

**BEFORE THE BOARD OF ZONING ADJUSTMENT
OF THE DISTRICT OF COLUMBIA**

In Re Appeal of:

William J. Harnett

v.

**Zoning Administrator
Department of Consumer and Regulatory
Affairs**

BZA Appeal No. 17615
ANC 2E
Public Hearing: June 5, 2007

7/29/2017

D.C. OFFICE OF ZONE

RECEIVED

APPELLANT’S OPPOSITION TO MOTION TO DISMISS APPEAL

Appellant William J. Harnett, by and through his undersigned counsel, respectfully opposes the Motion to Dismiss Appeal filed in this matter by the entity identified as “Washington Harbour Condominium Owners’ Association.”

In this proceeding, Mr. Harnett challenges the decision of the Zoning Administrator to approve the issuance of Building Permit No. 101019 as a matter of right, notwithstanding the fact that the actions for which approval was sought were in violation of the Zoning Regulations. The Building Permit was applied for and issued on November 17, 2006. Mr. Harnett filed his appeal on January 12, 2006, well within the 60 day period provided for by D.C. Mun. Regs., Title 11, § 3112.2. On this basis, the Director issued her March 21, 2007 notice that the “appeal has been accepted as complete” and scheduled the Public Hearing in this matter. A copy of that notice is attached as Exhibit 1. There is no basis for, nor was there any right to file, the Motion to Dismiss Appeal, and it should be summarily denied.

In further opposition to the Motion to Dismiss Appeal, Mr. Harnett respectfully states as follows:

1. On November 17, 2006, the District of Columbia Department of Consumer and Regulatory Affairs (“DCRA”) issued Building Permit No. 101019 for 3030 K Street, N.W.,

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Square 1173, Lot 102, located in the R-1-B Zoning District. The Zoning Administrator approved the issuance of the Building Permit as a matter of right, without the necessity of obtaining approval from the BZA or any other District of Columbia zoning authority.

2. Mr. Harnett timely filed this appeal before the BZA on January 12, 2007.

3. The party filing the Motion to Dismiss Appeal is identified as “Washington Harbour Condominium Owners’ Association.” There is no such entity. The Condominium Association where the affected property is located is known as “Washington Harbour Condominium Unit Owners’ Association, Inc.” In any event, as of the date of filing of the Motion to Dismiss Appeal, that entity had not requested or been granted party status pursuant to D.C. Mun. Regs., Title 11, § 3106.2. Thus, that entity had no right to make the filing and it is a nullity.

4. In the Motion to Dismiss Appeal, it is argued that the sole means of contesting the Zoning Administrator’s actions was to file an appeal with DCRA within 15 days, and then to pursue relief thereafter from the District of Columbia Office of Administrative Hearings (“OAH”).

5. The authorities cited in the Motion to Dismiss Appeal are inapplicable to this matter. The BZA’s authority to hear appeals related to decisions of the Zoning Administrator with respect to the issuance of building permits is clearly provided by the applicable law. The BZA’s authority therefore extends to the subject matter of this appeal. D.C. Mun. Regs., Title 11, § 3112.2 states:

Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the [BZA] . . .

6. In this matter, on November 17, 2006, the Zoning Administrator made a decision that the Building Permit could issue as a matter of right notwithstanding the applicable Zoning

Regulations. That decision is properly the subject of this appeal, and Mr. Harnett made the appropriate filing to bring this matter properly before the BZA for adjudication.

7. In addition, D.C. Code § 6-641-07(f) provides, in relevant part:

Appeal to the Board of Adjustment may be taken **by any person aggrieved**, or organization authorized to represent such person, or by any officer or department of the government of the District of Columbia or the federal government affected, **by any decision of the Inspector of Buildings granting or refusing a building permit** or granting or withholding a certificate of occupancy, or any other administrative decision **based in whole or part upon any zoning regulation** or map adopted under this Subchapter.

D.C. Code § 6-641-07(f) (emphasis added).

8. D.C. Code § 6-641-07(g)(1) further details the powers of the BZA with respect to such appeals:

Upon appeals the Board of Adjustment shall have the following powers:
(1) to hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement decision, determination, or refusal made by the Inspector of Buildings or the Mayor of the District of Columbia or any other administrative officer or body in the carrying out or enforcement of any regulation adopted pursuant to this subchapter.

D.C. Code § 6-641-07(g)(1) (emphasis added)

9. D.C. Code § 6-641.09(a), contained within the same subchapter as the above-quoted Code sections, further clarifies that the issuance of building permits is within the authority of the BZA, providing that “said Inspector shall not issue any permit for the erection, construction, reconstruction, conversion, or alteration of any building or structure, or any part thereof, unless the plans of an for the proposed erection, construction, reconstruction, conversion, or alteration fully conform to the provisions of this subchapter and of the regulations adopted under said sections.”

