

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 17966-A of Stephen Bruce, pursuant to 11 DCMR §§ 3100 and 3101, from a determination of the Office of 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, N.W. (Square 2125, Lot 815).

HEARING DATE: October 20, 2009
DECISION DATE: October 20, 2009
DATES OF DECISION
ON RECONSIDERATION: June 22, 2010 and July 13, 2010

ORDER DENYING RECONSIDERATION

Procedural Matters

On May 17, 2010, the Appellant, Stephen Bruce ("Appellant") filed a motion for reconsideration or rehearing in Board of Zoning Adjustment Appeal No. 17966. The Board of Zoning Adjustment ("Board"), through its issuance of Order No. 17966 on March 30, 2010 (Exhibit No. 28), denied his appeal as untimely filed.

The Board waived the requirement of 11 DCMR § 3126.2 that the reconsideration motion be filed within 10 days of the issuance of the order involved because the Appellant explained that the order had been mailed to the incorrect address; therefore, he did not receive it until May 11, 2010 – six days before he filed his motion for reconsideration. The copy of the order was mailed to "2710 31st Street, N.W.," while the Appellant resides at "2701 31st Street, N.W." The Board found this to be the "good cause" for a waiver required by § 3100.5, and further found that such waiver would not prejudice any party as all other parties to the appeal had responded to the motion within 10 days of its filing.¹

The Merits of the Motion

An appeal to the Board must be filed within 60 days from the date the appellant had notice or

¹Nor is this waiver prohibited by law, the last criterion necessary pursuant to § 3100.5.

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BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 17966-A

EXHIBIT NO. 33

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knowledge of the decision complained of, or “reasonably should have had notice or knowledge” of that decision. 11 DCMR § 3112.2(a). Timeliness is jurisdictional and if an appeal is untimely filed, the Board is without power to hear it. *Waste Management of Maryland, Inc. v. D.C. Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001).

In the instant appeal, the “decision complained of” was the decision to allow the garage on the subject property to be converted into a bedroom. That decision was made when Building Permit No. B0903245 was issued on February 11, 2009. The “Description of Work” on that Permit said: “Change the garage to one bedroom.” All permits for the project issued subsequent to Permit No. B0903245 were either revisions to it or “sub-permits” pertaining to one specific aspect of the construction.²

The Appellant makes several arguments in support of his motion, but the Board is not persuaded that either a reconsideration or a rehearing is in order. The Appellant first argues that the Department of Consumer and Regulatory Affairs (“DCRA”), in its submissions to the Board, failed to include several permits issued between March 3 and 19, 2009, and that one of these permits, issued on March 18, 2009, specifically states that it is revising the original permit, No. B0903245, with the addition of an electrical drawing. The Appellant’s argument continues that since this revision to the original permit falls within 60 days of the Appellant’s filing of the appeal, it makes the appeal timely. The 60-day period, however, starts to run from the date of the original decision complained of, and subsequent decisions *reinforcing* that original decision, such as the March 18th permit, do not change that starting date. The same is true of the April 7, 2009 and April 17, 2009 decisions of the Zoning Administrator (“ZA”), which upheld the original decision to issue Permit No. B0903245. These two April decisions were affirmations of the original decision, not “new” decisions in their own right; therefore, they are not separately appealable and did not re-start the 60-day period. *Basken v. D. C Bd. of Zoning Adjustment*, 946 A.2d 356, 364-370 (D.C. 2008)³; *Appeal No 16982 of J. Brendan Herron Jr. and ANC 3F* (April 7, 2005) (“[W]hen an appeal challenges the grant or denial of a building permit ... no subsequent communication from DCRA may be appealed.”) *Compare, Bannum v. D.C. Bd. of Zoning Adjustment*, 894 A.2d 423, 430 (D.C. 2006). (The failure to appeal a communication from DCRA prior to the issuance of the building permit “does not bar an ANC’s subsequent appeal of the related building permit.”)

²For example, Building Permit No. B0904181, issued on March 18, 2010, was a revision to Permit No. 0903245; Permit No. P0902394, issued on March 3, 2009, is a plumbing permit; Permit No. E0903358, issued on March 12, 2009, is an electrical permit; and Permit No. M0900762, issued on March 16, 2009, is an air conditioning permit.

