

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Board of Zoning Adjustment



Appeal No. 18070 of Advisory Neighborhood Commission 6B, pursuant to 11 DCMR §§ 3100 and 3101, from a decision of the Zoning Administrator, Department of Consumer and Regulatory Affairs, made September 16, 2009, to issue a building permit (No. B0906887) for a private club in the CAP/R-4 District at premises 136 D Street, S.E. (Square 733, Lot 41).¹

HEARING DATE: June 15, 2010
DECISION DATE: June 15, 2010

ORDER DISMISSING APPEAL

This appeal was submitted on March 22, 2010 by Advisory Neighborhood Commission 6B (the “ANC” or the “Appellant”), whose boundaries encompass the property that is the subject of the appeal. The appeal challenges the issuance, on September 16, 2009, of a building permit that allowed interior alterations and indicated the proposed use of the subject property as a private club, on the ground that the proposed use of the property was not a “private club” as that term is defined in § 199 of the Zoning Regulations. Following a public hearing on June 15, 2010, the Board of Zoning Adjustment (“Board”) voted to dismiss the appeal as untimely.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Hearing. By memoranda dated March 23, 2010, the Office of

¹ The ANC’s initial letter, dated March 15, 2010, indicates that ANC 6B voted “to appeal the decision of the Z[oning] A[dministrator] to grant a construction permit to the Airports Council International (ACI) to renovate the property at 136 D Street SE as a ‘private club.’” This presumably refers to Building Permit No. B0906887, which was issued September 16, 2009 and contains the following description of work: “interior alterations and repairs for existing basement apartment. For use as a private club.” However, when completing the appeal form on March 17, 2010, the chairman of ANC 6B indicated that the appeal was taken from an administrative decision of the Zoning Administrator made on April 24, 2009. Accordingly, the April 24 date was used in the caption of the advertisement of this appeal. An earlier permit, No. B094512, was issued on April 24, 2009 for interior demolition at the subject property. Because the prior permit did not indicate the proposed private club use of the subject property – the crux of the ANC’s complaint – the Board considered this appeal as a challenge of the decision made September 16, 2009 to issue the building permit that allowed interior alterations and indicated the proposed use private club use of the property. The caption used in this Order has been revised accordingly.

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Zoning (“OZ”) provided notice of the appeal to the Office of Planning; the Zoning Administrator (“ZA”), at the Department of Consumer and Regulatory Affairs (“DCRA”); the Councilmember for Ward 6; ANC 6B, the Appellant and also the ANC in which the subject property is located; and ANC Single Member District 6B01. Pursuant to 11 DCMR § 3112.14, on April 7, 2010, OZ mailed letters providing notice of the hearing to the ZA and to ANC 6B – both as the Appellant and as the affected ANC. Notice was also published in the *D.C. Register* on April 9, 2010 (57 DCR 3089).²

Party Status. The Appellant, DCRA, and the owner of the subject property, Airports Council International-North America (“ACI-NA”), were automatically parties in this proceeding. The Board granted a request to intervene by Michael Wilson, who resides with his family in a row dwelling adjoining the subject property. There were no other requests for party status.

Motions to Dismiss. On June 7, 2010, the property owner submitted a motion to dismiss the appeal as untimely, citing the 11-month gap between the date of the ZA’s decision that was challenged by the ANC and the time the appeal was filed. In its prehearing statement, submitted June 9, 2010, DCRA also argued that the appeal was untimely. DCRA asserted that the Board would not have jurisdiction to hear the appeal unless the Appellant could establish that it could not have reasonably known of the ZA’s decision to allow ACI-NA to operate a private club at the subject property before January 21, 2010, that is, 60 days before the appeal was filed on March 22, 2010. According to DCRA, the Appellant should have known, and in fact did know, about the ZA’s decision, the construction at the subject property, and its proposed use well before January 21, 2010, given the issuance of a building permit and its posting on the subject property in September 2009; information from a neighbor concerning construction at the subject property, received by the Appellant in December 2009; and the Appellant’s contention that the permit was posted on the property in early January 2010.

