

DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

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APPEAL NO 18031-B of THE WEST END CITIZENS ASSOCIATION

APPELLANT'S REPLY TO DCRA AND FOBOGRO REGARDING THE BOARD'S
PROCEDURAL ORDER ON REMAND OF
JULY 1, 2013

I Motion to Strike

In its Procedural Order on Remand of July 1, 2013, the BZA stated clearly that it was requesting a brief only on the preliminary matter of the Board's *authority* to consider the timeliness issue. In response to that narrow request, Appellant and DCRA limited their briefs accordingly FoBoGro instead opted to re-state the Board's request and then answer its own restated question, arguing at length about the substantive timeliness issue¹ For this reason, the Appellant asks the BZA to strike FoBoGro's Response to the extent it addresses anything more than the narrow question asked by the BZA in the Procedural Order, that being.

"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?"

Specifically, the Appellant moves that the BZA strike all of Section II (presumably labeled Section III in error), Section III, and Section IV (the Conclusion) of the FoBoGro Response, as well as any applicable portions of the introduction and Section I.

¹ FoBoGro's discussion, by the way, presents neither an accurate nor a complete history

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II. West End Citizens Association Reply

A Neither FoBoGro nor DCRA raised the issue of the timeliness of the appeal pursuant to 11 DCMR § 3112.2 at any time in the proceedings. FoBoGro claims in its Response that it did raise the timeliness issue, but it tellingly fails to cite the Record to support the claim. WECA asserts that timeliness under § 3112.2 was never raised by any party, and will leave it to FoBoGro to correct that assertion if it can. Even if the issue had been raised, the Board affirmatively declared that the appeal was timely filed and proceeded with a hearing. The BZA's consent to a hearing, and failure by all parties to raise the issue, has effectively waived the rule under § 3112.2, as discussed in Appellant's Response filed August 16, 2013, and further below.

B Both the brief of DCRA and FoBoGro were written using Board and Court of Appeals precedent which is no longer applicable. In a decision issued July 3, 2013, the Court of Appeals completed a full reversal of the state of the law regarding whether or not administrative filing deadlines were jurisdictional or not. The Court of Appeals credited the U.S. Supreme Court for the change in the law, noting that the Supreme Court "has repeatedly proclaimed that filing deadlines ordinarily are not jurisdictional, but rather are quintessential claim-processing rules." See *Gatewood v D C Water & Sewer Authority*, D.C. Court of Appeals Opinion in Appeal No 12-AA-368 (Decided July 3, 2013). As a claim-processing rule, it can be waived, and is not available to be raised at any time. The Appellant would refer the BZA to its original Response for a detailed discussion on this point. One of the reasons for this change instituted by the Supreme Court is the undesirable effects which a proliferation of jurisdictional rules can have. "Tardy jurisdictional objections can result in a waste of adjudicatory resources and can disturbingly disarm litigants" (*Gatewood*, at Pg 12).

This undesirable effect is present in this case, where several years after WECA first appealed FoBoGro's expansion of a nonconforming use, and more than a year after the Court of Appeals has determined that such an expansion was illegal, FoBoGro's illegal use continues unabated, to the detriment of the community in which it operates, while this Board is tasked with considering this "tardy jurisdictional objection."

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 September 3, 2013, a copy of the foregoing response was delivered via e-mail to the following:

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