

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment

Appeal No. 18031-B of West End Citizens Association

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COMES NOW Foggy Bottom Grocery, LLC (“FoBoGro”), intervenor and operator of the business and subject property located at 2140 F Street NW, Washington, DC, and through undersigned counsel submits its brief according to the July 1, 2013 Procedural Order on Remand. The BZA asks whether it has authority on remand to consider whether the West End Citizens Association’s (“WECA”) appeal of a zoning decision in 2009 was timely as a matter of law.¹

FoBoGro asserts that the BZA does have authority for the following reasons

- (1) The Board of Zoning Adjustment (“BZA”) has authority to consider the timeliness of any appeal according to 11 DCMR § 3112.2
- (2) FoBoGro raised the timeliness² of WECA’s appeal on December 2, 2009 before the BZA and in briefing and argument before the Court of Appeals
- (3) The DC Court of Appeals held that timeliness of an appeal is a matter of subject matter jurisdiction and a question of law, subject matter jurisdiction may be challenged *at any time*, by the parties or by a court.
- (4) Despite deference to the BZA in the construction of the zoning laws and factual determinations, “the ultimate responsibility for deciding questions of law is assigned to [the] court”³
- (5) The Court of Appeals remanded this matter to the BZA “to decide whether the WECA’s challenge to the C of O was timely.”⁴

¹ No case holds that the BZA lacks authority on remand to decide whether it had subject matter jurisdiction to hear an appeal

² FoBoGro preserved the equitable defense of laches reasoning that, even though WECA appealed issuance of the Certificate of Occupancy (“C of O”) No. CO100023 within the regulatory sixty (60) days, the appeal was barred because WECA had actual or constructive notice of the previously issued Certificate of Occupancy No. CO0800102, as a new Zoning Office decision. The BZA noted that WECA’s appeal was timely believing that the C of O No. CO100023 was the appealable “new decision” after the Zoning Administrator revoked the C of O No. CO0800102 BZA Appeal No 18031 of West End Citizens Association at 3, ¶ 19 (February 23, 2010).

³ *Basken v D C Bd of Zoning Adjustment*, 946 A.2d 356, 363 (D C. 2008)

⁴ Memorandum Opinion and Judgment (“MOJ”) at 1 and 11.

FoBoGro also observes that the issue is not *whether* the BZA has authority on remand to address the issue of jurisdiction, but rather, *what* the BZA must consider on remand, i.e., whether WECA met the conditions for a timely appeal. Consistent with BZA and DC Court of Appeals' decisions, FoBoGro contends that the August 21, 2008 Certificate of Occupancy No CO08000102 ("2008 C of O") was the "new decision" imputing actual or constructive knowledge to WECA, not the November 4, 2009 Certificate of Occupancy No CO100023 ("2009 C of O"), and WECA advanced no exceptional circumstances for its failure to timely appeal the 2008 C of O.⁵

The BZA did not have subject matter jurisdiction as a matter of law because WECA's appeal to the BZA was not timely. Lacking jurisdiction, the BZA had no authority to consider WECA's appeal, and on remand the appeal must be dismissed.

ARGUMENT

I. THE REMAND ORDER DIRECTS THE BZA TO DETERMINE WHETHER IT HAD JURISDICTION TO HEAR WECA'S APPEAL.

The DC Court of Appeals remanded this matter "to the BZA for further consideration of whether WECA's appeal of FoBoGro's C of O was timely."⁶ The BZA recognizes that "timeliness is jurisdictional" and that it is "without authority as a matter of law" to hear an untimely appeal.⁷ The principle that timeliness is jurisdictional in agency actions is affirmed in *Customers Parking Inc v District of Columbia*,⁸ in which a Tax Division appeal was untimely. Like the Tax Division for the District of Columbia, the BZA is a regulatory agency and the

⁵ See 11 DCMR § 3112.2 (a) and (d) (1)-(2)

⁶ MOJ at 1 and 11.

⁷ See BZA Application No. 18499 of Advisory Neighborhood Commission 6A at 5 (February 12, 2013); BZA Appeal No. 17966-A of Stephen Bruce at 2-3 (June 22, 2010, July 13, 2010), BZA Appeal No. 17915 of Jonathon Bolduc at 3 (May 12, 2009).

⁸ *Customers Parking Inc. v District of Columbia*, 562 A 2d 651, 654 (D.C. 1989)

requisites for subject matter jurisdiction are set forth in the DC Code and Municipal Regulations.

