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

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Appeal of Lawrence M. and
Kathleen B. Ausubel

Appeal No. 18300
ANC 3C

APPELLANTS' OPPOSITION TO OWNERS' MOTION TO DISMISS APPEAL

Owners' motion to dismiss Appellants' appeal as untimely distorts the facts of this case and completely ignores case law that controls the issue. Whether out of deception or ignorance, Owners even go so far as to disregard the relevant holding in the principal case used to support their motion, *Basken v. DC Board of Zoning Adjustment*, 946 A.2d 356 (DC 2008), which actually undermines their position.¹ The correct triggering event for the appeal period is the July 13, 2011 issuance of building permit B1103986 (the "Building Permit"), not Zoning Administrator, Matthew LeGrant's June 14, 2011 email to Appellants. The June 14 email is ambiguous at best and therefore not a "decision, determination, or refusal ... complained of," under Owners' own case law. 11 DCMR, Section 3112.2(a); *see Basken*, 946 A.2d 356, 366 (holding "[b]ecause [the DCRA Director's] May 25, 2006 [letter to appellants notifying them of adverse decision] was *not ambiguous*" it constituted a Section 3112.2 "decision" that triggered the 60 day limitation period) (*emphasis added*). As a result, Appellants' September 9, 2011 appeal is timely as it was filed before the 60 day limitations period – July 13, 2011 to September 12, 2011 – closed.

Even if the Board of Zoning Adjustment ("BZA" or "Board") should find otherwise, Appellants' appeal should not be dismissed as untimely, because (1) there were exceptional circumstances outside of Appellants' control, which could not have reasonably been anticipated

¹ This is not the first time Owners have glossed over relevant case law. See related Opposition to Defendants' Motion to Dismiss in DC Superior Court, hereto attached as Exhibit A (note: The Superior Court denied Defendants' Motion to Dismiss on November 3, 2011). It is also troubling that this motion to dismiss was filed just over a week before the scheduled November 8, 2011 hearing on this appeal, when counsel for Owners entered an appearance in this case over a month ago, on September 20, 2011.

and that substantially impaired Appellants' ability to file this appeal, and (2) the extension of the 60 day limitation period would not prejudice Owners, who had been on notice of Appellants' intention to file the instant appeal since July. 11 DCMR § 3112.2(d).

For these reasons, Appellants' September 9, 2011 appeal should be ruled as timely and Owners' motion should be summarily denied.

FACTS

In February 2011, Owners filed six applications for building permits seeking authority to expand and alter the existing house on their property. Among the filings was a February 17, 2011 application for a building permit to construct a large addition on the south side of the subject property, close to Appellants' home. Owners' property is classified within the R-1-A Zone District and is subject to the requirements of the Tree and Slope Protection ("TSP") Overlay Zone established under D.C. Mun. Reg. Title 11 § 1511, *et seq.*

Concerned with the adverse effects the proposed construction would have on several trees on the subject property that lay between Owners' home and Appellants' home, Appellants engaged an arborist, Keith C. Pitchford ("Mr. Pitchford"), to conduct an examination and provide his opinion about how the proposed construction might impact the trees at risk. Mr. Pitchford noted that the at-risk trees qualified for protection under the TSP Overlay, and that he had strong concerns that the proposed construction would require the severing of structural roots of at least one of the trees at risk, ultimately concluding that "this is very bad news for [Appellants] since these are roots that keep the tree from falling in your direction." Additionally, Mr. Pitchford advised that the proximity of the root pruning line to the trees themselves posed a significant threat of fatal damage to the trees. *See* Pitchford Associates letter, March 23, 2011, Exhibit D to Ausubel Appeal (BZA Exhibit No. 5).