³Though *Basken* was dealing with a Certificate of Occupancy (“C of O”), the logic is the same as that employed here. Generally speaking, one or several building permits are issued to permit the actual construction of a building. Once construction is complete, and a use is about to move into, *i.e.*, “occupy”, the building, the C of O is issued. The C of O is separately appealable ONLY if it contains a “new” zoning decision, thus providing the first notice to the public of this decision. If it does not contain any such “new” decision, the C of O is not separately appealable, because, it is, in essence, merely an affirmation that the building permits allowing the construction of the building for the end-use were issued correctly.

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The Appellant next claims that Permit No. B0903245 was ambiguous because it states that the "Existing Use" is a "Single Family Dwelling – R-3." The Appellant states that because an R-3 zone does not require side yards, and his appeal involved a possible side yard violation, the reference to "R-3" on the permit created ambiguity. But, the R-3 designation is not the zone designation on the permit. The "box" on the permit where the zone district would be typed in was left blank. The R-3 reference is clearly a use designation, as explained by DCRA in its Opposition to Appellant's Motion for Reconsideration. (Exhibit No. 29, at 2-3).

The Appellant attempts to show that he did not know of, and should not have known of, the issuance of the building permit until, at the earliest, February 27, 2009, which would have then made his filing timely. (Exhibit No. 28, at 8). This assertion, however, and the Appellant's attempts to support it, merely re-hash the arguments made at the hearing. The Board has already determined that the Appellant reasonably should have known of the decision complained of by February 18, 2009 and nothing in the Appellant's arguments provides new evidence that would convince the Board otherwise. The Appellant also attempts to point out inconsistencies in the testimony of the contractor working on the garage conversion project. The Board, however, heard the testimony, and such inconsistencies, if they exist, also fail to convince the Board that the Appellant should not reasonably have known of the decision complained of by February 18, 2009. The Board found that any potential inconsistencies in the contractor's testimony, if any, were unrelated to the conclusion that the Appellant should have reasonably known of the decision on or before February 18, 2009.

The Appellant's motion for reconsideration stated "specifically all respects in which the final decision is claimed to be erroneous, the grounds of the motion, and the relief sought." 11 DCMR § 3126.4. The Board, however, disagrees with the Appellant's claims of error and declines to reconsider its decision in Appeal No. 17966.

A rehearing requires that new evidence be presented to the Board that could not reasonably have been presented to the Board at the original hearing. 11 DCMR § 3126.6. No such new evidence was presented by the Appellant. The March 18, 2009 permit, as explained above, does not constitute new evidence. It did not change the decision on appeal – the conversion of the garage to a bedroom – or the date on which it was made – February 11, 2009 – or re-start the 60-day period.

Advisory Neighborhood Commission 3C did not file anything with the Board concerning the Appellant's request for reconsideration or rehearing; therefore, there is nothing to which the Board can accord the "great weight" required by D.C. Official Code § 1-309.10(d) (2001).

For all of the above reasons, it is hereby **ORDERED** that the Appellant's motion for reconsideration or rehearing is **DENIED**.

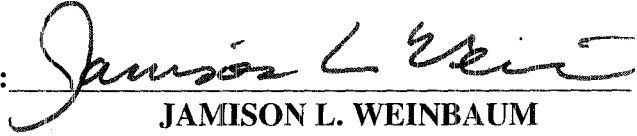
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VOTE: **4-0-1** (Meridith H. Moldenhauer, Anthony J. Hood, Shane L. Dettman,
and Nicole C. Sorg to Deny; No other Board member (vacant)
participating)

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

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

ATTESTED BY:



JAMISON L. WEINBAUM
Director, Office of Zoning

FINAL DATE OF ORDER: SEP 13 2010

PURSUANT TO 11 DCMR § 3125.9, NO ORDER OF THE BOARD SHALL TAKE EFFECT
UNTIL TEN (10) DAYS AFTER IT BECOMES FINAL PURSUANT TO § 3125.6.