For that reason, *Customers Parking Inc* found:

[T]he *timing imperatives for appeals of tax assessments are not merely statutes of limitation that may be waived, but are jurisdictional requirements that cannot be waived.* . Parties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent, and *the absence of such jurisdiction can be raised at any time.* (Emphasis added)⁹

Lack of subject jurisdiction may be challenged at any time, “[w]hensoever it affirmatively appears that the jurisdiction fails, the objection may be raised by the parties or the court itself.”¹⁰ Likewise, “[e]ven the party who invoked the jurisdiction of the federal court may raise lack of subject matter jurisdiction *after a trial on the merits*”¹¹ In *Henderson v E Street Theatre Corp* , the appellate court concluded that, “. . jurisdiction of the subject matter of a case may neither be assumed by a court nor conferred upon it by consent or silence of the parties It may be raised at *any stage of the proceedings* and hence this court raised the question *sua sponte* at oral argument ”¹² And in *Paton v District of Columbia* the court addressed the BZA’s *caveat* that no party specifically stated a challenge to timeliness as a matter of law when it noted,

Although the jurisdictional issue was not questioned by either appellant or appellee, it is well settled that jurisdiction of the subject matter of a case may neither be assumed by a court nor conferred upon it by consent or silence of the parties It may be raised *sua sponte* by the appellate court.¹³

⁹ *Customers Parking*, A 2d at 654 (citations omitted)

¹⁰ *In re Estate of Dapolito*, 331 A.2d 327, 328 (D.C. 1975)

¹¹ *Thomas v District of Columbia*, 82 F.R.D. 93, 94 (D.D.C 1979).

¹² *Henderson v E Street Theatre Corp.*, 63 A.2d 649, 650 (D.C. Mun. App. 1948)(emphasis added).

¹³ *Paton v. District of Columbia*, 180 A.2d 844 (D.C. Mun. App 1962).

III. ABSENT EXCEPTIONAL CIRCUMSTANCES, BZA APPEALS MUST BE TIMELY TAKEN FROM “NEW” DECISIONS.

The BZA has power and authority to hear and decide appeals of an aggrieved party challenging a new “.. order, requirement, decision, determination, or refusal made by .. [an] administrative officer”¹⁴ And, according to 11 DCMR § 3112.2(a):

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 (Emphasis added)¹⁵

Only exceptional circumstances may nullify notice of a zoning decision.¹⁶

FoBoGro asserts that the 2008 C of O was the new decision or notice of FoBoGro’s intent to have a grocery business with a sandwich shop or prepared food shop utilizing all three floors of the subject property. WECA took no action to appeal the 2008 C of O. Likewise, when the Zoning Office issued building Permit No B0907038 on or about August 10, 2009 to The George Washington University (“The GWU”)¹⁷ prior to starting renovations to the building on the subject property, WECA took no action. Further showing that WECA had notice of FoBoGro’s business undertakings perhaps as early as June 2009, on August 31, 2009 WECA protested FoBoGro’s substantial change application dated June 11, 2009 for transfer of the Alcohol Beverage Control Board (“ABC Board”) license from Mesco Inc.¹⁸ to FoBoGro. After filing the ABC Board protest and ignoring the August 10, 2009 building permits, WECA actively pursued the Zoning Administrator to the revoke of the 2008 C of O.

¹⁴ See DC Code 6.641.07 (g)(1) – (4). See also 11 DCMR §§ 3100 and 3112.2. In this case, WECA appealed a decision made by the Zoning Administrator, as an administrative officer carrying out or enforcing a zoning regulation.

¹⁵ See 11 DCMR § 3112.2(a). See also *Basken v D C Bd of Zoning Adjustment*, 946 A.2d 356, 364-370 (D C 2008) (Notice or knowledge is a “question of law subject to review de novo.”)

¹⁶ See 11 DCMR § 3112.2 (d)(1).

¹⁷ The GWU owns the subject property and building, which FoBoGro leases

¹⁸ Mesco Inc. was the former owner of the Foggy Bottom Grocery and lessor of the subject property.

Almost immediately after the Zoning Administrator revoked the 2008 C of O, he reissued the 2009 C of O with the same substantive terms and parameters, regarding which the DC Court of Appeals observed

[The 2009 C of O] was almost identical to the August 2008, C of O. It again described the occupancy as a retail grocery store and stated the occupied square feet to be 1835 square feet. The only differences were that the new C of O replaced the words “sandwich shop” with “accessory prepared food shop,” and noted specifically that there were three floors in the occupancy¹⁹

Because of WECA prior knowledge and there being no substantive difference between the two C of Os,²⁰ FoBoGro asserts that the 2009 C of O was not a “new” decision from which WECA’s appeal must have been taken, but a decision reinforcing the 2008 C of O decision. On this point, the BZA and the DC Court of Appeals recognize that *last* action or decision regarding a property is not the action which an appeal must be taken, but the *first*. In *Basken*,²¹ the court said

[A] certificate of occupancy is separately appealable where it provides the first notice from which and aggrieved person knew or reasonably should have know[n] of the resolution or decision that the certificate represents. 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 (Emphasis added.)