After several failed attempts to discuss the matter directly with the Owners, Appellants met with DCRA Zoning Administrator, Matthew LeGrant, on April 5, 2011 to express their concerns that Owners' proposed addition violated the TSP Overlay ordinance and would fatally damage the protected trees. During this meeting, Appellants reviewed site plan documents in Mr. LeGrant's possession that reflected measured tree *diameters* and not tree *circumstances* as stated in the TSP regulations, but at that time, Appellants did not have a copy of the plans, as they were still under review at DCRA. On April 21, 2011, counsel for Appellants inquired with Mr. LeGrant as to the status of his review and requested the opportunity to review any revisions that had been submitted by Owners. *See Exhibit A, attached.* The purpose of this request was to review the plans, which DCRA would not release to Appellants due to the permit still being under review.

On June 14, 2011, Mr. LeGrant notified Appellants by informal email ("June 14 email") that he "will proceed to approve the revised plans for submitted building permit application #B1103986." In his email, Mr. LeGrant also attached a copy of a report prepared by the Urban Forestry Administration ("UFA") dated June 3, 2011 ("UFA Report"), which directly contradicts his preliminary position that the Building Permit application meets the requirements of the TSP Overlay. Among other things, the UFA Report suggested numerous changes to planned construction prior to the issuance of any permit and noted that "UFA has great concern and does not feel that these trees will survive the construction in the long term." *See Exhibit E to Ausubel Appeal (BZA Exhibit No. 3.* Immediately following the June 14 e-mail from Mr. LeGrant, Appellants counsel responded and again requested a copy of the revised plans, which had still not been made available through the DCRA records office or file room, as the permit application remained pending. *See Exhibit B, attached.* Additionally, on June 15, 2011, concerned that an

adverse decision might be made in the future, Appellants requested a follow-up meeting with Mr. LeGrant to discuss his preliminary position. Appellants continued their efforts to set up a meeting over the next three weeks, but Mr. LeGrant did not respond until June 21, in which he denied Appellants' request for copies of the plans, stating "the plans are, as you are aware, public information. You may request a copy from DCRA's Fileroom if the owner has not yet provided you with a copy." *See* Exhibit B, attached. Appellants made numerous attempts to obtain the copies from DCRA's Fileroom to no avail, each time being told that DCRA cannot release plans or permit documents associated with permit applications that have not yet been approved. On July 6, 2011, Appellants filed a Freedom of Information Act ("FOIA") Request seeking copies of all documents, plans, and correspondence associated with the Building Permit. *See* Affidavit of Rachelle Llontop, attached as Exhibit C.

On June 24, 2011, with no permit having yet been issued, D.C. Councilmember Mary Cheh's office contacted DCRA Director Nicholas Majett to seek his assistance in the matter. On July 12, 2011, again with no permit having been issued, D.C. Councilmember Cheh made a second request that Mr. Majett look into the matter and "determine what is going on." *See* Exhibit D, attached. On July 12, Majett stated he would have the plans re-reviewed. *See* Exhibit E, attached. Finally, on July 13, 2011, Mr. Majett told Appellants that Mr. LeGrant would meet with them on July 15, 2011 to discuss the undecided matter. *See* Exhibit F, attached. Unbeknownst to Appellants, and despite the scheduled July 15 meeting to discuss the topic, Mr. LeGrant issued Building Permit No. B1103986 that same day: July 13, 2011. *See* Building Permit, Exhibit G, attached.

On July 15, Appellants met with Mr. LeGrant, Justin Bellow from DCRA, Judy Hubbard from D.C. Councilmember Cheh's office, and Milan Davis from UFA. At this meeting,

Appellants again conveyed their concerns about the proposed construction on Owners' property, underscored by their own arborist and the UFA Report. Appellants also highlighted the numerous inaccuracies in Owners' building permit application, including a false drawing of the Critical Root Zone around one of the endangered trees that according to Mr. Davis was "misleading." Mr. Pitchford confirmed this, adding that "all of the critical root zones as shown on this plan are not in accordance with industry standards, and, I believe, are being knowingly deceptive with the intent of misleading the reviewer." Mr. LeGrant indicated that his July 13, 2011 decision to issue the Building Permit was final, and the Appellants responded that they intended to appeal.

