therefore, the inquiry before this Board is whether the record before the Zoning Administrator at the time of issuance of Certificate of Occupancy No. 106898 included such relevant evidence as a reasonable mind might accept as *adequate* to support the issuance of the Certificate of Occupancy. The ANC has not alleged sufficient relevant facts for the Zoning Administrator to have denied the Certificate of Occupancy. Regulation 11 DCMR § 199.1, as interpreted by Board Order No. 17214 (July 15, 2005), states that in addition to meeting the floor space threshold, one of two other criteria must be met before an establishment is a fast food restaurant. The restaurant must either:

1. prepare or package at least sixty percent of its food items before the customer places an order, or
2. primarily serve its food and beverages in disposable containers and provides disposable tableware.<sup>3</sup>

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<sup>3</sup> See 11 DCMR § 199.1: Restaurant, fast food - a place of business devoted to the preparation and retail sale of ready-to-consume food or beverages for consumption on or off the premises. A restaurant will be considered a fast food restaurant if it has a drive-through. A restaurant will be considered a fast food restaurant if the floor space allocated and used for customer queuing for self-service for carry out and on-premises consumption is greater than ten percent (10%) of the total floor space on any one (1) floor that is accessible to the public, and it exhibits one (1) of the two (2) following characteristics:

- (a) At least sixty percent (60%) of the food items are already prepared or packaged before the customer places an order; and/or
- (b) The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware. (This definition does not include an establishment known as a retail grocery store, convenience store, ice cream parlor, delicatessen, or other business selling food or beverages as an accessory use or for off-premises preparation and consumption.) (32 DCR 4374-4375)

The ANC's first factual allegation is, "the sum of the floor space for customer queuing and the floor space for on-premises consumption exceeds the 10% threshold by a substantial amount." Appeal at 3. The District concedes that fact and concedes that the Zoning Administrator was aware of this fact on November 1, 2005. However, that fact alone does not place an establishment into the fast-food category.

Instead of alleging that the Zoning Administrator had facts before him on November 1, 2005, that proved the Birdland would meet one of the additional criteria, the ANC only alleges that the restaurant's *eventual* operations satisfied these additional criteria. *See id.* at 3. The ANC's failure is fatal. The record put forward by the ANC contains only evidence and allegations dating after November 1, 2005. By definition, any such evidence and allegations are not relevant to this appeal.<sup>4</sup> Even if every ANC factual allegation is true, the ANC still has not alleged sufficient facts for this Board to conclude that the Zoning Administrator did not have substantial evidence before him to categorize Birdland 4Sisters Cuisine as a fast food restaurant. This appeal should be dismissed for the failure to state a case upon which relief can be granted. *Cf. Leonard v. District of Columbia*, 794 A.2d 618, 629 (D.C. 2002).

### *C. Conclusion*

For the reasons stated above, the District's Motion to Dismiss should be GRANTED, and the ANC Appeal should be DISMISSED.

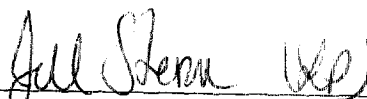
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<sup>4</sup> Such evidence, instead, is only relevant to the question of whether the restaurant is operating within the scope of its Certificate of Occupancy. That question is not before this Board. As Chairperson Griffis noted during the hearing of *In re Advisory Neighborhood Comm'n 6A (Cluck-U-Chicken)*, Appeal No. 17439, "If they are operating outside of that scope of the [Certificate of Occupancy], then that's an enforcement issue. . . ." Transcript, April 4, 2006, at 173.

Respectfully Submitted,

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June 5, 2006



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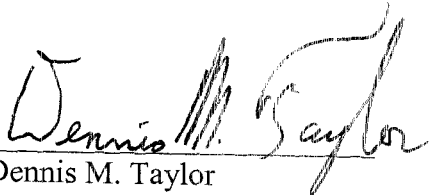
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing District of Columbia's Motion to Dismiss was served by electronic mail this 5<sup>th</sup> day of June 2006, to the following:

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