

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of Lawrence M. and
Kathleen B. Ausubel

Appeal No. 18300
ANC 3C

2011 OCT 28 PM 1:34

OWNERS' MOTION TO DISMISS APPEAL

**I.
INTRODUCTION**

The owners of the property which is the subject of this appeal, 2750 32nd Street Trust (hereinafter, the "Owners"), respectfully request that the Board dismiss this appeal as untimely filed. It is well settled that "the Board lacks jurisdiction to hear any appeal that is not filed in a timely manner." See BZA Appeal No. 18070 of ANC 6B, at p.4 (December 17, 2010), citing Economides v. DC Board of Zoning Adjustment, 954 A. 2d 427, 434-35 (DC 2008); Waste Mgmt. of Md., Inc. v. DC Board of Zoning Adjustment, 775 A. 2d 1117, 1121-22 (DC 2001); Mendelson v. DC Board of Zoning Adjustment, 645 A. 2d 1090, 1093 (DC 1994)(the timely filing of an appeal with the Board is mandatory and jurisdictional; if an appeal is not timely filed, the Board is without power to consider it).

The Board is bound to consider this threshold jurisdictional question first, prior to consideration of the appeal itself. BZA Appeal No. 17411 of Basken and Meyer, at p. 4 (March 23, 2006). Owners therefore respectfully request the Board's determination on this Motion to Dismiss prior to ruling on the Applicants' request for stay. This Motion to Dismiss is being filed and served 11 days in advance of the Board's scheduled November 8, 2011 consideration of the request for stay, in order to give Appellants sufficient time to respond, so that the Board can make a decision on this Motion at its November 8, 2011 public meeting.¹

¹ The Board's rules do not provide a specific time for filing a response to a Motion to Dismiss. However, the Board's rules indicate that seven days is sufficient time for filing a response to a motion for reconsideration. Owners respectfully request that this Board determine that this amount of time is sufficient for filing a response to this Motion.

BOARD OF ZONING ADJUSTMENT
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II.

SUMMARY OF ARGUMENT

The Zoning Regulations and the decisions of this Board and the DC Court of Appeals establish a very clear deadline for filing an appeal. 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, Section 3112(a). The Board may extend the 60-day deadline only if the appellant demonstrates that (1) exceptional circumstances outside the appellant's control, which could not have been reasonably anticipated, substantively impaired the appellant's ability to file the appeal; and (2) the extension of time will not prejudice the parties to the appeal. 11 DCMR Section 3112 (d).

By email memorandum dated June 14, 2011 (See Tab A), the Zoning Administrator informed Counsel for the Appellants in writing that after review of all of the relevant material submitted by the Owners and their Counsel, he found that "the proposed addition is in compliance with the underlying R-1-A base zone and applicable TSP provisions set forth in Sections 1513 and 1514. Accordingly, I will proceed to approve the revised plans for submitted building permit application #B1103986." Appellants' Form 125-Appeal, filed with the Board on September 8, 2011 (Ex. 1 of the Record) and their Statement in Support (Ex. 2) clearly indicate that the Appellants are "appealing the administrative decision of the Zoning Administrator" to issue Building Permit Number B1103986. Because the Appellants and their Counsel "had notice or knowledge of" the Zoning Administrator's June 14, 2011 decision to approve the plans for the project, the 60-day time period for filing the appeal began to run as of that date, and expired on August 12, 2011.

The issuance of the building permit by DCRA dated July 13, 2011 was nothing more than a reaffirmation of the Zoning Administrator's decision that he transmitted in writing to the Appellants' Counsel on June 14, 2011. It represents no new zoning decision, nor did the issuance of the permit start a new 60 day appeal period for the Zoning Administrator's decision. Because this appeal was not filed until well after the 60-day appeal period had expired, and because the Appellants can demonstrate no exceptional circumstances outside of their control that impaired their ability to act timely, and because an extension of the 60-day appeal period will prejudice the Owners, this appeal must be dismissed.