In response to Appellants' July 6, 2011 FOIA request, DCRA invoked their statutory 10 business day extension period, meaning it would be at least August 10 before DCRA released any of the requested documents. *See* Exhibit H, attached. Upon notification that the Building Permit had been issued, however, Appellants requested that DCRA make available through the Fileroom the plans and documents that had been subject to FOIA while under review. The Fileroom again denied Appellants' request, but on July 18, 2011, provided a copy of an issued Building Permit alone and the wrong one: B1103930, for an addition to Owners' kitchen. On July 26, 2011, Appellants inquired with DCRA's FOIA Officer as to the status of the pending FOIA request, and were informed that "the application documents (for the permits) are available at the Records Room, and do not require a FOIA request to obtain. Typically once the permits are issued they are available in this manner, however if you are unable to obtain access to them at the Records Room, please let me know." *See* July 26 e-mail correspondence between Rachelle Llontop, Kinley Bray, and Hamilton Kuralt, Exhibit I, attached.

On July 26, Appellants phoned the Records Room at DCRA and were informed that the files relating to Building Permit No. B1103986 could not be located. On July 27, 2011, Appellants' representative inquired in person at the DCRA Records Room, and was told that it would take 7-10 business days to process the request, despite the FOIA Officers' advice that the plans and permits were "available" in the Records Room. *See* Affidavit of Rachelle Llontop. Appellants then made multiple inquiries with DCRA's Records Room and FOIA Officers to obtain copies of the plans and documents submitted in support of Owners' application for Building Permit No. B1103986. *Id.* Ultimately, Appellants were notified on August 11, 2011 that the original FOIA request had been completed and the plans and documents requested were available for pick up, and Appellant retrieved these documents on August 12. *Id.* After reviewing the plans and documents filed in support of Building Permit No. B1103986 with their certified arborist and other consultants, Appellants prepared the instant appeal, which was filed with the Board of Zoning Adjustment on September 9, 2011.

ARGUMENT

I. ZONING ADMINISTRATOR LEGRANT'S JUNE 14, 2011 EMAIL DID NOT TRIGGER THE 60 DAY LIMITATIONS PERIOD TO FILE AN APPEAL WITH THE BZA. THE EMAIL WAS AMBIGUOUS AT BEST, AND OFFERED AMID SURROUNDING CIRCUMSTANCES THAT LED APPELLANTS TO REASONABLY BELIEVE NO DECISION TO COMPLAIN OF HAD BEEN MADE.

11 DCMR § 3112.2(a) requires an appeal to the BZA 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 earliest." § 3112.2(a). Appellants, however, had no knowledge or any reason to know that a final, appealable decision had been made until July 13, 2011.

As Owners correctly note, in some cases, “a letter from DCRA or the Zoning Administrator conveying a zoning decision *may* be an appealable decision” that triggers the limitation period. *Basken*, 946 A.2d 356, 366 (D.C. 2008) (*emphasis added*). But this is not true where the administrative communication is “ambiguous evidence of the intent to utter a final decision.” *Basken*, 946 A.2d 356, 365 (*quoting Donnelly Assocs. v. District of Columbia Historic Pres. Review Bd.*, 520 A.2d 270, 275 (D.C.1987) (holding that because an oral vote by the DC Historic Preservation Review Board was ambiguous as to whether a appealable decision had been made, the relevant limitations period had not yet accrued)). In fact, the *Basken* court – the case upon which Owners principally rely – explicitly states that the Zoning Administrator’s letter in that case was an appealable decision precisely because it “was not ambiguous,” as it contained explicit advice that the determination was final and invited the recipient to appeal such determination. *Id.* at 366.

