DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT
441 4th Street, N.W.
Washington D.C. 20001

In re:
Jonathan Bolduc,
Appellant,

Appeal No. 17915

DISTRICT OF COLUMBIA'S MOTION TO DISMISS

Appellee, the District of Columbia Department of Consumer and Regulatory Affairs, ("District or DCRA"), by and through undersigned counsel, respectfully moves this Board of Zoning Adjustment ("Board") pursuant to Rule 3117.3 of the Board of Zoning Adjustment Rules of Practices and Procedures, to dismiss the appeal of Jonathan Bolduc ("Appellant"). As a basis for the District's Motion, the District submits that the appeal is untimely and as such this Board does not have jurisdiction over the matter.

SUMMARY OF CASE

Gailya Wright owns the two-story, row house located at 1433 Parkwood Place, N.W. ("the Property"). On October 1, 2004, Ms. Wright was issued Building Permit No. 466306, authorizing her to renovate the single family dwelling at the Property, including the front porch.

Subsequently, Appellant, who owns the adjoining house located at 1435 Parkwood Place, N.W., was represented by his father-in-law, Don Hawkins, in the allegation of damages to his property. DCRA received many complaints from Mr. Hawkins that Ms. Wright's construction project damaged Appellant's property. As a result of an inspection conducted by DCRA in January of 2005, a Stop Work Order was issued and work at the Property ceased pending a resolution of the alleged damage. During this time, DCRA also required the construction plans

for the project to be revised and re-submitted for approval. When the review of the revised plans was completed and the Stop Work Order was satisfied, Building Permit No. 107753 was issued on June 6, 2007 to revise Building Permit No. 466306.

Additional complaints from Mr. Hawkins were received by DCRA over the next several years, from January 2005 to March 2008. These complaints included allegations that the owner of the Property: (1) did not have a legitimate permit, (2) did not have legitimate drawings that conform to DC Codes, (3) the work described on the permit differs from the actual work performed, and (4) the owner of the Property breached an agreement that she made with the Appellant concerning a civil matter between the parties. In response, DCRA conducted inspections at the Property and requested a wall test of the Property 'to determine the extent and size of the construction that occurred regarding building Permit No. B466306.' See August 9, 2007 letter from Acting Zoning Administrator Matthew LeGrant to property owner Gailya Wright. Accordingly, Ms. Wright arranged for the wall test, which showed that the renovations at the Property exceeded the original footprint of the house by less than one-half inch, which Mr. LeGrant determined to be consistent with the original plans submitted by Ms. Wright.

Therefore, based upon extensive review, consideration of all available documentation, multiple inspections of the Property, and the Zoning Administrator's determination that the wall test results were consistent with the approved plans, no further investigation or action was required by DCRA. As a result, Director Linda Argo, of the Department of Consumer Affairs, sent Mr. Bolduc and Mr. Hawkins a letter on March 25, 2008, advising them that DCRA's inspections "confirmed that the porch at issue was built in conformance with Building Permit No. B466306".

In response, on November 3, 2008, Mr. Hawkins filed an appeal from Director Argo's March 25, 2008 administrative decision. In his appeal, Appellant alleged that the construction of an oversized addition at the Property, pursuant to Building Permit No. 466306, interfered with the light and air available to him and his family. He further alleged that the addition at the Property was contrary to 11 DCMR §§ 403.2, 405.3, 405.6, and 405.9.

Pursuant to 11 DCMR § 3112.2(a), the appeal of Building Permit No. 466306, which was issued on October 1, 2004, was required to be filed on or before December 1, 2004. No appeal was filed.

Pursuant to 11 DCMR § 3112.2(a), the appeal of Building Permit No. 107753, which was issued on June 6, 2007, was required to be filed on or before August 5, 2007. Appellant did not file an appeal by the statutory due date.

Pursuant to 11 DCMR § 3112.2(a), the appeal of Director Argo's letter, dated March 25, 2008, was required to be filed on or before May 28, 2008[1]. However, Appellant filed his appeal, nearly six months late, on November 3, 2008. Accordingly, Appellant's appeal was filed untimely.

STANDARD FOR GRANTING A MOTION TO DISMISS FOR UNTIMELY FILING

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.

[1] The date of the decision letter being appealed is March 25, 2008; however, pursuant to Board of Zoning Adjustment Rules of Practices and Procedures Rule 3110.3, "[w]henever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper, and the paper or notice is served upon the party by mail, three (3) days shall be added to the prescribed period."

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"). Moreover, 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." See 11 DCMR § 3112.2(a). The Board may extend the sixty-day deadline "[o]nly if the appellant " meets the two requirements set forth by 11 DCMR § 3112.2(d) by demonstrating 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 11 DCMR § 3199.1." Both of these requirements must be met for the Board to grant an extension beyond the jurisdictional sixty-day deadline.