III. **THE FACTS**

Owners filed Building Permit Application No. B1103986 with the Department of Consumer and Regulatory Affairs on February 17, 2011, to construct an addition to their home at 2750 32nd Street, NW, Square 2119, Lot 25, which is zoned TSP/R-1-A. The plan includes an addition to the side of the dwelling, plus extensive landscaping, including the planting of 52 trees on the 19,358 sq. ft. site. The Appellants became aware of that permit application at some point shortly thereafter, and engaged Mr. Keith Pitchford, an arborist with Pitchford Associates, to assist them in their effort to stop the construction of the Owner's proposed addition. Mr. Pitchford wrote a letter dated March 23, 2011 to the Appellants in which he expressed his opinion about potential "irreparable harm" to a 30.5 in diameter white oak tree and a 12 in. diameter red maple tree that would result from the proposed construction of the addition.

The Appellants had several discussions with the Owners of the subject property in March and April, 2011, and the Owners agreed to submit a revised building plan to DCRA reflecting a change in the location of the proposed addition, in order to attempt to satisfy the Appellants. Subsequently, the Appellants and their Counsel met with Zoning Administrator Matthew

LeGrant on April 5, 2011 to express their concern about the technical sufficiency of the building permit application, as well as an allegation that the plans indicate the proposed removal of trees in violation of the TSP Regulations. The Appellants also submitted to Mr. LeGrant their arborist's report.

Owners and their landscape architect, Mr. Kevin Campion, met with Mr. LeGrant on April 14 to discuss the concerns expressed by the Appellants. Owners' Counsel met with Mr. LeGrant on April 18, 2011 to discuss the legal/regulatory issues involved in the application and the concerns expressed by the Appellants and their Counsel, and to make sure that Mr. LeGrant had copies of all of the filed documents. Mr. LeGrant indicated that he would contact the Urban Forestry Administration for additional input before making his decision. He also indicated at that meeting that he was missing certain other documents. Owners' Counsel and members of Owners' team subsequently sent supplemental documents and information to Mr. LeGrant, to insure that he had a complete set of all permit application and related materials. The information submitted to Mr. LeGrant included a comprehensive Tree Protection Plan, developed by the Owners' project arborist.

Appellant's Counsel wrote an email to Mr. LeGrant on April 21, 2011, reiterating the concerns expressed at their April 5 meeting, and opining that the Owners' plans would "fatally damage" significant trees. In early May, Mr. LeGrant requested Owners' Counsel to provide additional information relating to the project, which was delivered by Owners' Counsel several days later.

In separate emails on June 14, 2011, Mr. LeGrant notified Appellants' Counsel, and notified Owners' Counsel, that based on all of the information submitted by the Owners' team, he determined that the information submitted by the Owners demonstrates compliance with the TSP provisions and with the underlying R-1-A zoning regulations. In his email to the Appellants'

Counsel, Mr. LeGrant stated as follows: "Based on this information, I find that the proposed addition is in compliance with the underlying R-1-A base zone and applicable TSP provisions set forth in Sections 1513 and 1514. Accordingly, I will proceed to approve the revised plans for submitted building permit application #B1103986." When he made his decision, Mr. LeGrant had the report from the Owners' project arborist (indicating that with the tree protection measures proposed in the Owners' plan, the trees will be properly protected), a contrary report from the Appellant's arborist, and a June 3, 2011 memo from UFA with a list of additional tree protection recommendations that should be incorporated into the Owners' plans. Mr. LeGrant attached the June 3, 2011 UFA memo to his June 14 memos to Appellants' Counsel and to Owners' Counsel. Those UFA recommendations have been incorporated into the Owners' Tree Protection Plan that is part of the project documents.