FINDINGS OF FACT

1. The subject property is located at 136 D Street, S.E. The property is improved with a two-story plus basement row dwelling, which was previously used as a flat. The property was purchased by ACI-NA in May 2008 for use as a private club by its members.
2. The subject property is zoned CAP/R-4. A private club is permitted as a matter of right in that zone. (*See*, 11 DCMR § 330.5(g).)

² The Board regrets that the OZ apparently did not mail notice of the appeal or the hearing to the owner of the property that was the subject of this appeal. The property owner was represented by counsel and moved to intervene in this proceeding on June 7, 2010; that motion was deemed unnecessary since the owner of the property involved in the administrative decision at issue is automatically a party to an appeal. (*See* § 3199, definition of “party.”) The Board finds that, especially in light of the dismissal of the appeal, any error in failing to mail notice to the property owner was harmless.

3. On June 29, 2009, ACI-NA applied for a building permit for interior alterations and repairs to the basement apartment at the subject property. The proposed use of the entire property was as a private club.
4. Building Permit No. B0906887 was issued on September 16, 2009 for "interior alterations and repairs for existing basement apartment. For use as a private club."
5. The Board heard conflicting testimony about when the building permit was posted on the subject property. The property owner testified that the permit was posted by a contractor on or about September 28, 2009. The intervenor testified that the building permit was not posted until early January 2010, and the ANC stated that it learned of the posting from the intervenor by email dated January 14, 2010.
6. Information about the building permit, including the proposed use of the subject property, was publicly available on the DCRA website by mid-September 2009.
7. By email from the intervenor sent December 8, 2009, ANC 6B was informed that construction was underway at the subject property. The intervenor advised the ANC that he had contacted DCRA and was told that a building permit had been issued after the ZA decided that the proposed use of the property qualified as a matter-of-right "private club."
8. ANC 6B holds its regular monthly meetings on the second Tuesday of each month. On the first Tuesday of each month, the ANC's planning and zoning committee meets to review cases and to formulate its recommendations to the ANC. The ANC's executive committee sets the agenda for the next month's ANC meeting at the committee's meeting on the last Tuesday of the prior month.
9. After receiving another email from the intervenor, dated January 14, 2010, which stated that the building permit had been posted on the subject property earlier that month, the ANC's executive committee met on January 26, 2010 and placed the matter on the ANC's February agenda. Both the intervenor and the property owner were invited to a meeting of the ANC's planning and zoning committee, held February 2, 2010, and both made presentations to the committee.
10. The regular February meeting of ANC 6B was originally scheduled for February 9, 2010, but was rescheduled due to snow. At the monthly meeting held February 23, 2010, with a quorum present, ANC 6B heard presentations by the property owner and the intervenor, and then voted 9-0 to adopt a recommendation by its planning and zoning committee to appeal the ZA's decision.
11. By letter dated March 15, 2010 and received in OZ on March 19, 2010, ANC 6B requested that the Board "withdraw" the building permit. By email on March 19, 2010, OZ notified the

ANC that the appeal was incomplete for reasons specified in the email. The ANC responded with its filing received by OZ on March 22, 2010.

CONCLUSIONS OF LAW AND OPINION

Section 8 of the Zoning Act authorizes appeals of any decision “granting or refusing a building permit . . . based in whole or in part upon any zoning regulation”. D.C. Official Code § 6-641.07(f). An appeal must be filed within 60 days from the date the appellant “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.” (11 DCMR § 3112.2(a).) The Board may extend the 60-day deadline only if an appellant demonstrates that: (1) exceptional circumstances outside the appellant’s control, which could not have been reasonably anticipated, substantially impaired the appellant’s ability to file the appeal; and (2) the extension of time would not prejudice the parties to the appeal. (11 DCMR § 3112.2(d).) The Board lacks jurisdiction to hear any appeal that is not filed in a timely manner. *See, Economides v. District of Columbia Bd. of Zoning Adjustment*, 954 A.2d 427, 434-435 (D.C. 2008); *Waste Mgmt. of Md., Inc. v. District of Columbia Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121 (D.C. 2001); *Mendelson v. District of Columbia Bd. of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994) (the timely filing of an appeal with the Board is mandatory and jurisdictional).

