

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17966 of Stephen Bruce, pursuant to 11 DCMR §§ 3100 and 3101, from a determination of the Office of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to allow the conversion of a nonconforming one-family detached dwelling by adding an apartment within the garage in the R-1-A District at premises 2709 31st Street NW (Square 2125, Lot 815).

HEARING DATE: October 20, 2009
DECISION DATE: October 20, 2009

DECISION AND ORDER DISMISSING APPEAL

On April 28, 2009, this appeal was filed by Stephen Bruce ("Appellant") challenging two decisions by the Zoning Administrator ("ZA") of the District of Columbia Department of Consumer and Regulatory Affairs. The decisions which the Appellant claimed to be appealing were made on April 7, 2009 and April 17, 2009. Both "decisions" were statements by the ZA to the Appellant reassuring him that the ZA had not made any errors in issuing Building Permit No. B0903245. Permit No. B0903245 had been issued on February 11, 2009 to allow the Appellant's neighbor, at 2709 31st Street NW ("subject property"), to "change [a] garage to one bedroom." Exhibit No. 23, Attachment.

The Board held a public hearing on the appeal on October 20, 2009, and concluded that it had not been filed in a timely manner. Therefore, the Board voted 3-0-2 to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated April 28, 2009, the Office of Zoning ("OZ") provided notice of the filing of the appeal to the ZA at the D.C. Department of Consumer and Regulatory Affairs ("DCRA"), the Appellee herein, the D.C. Office of Planning, Advisory Neighborhood Commission ("ANC") 3C, the ANC within which the subject property is located, Single Member District 3C08, and the Council Member for Ward 3. Pursuant to 11 DCMR § 3112.14, OZ published notice of the hearing on the appeal in the *D.C. Register*, and, on July 24, 2009, provided such notice to the Appellant, the ZA, and ANC 3C.

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BOARD OF ZONING ADJUSTMENT
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EXHIBIT NO. 26

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Requests for Party Status. Consistent with 11 DCMR § 3199.1, the parties in this proceeding were the Appellant, DCRA, the owner of the subject property, and ANC 3C. There were no requests for party status.

ANC Report. ANC 3C filed a letter with the Board dated October 8, 2009, in which it discussed the issues on appeal, but took no position on the merits of the appeal. The ANC letter emphasized that mistakes may have been made in the past with regard to construction at the subject property, leading to the concerns expressed in this appeal, but the ANC made no recommendation as to whether the appeal should or should not be granted. Exhibit No. 22.

FINDINGS OF FACT

1. The property that is the subject of this appeal is located at address 2709 31st Street NW, Square 2125, Lot 0815, in an R-1-A zone district.
2. On the subject property is a detached one-family dwelling that was built in 1941 and is nonconforming as to lot area.
3. Also on the subject property is a garage, part of whose eastern side wall is a party wall shared with the dwelling.
4. On February 11, 2009, DCRA issued Building Permit No. B0903245 to the owner of the subject property, permitting it to "change the garage to one bedroom." Exhibit No. 23, Attachment.
5. On February 12 or February 13, 2009, the permit was posted on the outside of the large gate in front of the garage. The postings therefore faced 31st Street and would have been visible to a person from the street when the gate was closed.
6. Demolition work, including the removal of the garage door, began on the property on February 18, 2009, and a dumpster was first on-site on February 19, 2009, then removed, and replaced with a new one on February 26, 2009.
7. On February 26, 2009, supplies were dropped off at the subject property and on February 27, 2009, the concrete floor of the garage was jack-hammered to allow the placement of plumbing materials and the installation of new floor joists.
8. The Appellant lives next door to the subject property, at 2701 31st Street NW, and occasionally parks his car on 31st Street within sight of the subject property or walks his dog in front of the subject property.
9. On February 27, 2009, the Appellant entered the subject property and looked at the posted permit, from which he copied DCRA's telephone number.

10. The Appellant called DCRA on February 27, 2009 to complain that, in his opinion, the work on the subject property was in violation of the Zoning Regulations.
11. Sometime between February 27, 2009 and March 11, 2009, DCRA sent a Zoning Inspector to the subject property.
12. On March 11th, the Inspector told the Appellant that the plans had been approved by the ZA, and that same day, the Appellant contacted the ZA by e-mail, expressing his opinion that the construction at the property was improper. Exhibit No. 2, Attachment No. 2.
13. On March 11, 2009, the ZA replied to the Appellant and referred the matter to DCRA's enforcement staff for another inspection.
14. On March 27, 2009, DCRA's Zoning Enforcement Officer replied to the Appellant and informed him that the property had been inspected and no violations had been found. Exhibit No. 2, Attachment No. 4.
15. The Enforcement Officer visited the property again on March 29, 2009, and while on-site, discussed the work being done with the Appellant.
16. On April 7, 2009, the Enforcement Officer e-mailed the Appellant and reiterated that the ZA found no zoning violations at the property. Exhibit No. 2, Attachment No. 5.
17. On April 17, 2009, the Enforcement Officer again e-mailed the Appellant and informed him that an inspection had not turned up any evidence that the garage on the property was to be used as an accessory apartment. On that same date, the Enforcement Officer also informed the Appellant of his appeal rights and venues. Exhibit No. 2, Attachment No. 6.
18. The Appellant filed this appeal with the Office of Zoning on April 28, 2009. Exhibit No. 5.