After Mr. LeGrant sent his memoranda of June 14, Appellants requested a meeting with Mr. LeGrant, and also contacted the offices of Councilmember Mary Cheh and DCRA Director Nicholas Majett. Appellants met with Mr. LeGrant on July 15. According to the Appellants' notes of that meeting (Ex. 9 of the Record), Appellants informed Mr. LeGrant that they plan to file an appeal of his decision with the Board, because they believe that a special exception application must be filed by the Owners, under the TSP regulations, to construct the proposed building addition.

On July 22, Appellants' Counsel filed a Complaint for Injunction and a Motion for temporary, preliminary and permanent injunctive relief in D.C. Superior Court in a case called Lawrence M. Asubel, et al. v. 2750 32nd Street Trust, et al., Case No. 2011 CA 005856B. See Tab B. In their filing, Appellants indicated to the Court that they intend to file an appeal of Mr. LeGrant's decision with this Board.

Hearings were held in DC Superior Court on Appellants' TRO injunction petition on July 26 and 28, 2011. The Judge refused to enter a Temporary Restraining Order because it was apparent that a root investigation needed to proceed before determining whether or not construction could proceed without injuring the trees in question. Counsel for Appellants and Owners entered into a Praecipe setting forth an understanding for an air-spade investigation of certain roots which took place in the second week of August. Given the findings of this air-spade investigation, the project arborist directed that further investigation of the roots take place through a different method. Appellants opposed the project arborist's recommendations, and filed a second application for a Temporary Restraining Order seeking to enjoin any further activity under the Building Permit. After a hearing held September 14, 2011, the Court determined not to grant Appellants' second request for a Temporary Restraining Order.

This appeal was filed with the Board on September 9, 2011.

IV. **SECTION 3112.2 OF THE ZONING REGULATIONS**

Section 3112.2 of the Zoning Regulations, 11 DCMR, Section 3112.2, establishes a filing deadline of 60 days from the time that the Appellant has actual knowledge of the decision complained of, or reasonably should have had knowledge of the decision complained of. The Zoning Commission adopted this provision in Order No. 02-01, dated February 7, 2003, "in order to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals." See Tab C, Order No. 02-01, at p. 1. The adoption of Section 3112.2 in Order No. 02-01 "codifies the principles established in Waste Management (supra), and prior court decisions by requiring all appeals to the Board pursuant to the Zoning Act to be filed within sixty (60) days of the date the appellant had actual or constructive knowledge of the administrative decision

complained of." Id. at p. 2.² (emphasis added). In order to address those instances in which an appellant may not have notice or knowledge of a decision until construction is underway, the Zoning Commission included a new paragraph (b) in Order No. 02-01 that

"no appeal may be filed later than ten (10) days after construction is 'under roof' ... Since the sixty (60) day appeal period is based upon actual or constructive notice or knowledge of the decision complained of rather than the actual date of the decision complained of, the Commission's intent in paragraph (b) was to establish a firm deadline beyond which no appeal could be filed. Accordingly, the Commission ... added a new paragraph (c) to clarify that all appellants have at least sixty (60) days from the date of the decision complained of in which to file an appeal... The cap in paragraph (b) on the appeal period, however, does not relieve an appellant of the responsibility of filing a timely appeal, within sixty (60) days of actual or constructive notice or knowledge of the decision complained of." Order No. 02-01 at pp. 2-3. (emphasis added).

V.

THIS APPEAL WAS UNTIMELY FILED AND MUST BE DISMISSED

A case with a very similar notice issue is BZA Appeal No. 17411 of Paul A. Basken and Joshua S. Meyer (March 23, 2006), affirmed, Basken v. DC Board of Zoning Adjustment, 946 A. 2d 356 (DC 2008). See Tab D. Basken involved the expansion, conversion and occupancy of a three-unit apartment building into a seven-unit condominium. Two building permits were issued--one on September 9, 2004 for an addition to the existing building, and the other on December 17, 2004 authorizing conversion of the building to a seven-unit condo, "subject to zoning approval of the number of units in zone". After issuance of the second building permit in December, the appellants in that case voiced their zoning concerns about the project with DCRA, with their Councilmember, with their ANC and with the owner/developer of the property at issue on a number of occasions.

