

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

APPEALS OF:)
) BZA Appeal No. 17830
L. Napoleon Cooper)
)
_____)

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DISTRICT OF COLUMBIA'S MEMORANDUM IN OPPOSITION TO APPEAL

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs, ("District"), by and through undersigned counsel, respectfully files with this Board of Zoning Adjustment ("Board") an opposition to the above-cited appeal. As a basis for the District's Motion, the District submits that the appeal is untimely, barred by collateral estoppel, barred by administrative *res judicata*, and barred because Appellants' complaints regarding the Zoning Administrator are outside of this Board's jurisdiction.

SUMMARY OF CASE

On July 1, 2005, Jemal's Citadel, LLC ("Property Owner"), applied for an area variance from this Board from zoning requirements applicable to the rear yard, loading berths, and enlargement of a nonconforming structure to allow the redevelopment of an existing building in a mixed-use project that will primarily include a Harris Teeter grocery store in the Reed-Cooke/C-2-B zone at 1631 Kalorama Road, N.W. The Reed-Cooke Overlay District applies to the Squares 150, 2557, 2558, 2560, 2562, 2563, 2566, 2567, and 2572 in the Reed Cooke Special Treatment Area, as defined in the Comprehensive Plan, 10 DCMR § 1127, that are zoned non-residentially as of January 1, 1989.

**BOARD OF ZONING ADJUSTMENT
District of Columbia**

CASE NO. 17830
EXHIBIT NO. 16

Board of Zoning Adjustment
District of Columbia
CASE NO. 17830
EXHIBIT NO. 16

On January 10, 2006 a public meeting was held regarding the requested variance and subsequently the Board granted the variance application, subject to conditions. On June 12, 2006, the Board issued its Final Order.

On September 11, 2006, Harris Teeter applied for a Building Permit to construct the interior layout of 1631 Kalorama Road, N.W. The Building Permit Application process was the next step after receiving approval from the Board for the variance. The Building Permit Application reflected that the property was located within the Reed-Cooke Overlay District and clearly delineated aisle locations for beer and wine sales.¹ On November 13, 2006, the D.C. Department of Consumer and Regulatory Affairs issued the Building Permit authorizing the interior construction of the Harris Teeter grocery store – including the space for beer and wine sales.

In response to an inquiry from counsel for Jemal's Citadel, LLC, former Zoning Administrator Bill Crews wrote a letter confirming that the "subordinate sale of beer and wine for off-premises consumption is an allowable accessory use for a retail grocery store and that the restrictions in §1401.1(b) applies to principal uses only and not to accessory sales within a grocery store."² Thus, the letter confirmed to the property owner the approval of the Zoning Administrator of the Building Permit allowing the sale of beer and wine at the site.

On May 25, 2007, L. Napoleon Cooper, on behalf of himself, and as agent for other resident-neighbors, filed an appeal (appeal number 17677) with this Board of the March 21, 2007 letter. Specifically, Mr. Cooper alleged that the Zoning Administrator

¹ See Building Permit Application and Plans, Exhibit 2.

² March 21, 2007 Letter from former Zoning Administrator Bills Crews to Holland & Knight, LLC, page 2, Exhibit 3.

erred by allowing off-premises alcoholic beverage sales as an accessory use to a Harris Teeter grocery store.

On November 16, 2007 and again on January 29, 2008, testimony was heard by this Board in Mr. Cooper's appeal, number 17677. On March 4, 2008, the Board deliberated and denied appeal 17677 and upheld the Zoning Administrator's decision.

Subsequently on March 21, 2008, the Zoning Administrator issued a Certificate of Occupancy to Harris Teeter. On May 22, 2008, Mr. Cooper filed an appeal of the Zoning Administrator's issuance of the Certificate of Occupancy.

ARGUMENT

Appeal Should be Denied as Untimely

The appeal should be denied because it was filed untimely. Mr. Cooper filed this appeal on May 22, 2008 – more than sixty days from the March 21, 2008 issuance of the Certificate of Occupancy issued to Harris Teeter. The appeal should have been filed on or before May 20, 2008.

The timely filing of an appeal with the Board is mandatory and jurisdictional. *See Waste Mgmt. of Md. v. State Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994); *Woodley Park Community Ass'n v. District of Columbia Bd. of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985) (“if [petitioner's] appeal was not timely filed, the BZA was without power to consider it”); *Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980) (“question of timeliness is jurisdictional”). An appeal before the Board “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.” 11 DCMR § 3112.2(a).

The Board may extend the sixty-day deadline when an appellant meets the two requirements as set forth by 11 DCMR § 3112.2(d): “[o]nly if the appellant demonstrates that: (1) there are exceptional circumstance 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 (2) the extension of time will not prejudice the parties to the appeal, as identified in § 3199.1.” Both of these requirements must be met for the Board to grant an extension beyond the jurisdictional sixty-day deadline.

Mr. Cooper has been actively involved in this matter for some time. In fact, Mr. Cooper was waiting for the Certificate of Occupancy to be issued so that he could appeal. Mr. Cooper even wrote to the Zoning Administrator via e-mail on March 17 and March 27, 2008. Hence, Mr. Cooper knew of his responsibility to appeal the Certificate of Occupancy well within the sixty day period and he should have done so.

Additionally, Mr. Napoleon Cooper has not satisfied the two requirements for this Board to extend the time to file an appeal of the Building Permit. First, he has not alleged any facts why he was substantially impaired from timely filing. Mr. Cooper’s appeal includes many facts which indicate he has been following this matter closely and fully intended to oppose Harris Teeter. This negates any exceptional circumstances.

