

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18031-B of West End Citizens Association, pursuant to 11 DCMR §§ 3100 and 3101, from a November 4, 2009 decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, to issue Certificate of Occupancy No CO1000323, for a grocery store in the R-5-E District at premises 2140 F Street, N.W. (Square 81, Lot 811)

BOARD'S HEARING DATE: February 23, 2010

BOARD'S DECISION DATE: February 23, 2010

DATE OF FINAL ORDER: August 24, 2010

**DATE OF
COURT DECISION**

REMANDING TO BOARD: August 16, 2012, December 19, 2012

PROCEDURAL ORDER ON REMAND

This Procedural Order on Remand ("Order") is issued to set forth the Board of Zoning Adjustment's ("BZA" or "Board") initial procedures for complying with the District of Columbia Court of Appeals' remand instructions concerning this proceeding as set forth in a Memorandum Opinion and Judgment ("MOJ") dated August 16, 2012, as amended by an Order dated December 19, 2012 ("December Order")

Appeal No 18031 was brought by the West End Citizens Association ("WECA") and alleged that Certified of Occupancy No CO1000323 issued to Foggy Bottom Grocery, LLC ("FoBoGro") impermissibly expanded the existing nonconforming grocery use by permitting an accessory prepared food shop and by authorizing all three floors of the building for the grocery store use.

FoBoGro filed a motion to dismiss that among other things claimed that the appeal was barred by the equitable doctrines of *estoppel* and *laches*. FoBoGro never argued that the appeal was filed beyond the jurisdictional time limits set forth at 11 DCMR § 3112.2(a), which provides.

441 4th Street, N W , Suite 200/210-S, Washington, D C 20001

Telephone (202) 727-6311

Facsimile (202) 727-6072

E-Mail dcoz@dc.gov

Web Site www.dcoz.dc.gov

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18031-B

EXHIBIT NO. 30

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BZA APPEAL NO. 18031-B
PAGE NO. 2

An appeal 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

As a preliminary matter, the Board determined that it would not hear testimony on the equitable defenses unless and until it determined that the appeal had merit. The Board ultimately found no merit to WECA's claims of error and denied the appeal through an order dated August 24, 2010.

WECA petitioned the District of Columbia Court of Appeals ("Court") to review the BZA's decision. In its MOJ, the Court found no error in the Board's determination that the incidental sale of prepared food fell within a grocery store use and therefore did not represent an unlawful expansion of the nonconforming use. However, the Court reversed the Board's determination that the grocery use could extend beyond the first floor.

Although the Court's decision disposed of the two substantive issues presented, the MOJ went on to state:

The BZA found it unnecessary to reach FoBoGro's contention that WECA's appeal of its C of O was untimely as a matter of law, which would be an alternative basis for the BZA's denial of the appeal. The BZA will have to address that contention on remand, as it potentially has merit.

As explained earlier, FoBoGro never contended that WECA's appeal was untimely as a matter of law, but rather as a matter of equity. It was this equitable defense that the Board found unnecessary to consider. The Board found it unnecessary to reach FoBoGro's argument that the appeal was untimely as a matter of equity, not as a matter of law.

Nevertheless, WECA filed a petition for rehearing in which it asserted that the Board affirmatively found the appeal was timely filed in accordance with § 3112.2 (a) and thus no remand was required. In response, the Board advised the Court that although it had concluded that the appeal was filed within 60 days from the issuance of Certificate of Occupancy No. CO1000323, it never reached the specific issue first raised by the Court, namely whether the "the decision complained of" was stated in an earlier certificate.

In its December Order the Court concluded that it was appropriate to amend its MOJ to remand the record of the case for the Board to consider FoBoGro's *laches* and *estoppel* defenses. Further, the December Order stated:

Although our decision also identified, apparently for the first time in these proceedings, an issue as to whether WECA's appeal was timely as a matter of law, we leave it for the BZA to consider on remand whether its authority extends to the belated consideration of that issue in these circumstances.

BZA APPEAL NO. 18031-B
PAGE NO. 3

The Board believes it should resolve this jurisdiction issue as a preliminary matter and therefore asks that parties brief the following issue:

Does the Board have the authority as part of this proceeding on remand to consider whether WECA's appeal was timely as a matter of law when the issue was not raised by any party or the Board during the earlier proceeding but was identified for the first time in these proceedings by the Court of Appeals?

The **briefs** shall be filed with the Office of Zoning by 3:00 p.m. on Friday, August 16, 2013 and served upon the parties. Any party that fails to file a brief will be deemed to have taken no position on the issue. Any **reply brief** is due by 3:00 p.m. on Tuesday, September 3, 2013 and also served. No sur-reply will be accepted

This Procedural Order on Remand is not a final order of the Board and is therefore not the proper subject of a motion for reconsideration

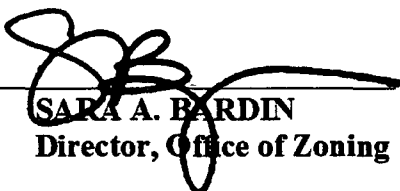
Accordingly, it is ORDERED that the Board APPROVES the issuance of this Order

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

A majority of members approved the issuance of this Order

(Lloyd J. Jordan, S. Kathryn Allen, Jeffrey L. Hinkle and Michael G. Turnbull to approve issuance; one Board seat vacant.)

ATTESTED BY. _____


SARA A. BARDIN
Director, Office of Zoning

FINAL DATE OF ORDER: July 1, 2013