² In Waste Management, the DC Court of Appeals held that "in the absence of exceptional circumstances substantially impairing the ability of an aggrieved party to appeal--circumstances outside of the party's control--we conceive of two months between notice of a decision and appeal therefrom as the limit of timeliness." Waste Management, supra, at 1122. (emphasis added).

On May 26, 2005, in response to an inquiry from the ANC, the DCRA Director sent a letter to the ANC in which he acknowledged an error by the Office of the Zoning Administrator in the review and issuance of the building permit. His letter also stated, however, that "the Zoning Administrator will not deny the property owners a Certificate of Occupancy for the property on the basis of the zoning review error".³ The record in that case reflects that the appellants received a copy of that letter by May 27, 2005. The certificate of occupancy for the seven-unit building was issued 14 days later, on June 10, 2005. Basken v. DC BZA, *supra*, at 358-60.

Basken and Meyer filed their appeal to the Board on August 5, 2005, which was less than 60 days after the certificate of occupancy was issued, but 70 days after the appellants had received actual notice of the zoning decision to issue the certificate of occupancy. The Board treated the December 2004 building permit issuance as the notice of the zoning decision. However, the Board also found that even if the appellants' confusion as to the language on the December 17, 2004 building permit about approval of seven units "subject to zoning approval" was deemed reasonable and created an extenuating circumstance beyond their control that impaired their ability to file an appeal, "that circumstance ended on May 26, 2005, the date of the DCRA Director's letter to the ANC." *Id.* at 362. The Board found that the appellants had actual knowledge of the decision to issue the certificate of occupancy on May 27, 2005, "and concluded that there can be no doubt that by May 27, 2005, [the appellants] knew that it was time to appeal." *Id.* The Board found that the date of issuance of the certificate of occupancy "did not

³ The DCRA Director's letter to the ANC also stated that the ANC "has the right to appeal this decision to the [BZA]." Basken v. DCBZA, *supra*, at 359. However, this additional language is not what makes this an appealable decision. The ANC was not represented by zoning counsel in that case. In this case, the Zoning Administrator's June 14, 2011 notice of his decision was sent to the Zoning Counsel for the Appellants. The Zoning Regulations are quite clear on the time and process for filing an appeal, and the Appellants' Zoning Counsel did not need instructions on how or when to file an appeal to this Board.

start the time to appeal the zoning decision, because DCRA made no additional zoning decisions when it issued the C of O." Id.⁴

In upholding the Board's dismissal of the appeal for lack of timeliness, the Court of Appeals in Basken held that "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." The Court found, however, that the language in the December 2004 building permit was ambiguous and therefore did not trigger the 60-day appeal period. Rather, the Court concluded that the May 26, 2005 letter from the DCRA Director clearly indicated that a zoning decision had been made, and was the date from which the 60-day appeal period ran. Id. at 364.

The Court in Basken also held as follows:

Further, and importantly for our decision, the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice. *See* D.C. Code § 6-641.07 (f) (authorizing appeals from "any other administrative decision") and 11 DCMR § 3112.2 (providing for an appeal by any person aggrieved by "any order, requirement, decision, determination, or refusal" within sixty days from the date the person knew or reasonably should have known of "the decision complained of"). In addition, our case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision, *See Goto v. District of Columbia Bd. of Zoning Adjustment*, 423 A.2d 917, 924 (D.C. 1980) (upholding BZA decision that "began to run the clock with [Zoning Administrator] Fahey's letter of January 6, 1976"), and may start the time for appeal by a person who has notice of the letter. Id. at 366.⁵

⁴ In dismissing an appeal in a later case, this Board has held that, for purposes of applying Section 3112 to determine timeliness, there is no distinction between a building permit and a certificate of occupancy. BZA Appeal No. 17391 of Diana deBrito and Jonathan Gottlieb (October 2, 2006) at footnote 5, affirmed, deBrito v. DC Board of Zoning Adjustment, No. 06-AA-1298 (DC Court of Appeals, August 30, 2007).