Next, Mr. Cooper has failed to acknowledge that the property owner and tenant will be harmed if the untimely filing is allowed. Harris Teeter has been open and operating since April 2008. Mr. Cooper does not address the prejudice to both the

property owner and Harris Teeter. This is a required element as well, which must be addressed by the Appellant, but was not.

Therefore, this Board does not have the discretion to allow or hear the late appeal by Mr. Cooper regarding the Certificate of Occupancy issued to Harris Teeter nor can this Board find that he has proven that the extension will not harm the parties. Therefore, pursuant to 11 DCMR § 3112.2(a), the appeal should be dismissed as untimely.

Barred by Collateral Estoppel

This appeal should be denied because Mr. Cooper is collaterally estopped from re-litigating the issue whether Harris Teeter can sell beer and wine as an accessory use at 1631 Kalorama Road, N.W. This very issue was determined by this Board on March 4, 2008, and cannot be re-litigated again now.

The doctrine of collateral estoppel, also known as issue preclusion, renders conclusive in the same or a subsequent action determination of an issue of fact or law when: 1) the issue is actually litigated; 2) and determined by a valid, final judgment on the merits; 3) after a full and fair opportunity for litigation by the parties or their privies; 4) under circumstances where the determination was essential to the judgment, and not merely dictum. *Modiri v. 1342 Restaurant Group, Inc.*, 904 A,2d 391, 394 (D.C. 2006) (internal citations and quotations omitted).

Here Mr. Cooper rehashes the same arguments he put forth in appeal 17677 stating that the Zoning Administrator's decision "contradicts the expressed objectives and purposes of the Reed Cooke Overlay District at § 1400.2(2)(3) and § 1400.2(c)." *See* Addendum to Notice of Appeal paragraph one. He goes on to allege that Building Permit 98040 is "automatically void." *See* Addendum to Notice of Appeal paragraph two.

These are the same exact arguments that were advanced and rejected by this Board in appeal 17677. The Board had in-depth discussion during deliberations regarding the lack of clearly expressed “objectives” and “purposes” of the Reed Cooke Overlay District. In fact, this Board stated “I wish that Reed-Cooke or Mr. Cooper had come in with some testimony, some evidence that directly went to the issue of what the intent was when the Reed-Cooke Overlay was adopted.” *See*, May 4, 2008 Transcript. Hence, these same exact issues were litigated by the parties and essential to this Board’s decision in affirming the Zoning Administrator’s decision in appeal 17677 and are precluded from litigation in appeal 17830. Therefore, the instant appeal should be denied.

Barred by Administrative Res Judicata

This appeal should be denied as it is barred by the doctrine of administrative *res judicata*. On May 4, 2008, this Board determined that the Zoning Administrator was correct in approving the sale of beer and wine as an accessory use at Harris Teeter. Mr. Cooper cannot now re-litigate that decision.

After a valid final adjudication on the merits, the doctrine of *res judicata* bars re-litigation of the same claim between the same parties. *Gilles v. Ware*, 615 A.2d 533, 538 (D.C. 1992); *Henderson v. Snider Bros., Inc.* 439 A.2d 481, 485 (D.C. 1981). The doctrine applies when the agency is acting in a judicial capacity, resolving disputed issues of fact properly before it which the parties have an adequate opportunity to litigate. *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1194 (D.C. 1980)(citations omitted). “The threshold inquiry is whether the earlier proceeding is the essential equivalent of a judicial proceeding.” *Id.*

In this instant appeal, Mr. Cooper is questioning the same decision of the Zoning Administrator: approval of Harris Teeter to sell wine and beer as an accessory use at 1631 Kalorama Road, N.W. He even tries to attack Building Permit 98040, which was central to his earlier appeal 17677, stating that it is “automatically void” as a “condition precedent” to the final Certificate of Occupancy. *See* Addendum to Notice of Appeal paragraph two. This very inquiry was litigated in appeal 17677 and rejected by this Board. This argument should be rejected again, as barred by the doctrine of administrative *res judicata*, and the appeal denied.

Complaints against the Zoning Administrator are outside of this Board’s jurisdiction

This appeal should be denied because Mr. Cooper is making unsubstantiated, erroneous, and outrageous statements about the Zoning Administrator and his actions. There is no truth to his allegations, and his conclusory statements should be disregarded by this Board.

CONCLUSION

For all of the foregoing reasons, the District requests that this Board deny Mr. Cooper’s appeal.

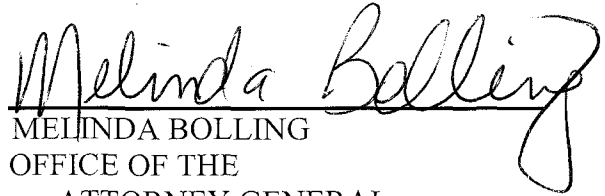
Respectfully submitted,

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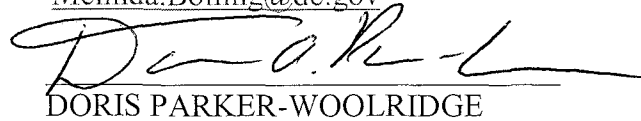
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Opposition to Appeal was served this 14th day of November, 2008, via electronic mail or first-class postage prepaid mail to the following persons:


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