To illustrate further, in *Bruce* a building permit issued on February 11, 2009 was found to be the first decision from which an appeal should be taken. When the appellant filed an appeal *a mere three days late*, he argued that subsequent permits marked the time from which an appeal must be taken. The BZA disagreed, concluding that *subsequent building permits* were decisions

¹⁹ MOJ at 3

²⁰ WECA advanced an argument at the Court of Appeals that the 2008 C of O was ambiguous and that its ambiguity somehow nullified notice of the Zoning Administrator’s decision. This argument was rejected.

²¹ See *Basken*, 946 A.2d at 367-368.

that *reinforced the original decision* to issue a permit,²² meaning the subsequent permits were later decisions, not “new” decisions from which timeliness of an appeal would be ascertained.²³

In this case, the 2008 C of O was the first and new decision respecting the FoBoGro property in over 10 years.²⁴ However, acting upon form over substance, instead of appealing the 2008 C of O or the August 10, 2009 building permit, WECA wrongfully used the 2009 C of O as the opening to advance its otherwise untimely appeal.²⁵

III. WECA’S APPEAL TO THE BZA WAS UNTIMELY.

The DC Court of Appeals notes

[T]he requirement . . . that an appeal be timely is jurisdictional, hence we have said that “if the appeal was not timely filed, the Board was without authority to consider it”²⁶

In addition, according to *Waste Management*,²⁷ negotiations, discussions, and other efforts to resolve a zoning issue do not extend the time for initiating an appeal to the BZA. Whether an appeal is timely, or a party can argue that there were exceptional circumstances to alleviate it of the failure to timely appeal, depends on facts and circumstances²⁸

FoBoGro urges that WECA had actual or constructive notice as a matter of law regarding the 2008 C of O and the building permit issued on August 10 2009, on account of WECA’s

²² *Bruce, supra* n. 5, at 3.

²³ *See Basken*, 946 A.2d at 364-370

²⁴ WECA previously challenged Mesco Inc.’s interest in expanding the use of the property in Application 16259 of The George Washington University (September 3 and October 1, 1997).

²⁵ The BZA declined to address FoBoGro’s timeliness argument and WECA advanced no evidence, reason or argument about exceptional circumstances to explain its failure to appeal the 2008 C of O decision. *See* 11 DCMR § 3112.2 (d)(1).

²⁶ *Waste Mgmt of Md, Inc v District of Columbia Bd Of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001) (citations omitted) A later amendment to 11 DCMR § 3112.2 codified “... the principles established in *Waste Management* and prior Court decisions, requiring that appeals to the Board pursuant to the Zoning Act be filed within sixty (60) days of the date the appellant *had actual or constructive knowledge* of an administrative decision complained of.” *Economides v D C Bd of Zoning Adjustment*, 954 A.2d 435 (DC 2008) (quoting 50 D.C. Reg. 1202 (2003)).

²⁷ *Waste Management*, 775 A.2d at 1122.

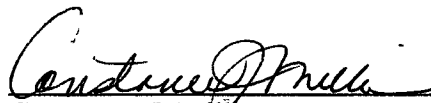
²⁸ *Id*

efforts pressuring the Zoning Administrator to revoke the 2008 C of O long after the Zoning Office issued it. Rather, WECA's efforts show how WECA understood an appeal of the 2008 C of O was time barred and how it misused the Zoning Administrator's issuance of the 2009 C of O to advance its untimely appeal.

IV. CONCLUSION

FoBoGro urges that the BZA has authority under the zoning regulations, DC Code, the common law, and the direction from the DC Court of Appeals to decide that WECA's appeal to the BZA was not timely as a matter of law. To reach this decision, because the 2008 and 2009 C of Os were substantively identical, the facts clearly support the legal conclusion that the 2008, not the 2009 C of O, was the new decision from which WECA must have appealed. WECA advanced no exceptional circumstances for its untimely appeal. Therefore, as a matter of law, WECA's appeal must be dismissed for lack of subject matter jurisdiction.

Respectfully submitted this 14th day of August 2013,


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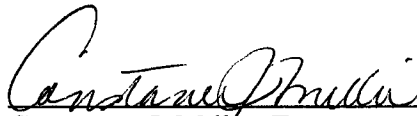
Certificate of Service

I hereby certify that a copy of the foregoing document was served by email this 14th day of August and also mailed by first class mail to the following persons:

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