⁵ The Court in Goto held that even an oral ruling from the Zoning Administrator is sufficient for the purpose of filing an appeal. The Court in Goto noted that there was nothing in the regulations at that time providing that only written rulings may be appealed, nor is there anything to that effect in the DC Code or the Zoning Regulations today. Rather, the Court in Goto found that an appeal may be taken from "any decision of an administrative officer..." on a zoning matter. 423 A. 2d at 924.

Accord, BZA Appeal No. 17830 of L. Napoleon Cooper (February 18, 2009) (C of O is appealable if it provides the first notice of a particular zoning decision, but "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", quoting Basken, 946 A. 2d at 367-68) (emphasis added).

In the instant case, similar to the Basken case, the Ausubels and their counsel were notified by the Zoning Administrator in writing on June 14, 2011, in clear and unambiguous terms, of his decision that the building permit application and revised plans complied with both the R-1-A Zoning Regulations and the TSP Overlay Zoning Regulations, and that he had determined to approve the revised plans for the building permit. As in the Basken case, after learning of the June 14, 2011 zoning decision, rather than filing their appeal to the Board, the Ausubels and their Counsel sought to voice their concerns with the Zoning Administrator, their Councilmember, and the DCRA Director. "A party who chooses to engage in negotiations or other ways to resolve a dispute does not thereby extend its time for filing an appeal." BZA Appeal No. 17391 of Diana de Brito and Jonathan Gottlieb (October 2, 2006) at p. 7, citing Waste Management, supra. See also BZA Appeal No. 16849 of Robert Lehrman (May 8, 2003), at p. 6. The subsequent issuance of the building permit to the Owner in this case one month later yielded no new zoning decision, nor did it trigger a new 60-day appeal period.

When the Ausubels met with the Zoning Administrator on July 15, subsequent to the July 13 permit, they indicated to the Zoning Administrator "that they plan to file an appeal to BZA, as they believe that this proposed construction is in violation of the TSP." See Exhibit 9, Appellant's Minutes from July 15, 2011 Meeting with Matt LeGrant (regarding 2750 32nd St. NW building permit), at p. 7. However, instead of filing their appeal to this Board, the Ausubels and their attorneys filed a "Complaint for Injunctive Relief" and a "Motion for Temporary Restraining Order and Preliminary Injunction" in the DC Superior Court on or about July 22,

2011, seeking, inter alia, temporary, preliminary and permanent injunctive relief. In their filing with the Court, the Ausubels indicated their intention to file an appeal with this Board. Nonetheless, they did not file their appeal with this Board until September 9, 2011, 86 days after actual notice of the Zoning Administrator's decision.

Both the DC Court of Appeals and this Board have held that "the Board need 'not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision.' " BZA Appeal of de Brito and Gottlieb, supra, at p. 7, citing Waste Management, supra. In this case, the Ausubels told the Zoning Administrator on July 15, 2011 of their decision to appeal to this Board, and they reiterated their decision and intention to the Court on July 22, 2011. But, they then decided to file their appeal 86 days after they had received written notice and actual knowledge of the zoning decision that they seek to challenge.

Because the appeal was filed more than 60 days after the Appellants had actual knowledge of the decision complained of, this appeal was untimely per 11 DCMR, Section 3112.2(a) and must be dismissed.

VI.
THERE IS NO BASIS FOR AN EXTENSION OF THE 60-DAY TIME PERIOD FOR
FILING THIS APPEAL

Because the appeal was untimely filed per Section 3112(a), the inquiry shifts to a consideration under Section 3112(d) of whether the Appellant can demonstrate that (1) there are exceptional circumstances outside the Appellants' control, which could not have reasonably been anticipated, that substantially impaired the Appellants' ability to file this appeal to the Board, and (2) the extension of time will not prejudice the Owner. Even assuming that this inquiry is justified, the Appellants would be required to satisfy both tests, but cannot satisfy either one.