ARGUMENT

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). Therefore, when an appeal is either not filed, or is filed past the deadline specified in 11 DCMR §3112.2, it is considered untimely and the Board is without power to consider it. *Id.*

Appellant's Due Process Complaint Resulted Directly from His Own Omission

In the instant case, the Appellant complains that the addition at the Property was approved "without a hearing, without public testimony, and without any due process as set forth in the Zoning Regulations". However, the Appellant overlooked his own jurisdictional requirement to timely file, which is a prerequisite for his opportunity to be heard by this Board.

Accordingly, the due process complaint noted in his statement of appeal is the direct result of his own omission. More specifically, the Zoning Regulations specify that "[a]ny 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 Board ... 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." See 11DCMR §3112.2 [***emphasis*** added]. Moreover, the Appellant had repeated notice of the decisions of which he now complains as he and his family reside next door to the Property at issue. However, despite such notice, Appellant failed to either file an appeal or to timely file an appeal concerning the permits issued. For example, Appellant had notice of the approved construction complained of, or reasonably should have had notice or knowledge of it, when construction first began at the Property in 2004, under Building Permit No. 466306. However, Appellant failed to file an appeal concerning that permit. Likewise, Appellant also had notice of the approved construction complained of, or reasonably should have had notice or knowledge of it, when construction was allowed to continue in 2007, pursuant to Building Permit No. 107753. Yet, he again failed to file an appeal. Finally, Appellant received additional notice of the administrative decision complained of, or reasonably should have had notice or knowledge of it, when he received Director Argo's March 25, 2008 letter, which informed him that the construction that he complained of at the Property complied with the Building Permit No. 466306. Although, the District does not agree that the letter at issue is an appealable 'administrative decision', even if it were - the Appellant again failed to file the appeal in a timely manner as it would have been due on or before May 28, 2008. It was not filed until

November 3, 2008 - almost six months past the deadline specified in 11 DCMR § 3112.2(a). Therefore, Appellant's due process complaint is a direct result of his own omissions, as his untimely appeal precludes the Board's ability to hear the case under the Zoning Regulations.

Appellant Has Repeatedly Missed Deadlines to Appeal the Construction of the Porch at Issue

Although the Appellant provides notice to the Board that he seeks to appeal the March 25, 2008 administrative decision of Director Argo, the actual language of his appeal indicates that he is appealing "[a]n addition which increases the lot occupancy of an already nonconforming structure [that] was approved by Argo without a hearing, without public testimony, and without any due process as set forth in the Zoning Regulations, to the detriment of [he and his] family." See Appeal Form filed by Jonathan Bolduc, dated November 3, 2008. The "addition" referenced in Appellant's statement of appeal is the enclosure of a pre-existing front porch that was approved by the District, on October 1, 2004, as a part of the overall renovation project authorized by Building Permit No. 466306. Pursuant to 11 DCMR § 3112.2(a), the appellant had an opportunity to appeal Building Permit No. 466306 on or before December 1, 2004. However, no appeal was filed.

Moreover, Appellant had another opportunity to appeal the construction at the Property when the second permit, Building Permit No. 107753, was issued on June 6, 2007. This permit was issued after the District requested and approved revised plans for the project. Pursuant to 11 DCMR § 3112.2(a), the appeal of Building Permit No. 107753 was required to be filed on or before August 5, 2007. However, no appeal was filed.

Finally, even if Appellant could appeal the construction at the Property pursuant to Director Argo's March 25, 2008 letter, Appellant missed the deadline to file that appeal as well.

Pursuant to 11 DCMR § 3112.2(a), the appeal of the March 25, 2008 letter would have been required to be filed on or before May 28, 2008. However, Appellant did not file his appeal until November 3, 2008, nearly six months later.

Accordingly, the Appellant has had more than one bite at the proverbial apple and has failed to timely file at every opportunity. More specifically, he is one thousand four hundred and thirty-three (1,433) days late in filing his appeal regarding the construction at the Property under Building Permit No. 466306, which was issued on October 1, 2004, because the deadline for filing that appeal was on or before December 1, 2004. Additionally, he is four hundred and fifty-six (456) days late in filing his appeal regarding construction at the Property under Building Permit No. 107753, which was issued on June 6, 2007, because the deadline for filing that appeal was on or before August 5, 2007. Lastly, even if Director Argo's March 25, 2008 letter was appealable, Appellant is one hundred and fifty-nine (159) days late in filing his appeal as the deadline for filing such an appeal was on or before May 28, 2008, and his appeal was not filed until November 3, 2008. Accordingly, the appellant missed each deadline to file his appeal regarding the same construction project at the Property, which was approved by Building Permit No. 466306, revised under Building Permit No. 107753, and deemed in compliance with the Zoning Regulations by the Zoning Administrator and confirmed by Director Argo's March 25, 2008 letter. Therefore, pursuant to 11 DCMR § 3112.2(a), the appeal should be dismissed as untimely.

