

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17830 of L. Napoleon Cooper, pursuant to 11 DCMR §§ 3100 and 3101, from a March 21, 2008 decision of the Zoning Administrator to issue Certificate of Occupancy No. 163333, for a grocery store and sale of off-premises alcoholic beverages in the RC/C-2-B District, at premises 1631 Kalorama Road, N.W. (Square 2572, Lot 36).

HEARING DATE: November 18, 2008
DECISION DATE: November 18, 2008

DISMISSAL ORDER

Background

On May 22, 2008, Mr. L. Napoleon Cooper ("Appellant") filed this appeal on his own behalf and on behalf of Mr. Yeheyis Getachew and Dorchester Grocery and Deli. The Appellant appealed the Department of Consumer and Regulatory Affairs' ("DCRA") issuance of Certificate of Occupancy Permit ("C of O") No. 163333 to Harris Teeter, Inc, intervenor herein. The C of O, issued on March 21, 2008, authorized the intervenor to open a "[g]rocery store with accessory delicatessen- prepared food shop (8 seats) and off-premises alcoholic beverage sales as an accessory use- subject to BZA Orders 17395-A, 17675, and 17677" at 1631 Kalorama Road, N.W., within the Reed-Cooke Zoning Overlay District (R-C Overlay). *See*, 11 DCMR Chapter 14.

The Appellant herein had brought an earlier appeal concerning the same property and use, which was decided by the Board of Zoning Adjustment ("Board" or "BZA") on March 4, 2008, and memorialized in a written Board Order, No. 17677, issued December 9, 2008. In this earlier appeal, Mr. Cooper had appealed a letter from DCRA's Zoning Administrator ("ZA") which opined that the prohibitions set forth in the R-C Overlay, including one on off-premises alcoholic beverage sales, applied only to principal uses and not to accessory uses. *See*, 11 DCMR § 1401.1. This Board, in Order No. 17677, upheld the ZA's interpretation, thus permitting the intervenor's grocery store to sell alcoholic beverages for off-premises consumption as an accessory use to the grocery store, which is a matter-of-right use in both the R-C Overlay, and in the underlying C-2-B zone in which the property is located.

Prior to both this appeal and Appeal No. 17677, on November 13, 2006, a building permit, No. 98040, had been issued permitting build-out of the grocery store use. This building permit had been properly applied for and specifically noted that the grocery store it authorized would be

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BOARD OF ZONING ADJUSTMENT
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EXHIBIT NO. 21

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37,405 square feet in area. Along with the building permit application, the required plans had been filed with DCRA. These plans depicted areas for the display of beer and wine, *i.e.*, alcoholic beverages, for sale in the store. Although the sale of alcoholic beverages for off-premises consumption was not affirmatively stated as an accessory use on the face of the building permit, its authorization was implicit in the building permit because the presence of alcoholic beverages in the store was made explicit on the plans. The ZA's letter, which was upheld in Appeal No. 17677, affirmatively stated what was implied in the building permit – that intervenor's grocery store was authorized to sell alcoholic beverages for off-premises consumption.

The current appeal

The Appellant now brings the instant appeal against the issuance of the C of O for the intervenor's grocery store, alleging various violations of the law. Specifically, the Appellant's addendum to his appeal document alleges that (1) the C of O issued for the grocery store violates the purposes of the R-C Overlay, (2) building permit no. 98040 is "automatically void" because of alleged unlawful actions of the intervenor in violation of D.C. Official Code § 25-434 (2005), and (3) certain constitutional rights of the Appellant were violated, presumably by the issuance of the C of O, apparently because, the Appellant claims, the presence and operation of the grocery store has negative impacts on the neighborhood, including negative economic consequences for a nearby small grocer. Exhibit No. 1, Addendum. It became clear during the course of the proceedings in this appeal that the zoning violation alleged by the Appellant (#1, above) was actually two separate claimed violations: (1) the C of O's permission to sell alcoholic beverages for off-premises consumption violates the R-C Overlay prohibition set forth at 11 DCMR § 1401.1(b), and (2) the size of the grocery store allowed by the C of O violates the purposes of the R-C Overlay set forth at 11 DCMR § 1400.2.

Disposition of the current appeal

This Board has a narrow jurisdiction, confined to interpreting the Zoning Regulations of the District of Columbia. In appeals, its jurisdiction is limited to decisions made "in the carrying out or enforcement of" the Zoning Regulations. D.C. Official Code § 6-641.07(g)(1) (2001). The Board has no jurisdiction over alleged violations of the D.C. Code, particularly those sections of the Code, such as § 25-434, not in any way related to zoning, and it has no jurisdiction to interpret or decide Constitutional questions. *See, e.g.*, Board Order No. 17504, *Appeal of JMM Corporation*, and Board Order No. 13967, *Appeal of California Steakhouse*, cited therein. Therefore, the only allegations of the Appellant which the Board may decide are those claiming that the issuance of the C of O for the grocery store violated the R-C Overlay.