A. There Are No Exceptional Circumstances Outside of Appellants' Control that Substantially Impaired Their Ability To File A Timely Appeal.

The Appellants, who were represented by Zoning Counsel, clearly decided by July 15, 2011, and perhaps even earlier, that they would file this appeal to the Board. At that point, the Zoning Administrator's decision that is the subject of this appeal was 32 days old. However, rather than file a timely appeal of the Zoning Administrator's decision with this Board, the Appellants and their Counsel concentrated their legal efforts on filing and prosecuting a complaint and a motion for injunctive relief in the DC Superior Court, seeking "to enforce the zoning laws of the District of Columbia." They also informed the Court on July 22 in their initial pleadings that they intended to file this appeal with the Board. Between July 22 and August 12⁶ the Appellants and their Counsel engaged in substantial litigation in Superior Court. Appellants filed two separate motions seeking injunctive relief. Both motions were afforded hearings where evidence was presented, and neither motion was granted.

The Appellants and their Counsel were clearly active during that time with efforts seeking to advance their legal position, but only in the Superior Court. They have alleged no exceptional circumstances that were beyond their control, and which could not have been reasonably anticipated, that prevented them from filing a timely appeal to the Board, nor can they reasonably do so. This Board has concluded in other cases that an Appellant who engages in other activity to attempt to resolve a dispute does not by that action extend its time for filing an appeal to this Board. BZA Appeal of deBrito, et al., supra.

⁶ The 60th day after the Zoning Administrator's June 14 decision was August 13, which was a Saturday. In order for the appeal to have been timely, the Appellants would have had to file it within 60 days from the date of the Zoning Administrator's decision, or in this case, by Friday, August 12.

B. An Extension Of Time Will Prejudice The Owners

An extension of time will have a substantial impact on the Owners. The Owners received a lawful building permit dated July 13, 2011 to construct the proposed addition to their home at 2750 32nd Street, NW. They have commenced construction activity. Any delay to the construction will prejudice the Owners because of the substantial financial costs that will result from postponement of construction, pending an appeal. See Tab E. Their contract with the general contractor began to run upon issuance of the project's building permit. Under the terms of the contract, the general contractor is entitle to \$38,200.80 per month for each month the project is delayed in order to offset the contractor's lost opportunity costs, even if no work is performed. Additionally, Owners' home was acquired using available cash and investments, and they cannot obtain permanent mortgage financing until the construction is complete. As a result, each month of delay in construction, is costing Owners approximately \$20,132.53 per month in financial costs. Owners expect the total financial cost incurred as a result of a delay to construction pending appeal to be approximately \$58,333.33 per month. This sum reflects investment income lost on funds used to purchase the home, the financial impact resulting from their inability to utilize the home mortgage interest deduction, the amount due to the contractor for each month of delay, as well as other expenses incurred as a result of the delay.

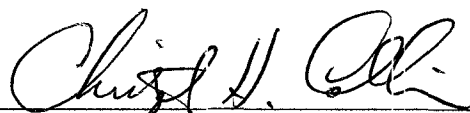
**VI.
CONCLUSION**

Based upon the clear language of the Zoning Regulations and upon prior rulings by this Board and by the DC Court of Appeals, this appeal has been untimely filed by the Appellants.

Further, there is no basis for an extension of the 60-day appeal period. Accordingly, the Board is without jurisdiction to hear this appeal, and the appeal must be dismissed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Christopher H. Collins

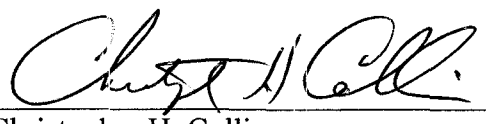
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2011, a copy of the foregoing was sent by hand to the following:

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