Mr. LeGrant’s June 14 informal email is, however, at best, ambiguous. *Basken* at 365. The email vaguely concludes, “I will *proceed* to approve the revised plans for submitted building permit application #B1103986.” *See* Exhibit (*emphasis added*). No indication is given whether a decision was actually made or not, and no time table is provided for when Mr. LeGrant will “proceed” to make an appealable decision. Given that several reasonable interpretations can be made from this confusing language (*e.g.*, a decision will be made sometime in the indefinite future), the email is ambiguous on its face and should be ruled as such. *See Beck v. Continental Cas. Co. (In re May)*, 936 A.2d 747, 751 (D.C. 2007) (holding a writing “is ambiguous if, on its face, it has more than one reasonable interpretation”). In light of this ambiguity, it is understandable and reasonable that Appellants were under the impression that an appealable decision had not been made.

The ambiguity is exacerbated by the surrounding circumstances following the June 14 email. Until the issuance of the Building Permit on July 13, Appellants had every indication that an appealable decision was not – or possibly would not - be made. First, Mr. LeGrant attached a copy of the UFA Report that directly contradicts his preliminary position, recommending numerous changes to the planned construction prior to the issuance of any permit and Mr. LeGrant gives no indication of whether such conditions will be a requirement of the permit. Second, in the same email and immediately following, Mr. LeGrant ignores or denies multiple requests by Appellants to inspect the plans and information upon which the decision has purportedly been reached. Ten days after what Owners claim was a final decision, no permit had been issued, and multiple e-mails between Mr. LeGrant, Mr. Majett, Councilmember Cheh, and the Appellants indicated that a final decision had not yet been made; for example, on July 12, 2011, Appellants were copied on an email from D.C. Councilmember Cheh asking Mr. Majett to look into the matter and “determine what is going on.” Mr. Majett responded, indicating the plans were to be reviewed again. Mr. LeGrant himself further indicated a decision had not been made by offering to meet with Appellants as late as July 13, 2011 to discuss the matter. Taken together, it is clear why Appellants did not convey their intention to file an appeal with the BZA until July 15, 2011; until July 13, 2011, they had no reason to think a decision had been made.²

Contrary to Owners’ mischaracterization of the facts, the issuance of the building permit was not a “reaffirmation of the Zoning Administrator’s decision” on June 14. Owner’s motion to dismiss, pg. 3. No decision existed to affirm. Conversely, by July 13, there could be no mistake as to whether a decision regarding the Building Permit had been made. The issuance of the

² To add to the ambiguity, Mr. LeGrant was frequently unresponsive despite numerous requests from June 14, 2011 to July 13, 2011. Even then, Appellants had to be told by a third party that Mr. LeGrant would finally meet with them. *See* Majett July 13, 2011 email.

Building Permit is clearly the event that triggered the 60 day limitation period to file Appellants' appeal.

It should be noted that § 3112.2(c) – which states that notwithstanding § 3112.2(a), “an appellant shall have a *minimum* of sixty (60) days from the date of the administrative decision complained of in which to file an appeal” – was added to § 3112.2 to prevent exactly this type of confusion where there is ambiguity over appellant’s “knowledge” of the decision. 11 DCMR § 3112.2(c). If Mr. LeGrant’s email of June 14 had arrived more than 60 days before the issuance of the Building Permit, Appellants would have lost the right to appeal the permit completely – an absurd result. Indeed, “[i]n situations where ambiguity exists regarding the date of an order or decision,” the DC Court of Appeals will “resolve [] the ambiguity in favor of the party seeking review.” *Basken* at 365 (quoting *Askin v. District of Columbia Rental Hous. Comm’n*, 521 A.2d 669, 675 (D.C. 1987)). The ambiguity surrounding the June 14 email should similarly be resolved in Appellant’s favor, and the Owners’ motion to dismiss this appeal as untimely should be dismissed.

II. THE FACTUAL CIRCUMSTANCES IN THIS APPEAL ARE SIGNIFICANTLY DIFFERENT THAN IN *BASKEN*.

Owners try to analogize Appellants’ case to *Basken v. DC Board of Zoning Adjustment*, 946 A.2d 356 (DC 2008) in their motion. Even upon the briefest of glances, *Basken* is anything but “a very similar notice issue... .” as Owners claim. Owner’s motion to dismiss, pg. 7. In reality, *Basken* and the case at hand possess several stark contrasts that separate the two.

