

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

APPEAL NO 18031-B of THE WEST END CITIZENS ASSOCIATION

APPELLANT'S RESPONSE TO THE BOARD'S
PROCEDURAL ORDER ON REMAND OF
JULY 1, 2013

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I. Introduction

In its Order (the "Remand Order") issued December 19, 2012, the District of Columbia Court of Appeals remanded the appeal of West End Citizens Association ("WECA") (Case No 11-AA-39) to the D C. Board of Zoning Adjustment (the "Board" or the "BZA") for the BZA to consider (i) FoBoGro's preserved defense of laches and estoppel, and (ii) whether the BZA has the authority to belatedly consider whether the appeal of the WECA was timely as a matter of law (Remand Order, pp. 1, 2)

In its original Memorandum Opinion and Judgment dated August 16, 2012 (the "Opinion"), the D C Court of Appeals reversed the Board's decision in Appeal Order No. 18031 on the merits, finding that only the first floor of the FoBoGro building was permitted to be used for the nonconforming grocery store use, and that to use the other two floors for the grocery use is an unlawful expansion of a nonconforming use in a residential zone. The Remand Order further affirmed that decision on the merits

The BZA then issued a Procedural Order on Remand on July 1, 2013 (the "Procedural Order") inviting the parties, as a preliminary matter, to submit briefs, by August 16, 2013, on the following question.

"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

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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?”

II Preservation of the Right to Submit Argument Regarding Timeliness of the Appeal.

WECA understands the Procedural Order to invite argument only on the narrow preliminary issue noted above, regarding whether or not the Board has the authority to reconsider the timeliness question.¹ Appellant understands that the Board is not, at this time, inviting argument on whether or not the appeal was timely, or on the laches or estoppel issues. As such, this brief is limited to that narrow issue, and WECA reserves the right to submit further substantive argument on the timeliness issue if the Board finds it does in fact have such authority, and on the laches and estoppel arguments when the Board requests same.

III The Board Does Not Have the Authority to Belatedly Consider Whether or Not the Original Appeal Was Timely Filed.

The issue is whether or not the BZA has the authority to consider - or reconsider - whether the original appeal by WECA was timely filed pursuant to 11 DCMR § 3112.2(a). The Board does not have such authority, in this particular situation, for the following reasons

A By consenting to a hearing on the merits, and by actually ruling on the timeliness issue, and not otherwise considering the timeliness rule under § 3112.2(a), the BZA, the respondent DCRA, and the Intervenor FoBoGro, all waived the timeliness rule under § 3112.2(a).

The issue turns on whether or not the timeliness rule of § 3112.2(a) is mandatory and jurisdictional, or non-jurisdictional. Jurisdictional rules may be raised at any point in the proceedings and are not subject to waiver, however late they are invoked. By contrast, non-jurisdictional rules and deadlines may be extended and waived. See *Gatewood v D C Water &*

¹ The Board’s August 24, 2010 Order No. 18031 included Finding of Fact No 19, opined “The Appellant, WECA, timely appealed the issuance of the 2009 C of O ”

Sewer Authority, D.C. Court of Appeals Opinion in Appeal No 12-AA-368 (Decided July 3, 2013).

Until very recently, the D.C. Court of Appeals has indeed deemed administrative appeal deadlines to be jurisdictional, as argued by DCRA in its August 13 filing (“DCRA Response”). See also, *Goto v D.C. Bd. of Zoning Adjustment*, 423 A.2d 917 (D.C. 1980). And the BZA has correctly and consistently followed that interpretation, as discussed in DCRA’s Response. Up until July 3, 2013, the Appellant would have agreed substantially with DCRA’s Response. And at least on one point - the requirement that the BZA follow D.C. Court of Appeals precedent on this issue – the Appellant continues to agree with DCRA.

But in a decision issued July 3, 2013, the D.C. Court of Appeals significantly reversed this long-standing precedent and established a new rule for deciding whether or not an administrative appeal deadline is jurisdictional or not. The new rule established by the Court is that it must analyze whether the deadline is truly jurisdictional or if it is a “claim-processing” rule. If it is a “claim-processing” rule rather than jurisdictional, it is subject to waiver if not raised by a party or the agency in due course. The Court of Appeals, relying on the U.S. Supreme Court, ruled that claim-processing rules are rules typically promulgated by a decision-making body “for the orderly transaction of its business, while jurisdictional rules are most often legislative enactments meant to be strictly imposed limits on the cases [a decisionmaker] may hear.” See *Gatewood* at Page 13, citing *Smith v. United States*, 984 A.2d at 200 (D.C. 2009).

The Court in *Gatewood* attributed this major break from precedent to a line of U.S. Supreme Court decisions, noting that the Supreme Court has “continued to move away from classifying administrative deadlines as ‘jurisdictional.’” The Court in *Gatewood* stated further that:

The [U.S. Supreme] Court has reiterated its dislike for the overuse of jurisdictional labels, cautioning against the undesirable effects a proliferation of jurisdictional rules can have. “Tardy jurisdictional objections can result in a waste of adjudicatory resources and can disturbingly disarm litigants.” With these consequences in mind, the Court has attempted to “bring some discipline to the use of the term ‘jurisdiction.’” As a result, the Court has “repeatedly” proclaimed that “filing deadlines ordinarily are not jurisdictional,” but rather are “quintessential claim-processing rules.” These proclamations, we are persuaded, “substantially undermine our former approach to administrative agency deadlines.” *Gatewood* at Page 12.

The Gatewood Decision As Applied to the Board of Zoning Adjustment And Appeal No. 18031.

The Court of Appeal’s absolute reversal on this issue clearly applies to the 60-day filing deadline for the BZA under § 3112.2 of the Zoning Regulations, which must, therefore, also be considered a “claim-processing” rule and not a jurisdictional rule. The critical factor in *Gatewood* was the fact that the rule at issue was not legislatively enacted by the District of Columbia Council, but was adopted administratively. This is the case with the filing deadline in § 3112.2. The D.C. Zoning Act (D.C. Code § 6-641.07) does not provide any deadline for the filing of an appeal to the BZA.

Further, the Court of Appeals found that the U.S. Supreme Court “has repeatedly proclaimed that “filing deadlines ordinarily are not jurisdictional,” but rather are “quintessential claim-processing rules.” *Gatewood* at Page 12, citing *Smith v United States*, 984 A.2d at 200. So not only is the 60-day filing deadline not enacted by the legislature, but it is a filing deadline, which the Supreme Court has found, and the D.C. Court of Appeals agrees, is a “quintessential claim-processing rule.”

According to *Gatewood* and its progeny, a “claim-processing” rule is waived if an agency consents to a hearing on the merits without raising the timeliness issue. As the Court of Appeals confirmed in this case, no party has made a motion to dismiss based on

§ 3112.2, and in fact this Board has already ruled definitively on the timeliness issue, as noted above. Therefore, the BZA has waived its right to entertain the issue again at this late stage, and the parties have waived their right to raise the issue, since they failed to do so in the lengthy proceedings before the BZA and before the Court of Appeals. Therefore, neither the Court nor the BZA has the authority to entertain belated issues of timeliness, as is presented in this case.

CONCLUSION

For the above reasons, WECA asserts that the BZA does not have the authority to consider whether WECA's appeal was timely filed as a matter of law because the issue was not raised by any party at any time in these proceedings, and was therefore waived by the Board, DCRA, and the Intervenor.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Martin P Sullivan, HEREBY CERTIFY that on August 16, 2013, a copy of the foregoing response was delivered via e-mail to the following

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