The March 25, 2008 Letter of Director Argo is Not Appealable to this Board

The Appellant is wrong to assert that the March 25, 2008 letter is "an administrative decision" that can be appealed. This March 25, 2008 letter is a concurrence or confirmation of the zoning approval provided under Building Permit No. 466306 that were issued by DCRA. It

is not a decision of the DCRA – unlike if it were a Zoning Determination Letter. Rather, it memorializes the reasons that Zoning Administrator LeGrant found that the owner of the Property built in conformance with Building Permit No. 466306. Accordingly, the March 25, 2008 letter was not "an administrative decision" which can be appealed. The "administrative decision" was actually the Building Permit which was issued on October 1, 2004. Therefore, the March 25, 2008 did not harm or aggrieve the Appellant and his appeal should be dismissed.

The Appellant Has Not Demonstrated Exceptional Circumstances

Although the Regulations allow this Board to extend the sixty-day filing requirement, this can only occur when the appellant has "exceptional circumstances" where appellant's ability to timely file was "substantially impaired." More specifically, "[t]he Board may extend the sixty-(60) day deadline for the filing of an appeal ***only if*** the appellant demonstrates that:(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 (2) The extension of time will not prejudice the parties to the appeal, as identified in § 3199.1." See 11 DCMR §3112(d) [***emphasis*** added].

In the instant case, the Appellant has not alleged any facts which would meet the requirement for extension. In his statement of appeal, Appellant simply states that his "appeal [was] delayed by the loss of [his] FOIA request for emails and other documents." However, the DCRA Freedom of Information Act (FOIA) Officer, Ms. Cecelia Tilghman confirms that Mr. Hawkins filed his FOIA requests on May 22, 2008 and on April 2, 2009. Clearly, if the documents and emails referenced by the Appellant were essential to his appeal, it was incumbent upon him to file the FOIA request more than five days before the appeal was due so that he could receive them in time to be included in his appeal. Moreover, as FOIA requests are governed by

specific timelines, the time for filing the appeal as compared to the time to process the FOIA request could have been reasonably anticipated by the Appellant in this case so that the time needed would not substantially impair his ability to file an appeal. Additionally, as the emails and documents Appellant alleged were required before his appeal could be filed were not attached, or even referenced in his statement of appeal, his assertion of their level of importance is questionable.

Additionally, the Appellant followed this matter closely from 2004 to the present, filed several complaints, and continually stated his intent to oppose on-going construction at Property. Therefore, his involvement indicates that he was aware of the progress of the construction and yet he failed to avail himself of the appellate process in a timely manner.

Therefore, the appellant has not provided this Board with any facts to support "substantial impairment" and as such cannot meet the standard to allow this Board to extend the sixty-day filing requirement.

Appellant Has Not Demonstrated That His Late Filing Does Not Prejudice the Parties to the Appeal

Finally, the Appellant has not addressed the prejudice to the property owner. This is a required element as well. As the Appellant has failed to acknowledge the prejudice to the property owner, the Board cannot extend the time to file and the appeals should be dismissed.

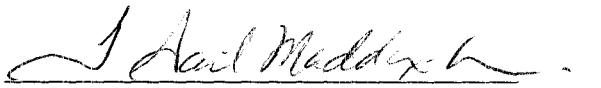
WHEREFORE, due to Appellant's untimely filing, the appeal should be dismissed.

Respectfully submitted,

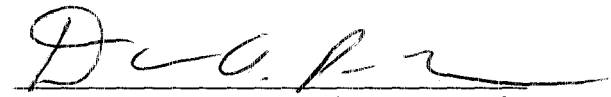
PETER J. NICKLES
Attorney General for the District of Columbia

BENNETT RUSHKOFF
Acting General Counsel

MELINDA BOLLING
Acting Deputy General Counsel



T. GAIL MADDOX-LEVINE [475827]
Assistant Attorney General
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS
Office of General Counsel
941 North Capital Street, N.E. - Suite 9400
Washington, D.C. 20002
(202) 442-8401 (office)
(202) 442-9447 (fax)
Tgail.Maddox-Levine@dc.gov
Appellee's Counsel



DORIS A. PARKER-WOOLRIDGE [433963]
Assistant Attorney General
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS
Office of General Counsel
941 North Capital Street, N.E. - Suite 9400
Washington, D.C. 20002
(202) 442-8407 (office)
Appellee's Counsel

CERTIFICATE OF SERVICE

I, T. Gail Maddox-Levine hereby certify that on April 24, 2009, a copy of the District of Columbia's Motion to Dismiss was sent first class mail to:

Don A. Hawkins, Agent
c/o Jonathan Bolduc
1435 Parkwood Place, N.W.
Washington, D.C. 20010

Lisa Kralovic
Advisory Neighborhood Commission 1A01
1529 Spring Place NW
Washington, DC 20010

T. Gail Maddox-Levine