The Board may have the jurisdiction to hear that portion of the appeal alleging violations of the R-C Overlay, but this jurisdiction disappears if the appeal were not timely brought. *See, Waste Management of Maryland v. D.C. Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121-1122 (D.C. 2001), citing *Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980). (Timeliness is mandatory and *jurisdictional* and "if the appeal [is] not timely filed, the Board [is] without power to consider it.") In order for an appeal to be timely, it must be filed "within sixty

(60) days from the date” the appellant “had notice or knowledge of the decision complained of, or reasonably should have had” such notice or knowledge. 11 DCMR § 3112.2(a).¹

The decision complained of here is ostensibly the March 21, 2008 issuance of the C of O for the grocery store, but the two allegations on appeal, i.e., the size of the store and its sale of alcoholic beverages, do not arise from the issuance of the C of O. The decisions to allow the store’s size and sale of alcohol were *made* at the building permit stage and were *validated* by the subsequent issuance of the C of O. Building Permit No 98040 set forth the size of the grocery store. Its accompanying plans depicted shelf space for alcoholic beverages within the grocery store, and the ZA’s letter ratified the store’s ability to sell alcoholic beverages. All of these documents were included in the record of Appeal No. 17677, which was brought by the same Mr. Cooper who is the Appellant herein. Therefore, the Appellant has been aware of the size of the grocery store since the issuance of Building Permit No. 98040, and at least since the decision in Appeal No. 17677 on March 4, 2008. Further, the Appellant has been aware of the fact that the store was going to sell alcoholic beverages for off-premises consumption at least since the March 4, 2008 decision in Appeal No. 17677, and it could reasonably be stated that he was aware of this fact long before that date, as the proceedings leading up to the decision in Appeal No. 17677 stretched out over several months. (Appeal No. 17677 was filed on May 25, 2007.) Yet, the Appellant did not file the instant appeal until May 22, 2008, more than the required 60 days after the March 4, 2008 decision in Appeal No. 17677.

This appeal alleges nothing new – nothing that has not already been before this Board, specifically in Appeal No. 17677 – and therefore, nothing that the Appellant was unaware of during the pendency of Appeal No. 17677. This type of appeal was specifically disallowed by the District of Columbia Court of Appeals (“DCCA”) in *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008). In *Basken*, DCRA issued a building permit that ambiguously permitted seven dwelling units in an R-4 zone district. After the permit was issued, questions were raised as to the legality of seven units, and the Director of DCRA issued a letter that unambiguously stated that although seven units may have been allowed in error, the Zoning Administrator would not deny the property owners a C of O due to that error. That unambiguous statement put the appellants on notice that seven units would be allowed and constituted the “decision complained of” contemplated by 11 DCMR § 3112.2(a). The *Basken* appellants, however, although aware of this decisional letter the day after its issuance, did not appeal it, and chose instead to appeal the C of O for the property. The C of O was issued 13 days after the appellants knew of the letter and the appellants appealed the C of O approximately 55 days after

¹ The Appellant also appears to be alleging that 11 DCMR § 3112.2(d) applies to make his appeal timely in that he claims DCRA’s actions prevented him from finding out about the issuance of the C of O until April 30, 2008. Subsection 3112.2(d) permits the Board to extend the 60-day filing period if exceptional circumstances outside of an appellant’s control prevented him from filing his appeal, and if this extension of time will not prejudice any parties. During the hearing in this appeal, the Board heard no factual evidence on the possible applicability of § 3112.2(d), but concludes that, even if this provision did apply, this appeal would still be untimely under the *Basken* decision, (see, *infra*) and that it is highly likely that permitting an extension of time to file under § 3112.2(d) would have prejudiced the intervenor, who, in March of 2008, had opened its grocery store in reliance on this Board’s decisions in Application No. 17395, Appeal No. 17677, and related Appeal No. 17675.

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its issuance, *i.e.*, approximately 68 days after the issuance of the letter. The C of O, however, made no new zoning decisions, nor did it contain any new information – it reflected that the building would contain seven dwelling units.

The Board concluded that the decision on appeal – the legality of seven units – was made in the DCRA Director's letter and that, therefore, the C of O "was not the 'decision ... associated with the zoning error complained of.'" *Basken*, at 362. The Board additionally found that the issuance of the C of O did not start the time to appeal because "DCRA made no additional zoning decisions when it issued the C of O." *Id.*

The DCCA, in upholding the Board's determinations, clearly stated that a C of O is separately appealable where it provides the *first notice* of a particular zoning decision, but that "[a] certificate of occupancy does not ... start another sixty-day appeal period as to any and all DCRA zoning decisions affecting a project that preceded issuance of the certificate." *Id.* At 367-368.

The latter scenario is precisely what is before the Board in the instant appeal. Both the decisions being questioned on appeal – the size of the store and its ability to sell alcoholic beverages – were decided at the building permit stage, or at the latest, in the Board's March 4, 2008 decision in Appeal No. 17677. The C of O for the grocery store contained no new information and did not constitute the "first notice" of these decisions to the Appellant; therefore it is not separately appealable.

For all the reasons set forth above, the Board concludes that this appeal is untimely² and the Board is without jurisdiction to hear it. Therefore it is hereby **ORDERED** that the appeal is **DISMISSED**.

VOTE: **4-0-1** (Ruthanne G. Miller, Shane L. Dettman, Mary Oates Walker and Gregory N. Jeffries to dismiss. No fifth Board member participating or voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

Each concurring Board member approved the issuance of this order.

ATTESTED BY:


RICHARD S. NERO, JR.

Acting Director, Office of Zoning

² Untimeliness notwithstanding, one of the precise issues alleged on appeal – a violation of the prohibition in § 1401.1(b) -- has already been determined adverse to the Appellant by this Board in Order No. 17677. The other issue alleged on appeal, the size of the store and potential impacts on the public good, has already been vetted by this Board in Order No. 17395, which arose out of the intervenor's original application for area variances necessary to operate the grocery store in the first place.

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FINAL DATE OF ORDER: FEB 18 2009

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND 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.