10. The above-cited provisions are part of the Zoning Act of 1938. Significantly, D.C. Mun. Regs., Title 11, § 3100.1, provides that the “Board of Zoning Adjustment shall have

original jurisdiction to ... exercise all other powers authorized by the Zoning Act of 1938.” As such, it is clear that the BZA is empowered to hear appeals of the issuance of building permits on the grounds that such permits are inconsistent with applicable Zoning Regulations. Mr. Harnett’s appeal is just such an appeal.

11. The Motion to Dismiss Appeal ignores the above-referenced Code provisions. It instead cites D.C. Mun. Regs., Title 12A, § 112A. It suggests that D.C. Mun. Regs., Title 12A, § 112A requires that appeals of building permits must be “first made within the Department,” and then to OAH. Motion to Dismiss at ¶ 5, 8.

12. This argument is based on a fundamental misunderstanding of the issues that are addressed by the BZA (as opposed to OAH) and a fundamental misreading of the applicable statutory and regulatory framework.

13. D.C. Mun. Regs., Title 12A, § 112A does not provide that any appeal of a building permit must comply with that section. Quite the contrary, it applies to an appeal “based on a claim that the Construction Codes or the rules legally adopted thereunder have been incorrectly interpreted or applied, the provisions of the Construction Codes do not fully apply, or that an equally good or better form of construction can be used.” Had the basis of Mr. Harnett’s appeal been that the work for which the Permit was sought did not conform to applicable building codes, perhaps the point would have some validity. But Mr. Harnett’s appeal is based on the fact that the Permit was issued for work that does not comply with applicable Zoning Regulations – and the Zoning Administrator’s conclusion to the contrary is the subject of the challenge in this proceeding. This challenge plainly raises issues with respect to the proper interpretation, administration, enforcement, and application of the Zoning Regulations, and the Zoning Administrator’s decisions on those matters – all well within the settled purview of BZA.

14. Because D.C. Mun. Regs., Title 12A, § 112A 11 is inapplicable to this appeal, the suggestion that there was a requirement to file an appeal with DCRA within 15 days is equally inapplicable. Mr. Harnett timely filed his appeal with the BZA in this matter. The Director's March 21, 2007 correspondence, Exhibit 1, confirms the procedural propriety of the filing.

15. In the Motion to Dismiss Appeal, it is also argued that the subject of this appeal is an October 23, 2006 letter from the Zoning Administrator. This is incorrect. That letter – which was not served on Mr. Harnett – was not and could not have been the Zoning Administrator's action pursuant to the application for the Building Permit issued on November 17, 2006 as No. 101019. In fact, it did not represent any action. Even if it did, it was not until the Building Permit was applied for that the Zoning Administrator did review, or even could have reviewed, the application of the Zoning Regulations to the precise work for which authorization was sought. That application was filed and the Permit issued on November 17, 2006. The fact that the Zoning Administrator wrote a letter some 25 days before the Building Permit was sought, reviewed, and obtained – and without even seeing the application explaining the work involved – has nothing to do with this appeal.

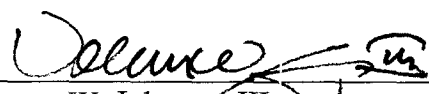
16. Mr. Harnett's appeal was in full compliance with D.C. Mun. Regs., Title 11, § 3112.2 and the applicable law. Moreover, the Motion to Dismiss Appeal advances nothing short of a remarkable proposition: That the BZA is not empowered to review the issuance of building permits based on an allegation that they contravene the applicable Zoning Regulations. That proposition flies in the face of the above-cited provisions and the local practice.

17. To the extent that the BZA were to find any infirmity in the timing or form of the filing of this appeal, Mr. Harnett would respectfully ask for leave to correct the filing under the applicable law, including D.C. Mun. Regs., Title 11, § 3112.2(d). Under the circumstances, it

was not until the Building Permit was applied for and reviewed that there could have been any much less any meaningful – decision, determination, or other action in the administration or enforcement of the Zoning Regulations; and none of the parties to the appeal can assert any legitimate prejudice.

The Motion to Dismiss Appeal must be denied in its entirety.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2007, I caused to be mailed, via first class mail, postage prepaid, a copy of this Appellant's Opposition to Motion to Dismiss Appeal and accompanying Exhibit 1 to the following:

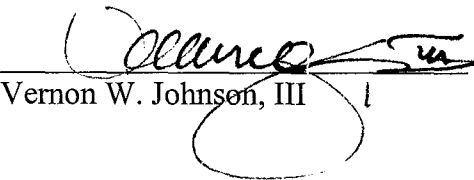
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