CONCLUSIONS OF LAW

The Board is authorized by Section 7 of the Zoning Act of 1938, D.C. Official Code § 6-641.07(g)(2) (2001), to hear and decide appeals where it is alleged by the appellant that there is error in any decision made by an administrative officer in the administration of the Zoning Regulations. Pursuant to 11 DCMR § 3112.2(a), an appeal must be filed within 60 days of the date the person appealing an administrative decision interpreting the Zoning Regulations had notice or knowledge of the decision complained of, or reasonably should have had such notice or knowledge, whichever is earlier. The Board may extend this 60-day deadline if unanticipated exceptional circumstances outside the appellant's control impaired his ability to file the appeal and no party will be prejudiced. 11 DCMR § 3112.2 (d). If, however, the Board finds an appeal to have been filed in an untimely manner, the Board lacks jurisdiction to hear it. *Economides v. D.C. Bd. of Zoning Adjustment*, 954 A.2d 427, 434-435 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. D.C. Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001).

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There is also consistent precedent of this Board that once a building permit is issued, no subsequent communication from DCRA may be appealed unless it contains a new decision. *See, BZA Order, Appeal No. 16982 of J. Brendan Herron, Jr. and ANC 3F*, 52 DCR 3904 (2005); *BZA Order, Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer*, 53 DCR 2495 (2006), *affirmed, Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356 (D.C. 2008).

The decisions ostensibly on appeal here are those made by the ZA, through the DCRA Enforcement Officer, dated April 7, 2009, and April 17, 2009. Those “decisions,” however, were not really decisions, but merely affirmations of the decision made by the issuance of the building permit on February 11, 2009. The April 7th and 17th statements by the Enforcement Officer reiterated what had to have already been determined by the ZA – that the issuance of the permit on February 11, 2009 would not result in construction or a use not permitted by the Zoning Regulations. The real decision on appeal is the decision to issue the building permit, which allowed the conversion of the garage on the subject property into a bedroom. This decision was made on February 11, 2009, with the issuance of the permit.

The Board concludes that the Appellant knew or should have known of the permit issuance at some point between February 13th, when the permit was posted on the property, and February 18, when actual demolition work began there. The Appellant lives immediately next door to the subject property, sees it daily, and should have been aware of these activities during this period. Even using the latest date of February 18th as the starting point for computing the 60-day period, the appeal would still be untimely filed. The 60th day under this scenario would have fallen on April 19th and the appeal was filed nine days later on April 28th.

The Board cannot extend this time period because there is no evidence that exceptional circumstances outside of the Appellant’s control prevented him from filing the appeal by April 19th, nor has he argued that this was the case. The Board is therefore bound to find the filing of the appeal untimely, and because untimeliness divests the Board of jurisdiction, the appeal must be dismissed. *Waste Mgt. of Md., Inc.*, 775 A.2d at 1121.

The Board is required to give “great weight” to issues and concerns raised by ANC 3C in this proceeding. D.C. Official Code § 1-309.10(d). Great weight means acknowledgement of the ANC’s issues and concerns and an explanation of why the Board did or did not find its views persuasive. ANC 3C states in a general way that it “objects to the incidence of illegal construction,” and that some of the issues in this appeal “should have been resolved in 2001” when earlier construction was done to the subject garage. Exhibit No. 22. The ANC did not, however, make a recommendation as to the merits and, even if it had, the recommendation would not have been legally relevant because the Board disposed of the appeal on a procedural basis. *See, Concerned Citizens of Brentwood v. District of Columbia Bd. of Zoning Adjustment*, 634 A.2d 1234, 1241 (D.C. 1993) (great weight requirement extends only to issues and concerns that are legally relevant).

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For the reasons stated above, the Board, on its own motion, hereby **ORDERS** that this appeal from the February 11, 2009 issuance of Building Permit No. B0903245, and from the subsequent April 7, and April 17, 2009 affirmations of that issuance, be **DISMISSED**.

VOTE: **3-0-2** (Marc D. Loud, Meridith H. Moldenhauer, Anthony J. Hood, to Dismiss; Shane L. Dettman not present, not voting; one Mayoral appointee (vacant) not participating)

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

A majority of Board members approved the issuance of this order.

ATTESTED BY: 
JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: MAR 30 2010

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.

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