Here, ANC 6B appeals the decision to grant a building permit, claiming that the private club use authorized by the building permit was not the use that the property owner actually intended to establish. “Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations.” *Basken v. District of Columbia Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008) (citations omitted).

The building permit that indicated the proposed use of the subject property was issued on September 16, 2009. Regardless of whether the building permit was posted immediately thereafter, as the owner claims, or in early January, as the Appellant contends, the Board finds that the ANC knew on December 8, 2009 that construction had begun at the subject property, when so informed by the intervenor, and thus had, or reasonably should have had, notice or knowledge that a building permit had been issued for the subject property by that date. In fact, the same email from the intervenor that informed the ANC of the construction also relayed the information that the intervenor had been told by DCRA that a building permit had been issued for the subject property. Therefore, the 60-day deadline for filing a timely appeal would have expired on February 8, 2010. However, the appeal was not filed for another six weeks, on March 22, 2010.

The Board cannot extend the 60-day deadline in the absence of exceptional circumstances outside the Appellant’s control that prevented the filing of the appeal earlier than March 22, 2010. The ANC itself does not claim exceptional circumstances; rather, the chairman testified

that the situation pertaining to the subject property did not warrant emergency treatment and that the ANC had acted appropriately in placing the matter on its agenda for the February meeting. The Board credits the chairman's testimony that the ANC is made up of unpaid volunteers and that all deliberations of the ANC and its committees take place in public meetings that are noticed well in advance to the community. The Board is also sympathetic to the difficulties the ANC would face in securing a suitable meeting space outside its normal meeting schedule and in identifying a time and place when a quorum could be present.

However, the ANC chairman acknowledged that relatively quick action by the ANC is possible in emergency situations, and that issues pertaining to the subject property could have been considered at the January meeting, even though the ANC claimed it lacked complete information then. The Board concludes that the ANC had adequate knowledge to file an appeal earlier than March 22, 2010 and could have taken quicker action to attempt to preserve its appeal rights, if it so desired. The Board does not agree with the ANC that it had "no way of knowing for sure when the Board's 60-day clock had begun" (Hearing Transcript of June 5, 2010, p. 118), nor does the Board agree with the ANC's decision not to act on an appeal until receiving information from the intervenor that the permit was posted on the subject property in early January.³

The Board is required to give "great weight" to the issues and concerns raised by the affected ANC. (Section 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d) (2001)).) In this case, ANC 6B is the Appellant. For the reasons discussed above, the Board concludes that the ANC has not offered persuasive advice that would cause the Board to find that the appeal was filed timely.

Based on the findings of fact and conclusion of law, the Board concludes that this appeal by ANC 6B does not satisfy the requirements of timeliness set forth in § 3112.2 of the Zoning Regulations. The Board cannot extend the 60-day deadline in the absence of evidence that exceptional circumstances outside of the Appellant's control prevented the filing the appeal earlier, nor has the ANC claimed exceptional circumstances. The Board must therefore find the filing of the appeal untimely, and because the lack of timeliness divests the Board of jurisdiction, the appeal must be dismissed. *Waste Mgt. of Md., Inc.*, 775 A.2d at 1121. The appeal of ANC 6B challenging a decision of the Department of Consumer and Regulatory Affairs to issue a building permit for a private club use in the CAP/R-4 District at 136 D Street, S.E. (Square 733, Lot 41) was not timely filed. Accordingly, it is therefore **ORDERED** that the appeal is **DISMISSED**.

VOTE: **3-0-2** (Meridith H. Moldenhauer, Shane L. Dettman, and Nicole C. Sorg to Dismiss the appeal; No Zoning Commission member and no other Board member (vacant) participating)

³ The Board finds no merit in the intervenor's contention that the building permit was ambiguous. While the box labeled "proposed use" is in fact blank on Building Permit No. B0906887, the "description of work" – the largest box on the permit – clearly indicates that the approved work would be undertaken "for use as a private club."

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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: DEC 17 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.