First, Appellants properly filed their appeal within 60 days after the building permit was issued. The *Basken* petitioners, however, did not file their appeal until almost a year after the building permit complained of was issued. *Id.* at 360. Second, and more importantly, the DCRA Director’s correspondence to the *Basken* petitioners could not have been clearer that an

appealable decision had been made. The Director’s formal letter definitively announced to petitioners that the “Administrator will not deny the property owners a Certificate of Occupancy for the property on the basis of the zoning review error.” *Id.* at 359. And, in case there was any doubt, the Director additionally informed petitioners they have “the right to appeal this decision to the [BZA].”³ *Id.* Taken together, the Board found, and the Court of Appeals affirmed, that “there can be no doubt that by [the date of the Director’s letter], [petitioners] knew that it was time to appeal.” *Id.* at 366.

In contrast, Appellants in the instant case had only an ambiguous email from the Zoning Administrator – with an attachment that directly contradicted his preliminary position – informing Appellants he would “proceed” to take action regarding building permit application #B1103986.” Given this email and the surrounding circumstances, it cannot be also said that there was “no doubt” that Appellants in this case “knew that it was time to appeal.” *Basken* at 366.

III. EVEN IF THE BOARD FINDS THE JUNE 14 EMAIL TRIGGERED THE 60 DAY LIMITATIONS PERIOD, THE PERIOD SHOULD BE EXTENDED, PURSUANT TO SECTION 3112.2(d).

Under § 3112.2(d), the 60 day limitations period for the filing an appeal may be extended if: (1) there are exceptional circumstances outside of Appellants’ control, which could not have reasonably been anticipated and that substantially impaired the Appellants’ ability to file this appeal, and (2) the extension of the 60 day limitation period would not prejudice Owners. *Id.* Appellants satisfy both requirements, permitting an extension of the 60 day limitations period.

A. Appellants Were Prevented From Filing This Appeal By Unanticipated Circumstances Beyond Their Control.

³ Owners try to make light of this fact, arguing “this additional language is not what makes this an appealable decision.” Owners’ Motion, pg. 8, n.3. This directly contradicts the Court, however, which stated that the additional language was “an unambiguous signal that the decision was made.” *Id.* at 365.

Despite numerous requests made by Appellants for the building permit application, the Records Department in the Office of Zoning refused to comply.⁴ *See* Affidavit of Rachelle Llontop. The Board's Rules of Procedure require that the applicant must aver in its initial appeal "each and every exception to the administrative decision, in specific detail." *See* BZA Form 125. Without having reviewed all of the documents upon which the Zoning Administrator relied in allowing issuance of the Building Permit, Appellants could not proceed with their appeal without taking a significant risk that it would fail to aver one or more alleged errors in the Zoning Administrator's decision-making process. Since amendment of applications and appeals requires leave of this Board, the Appellants could not reasonably file their appeal until they were (a) in receipt of the supporting documents in the application, (b) had reviewed those supporting documents with experts to conclude once and for all that an error (or errors) had been made in approving the Building Permit, and (c) had prepared the appeal documents with sufficient detail to meet the Board's Rules of Procedure.

Appellants made multiple attempts to obtain the documents, and to expedite that process, but it was more than three months after Appellants' first request for such documents that they were produced by DCRA. Due to this delay, which was outside the control of Appellants and unanticipated, especially given the early nature of the FOIA request, Appellants were prevented from filing this appeal to the BZA within the time period during which Owners allege the appeal period ran.

B. Owners Would Not Be Prejudiced By An Extension Of Time.

⁴ Notwithstanding Appellants' requests and DCRA's obstructionism, the Records Department at DCRA, including both the Records Room and Fileroom (where plans are kept), is required by law to make all building permit applications public record. *See* D.C. Code § 2-536(a)(8a).

Owners knew as early as July 15, 2011 that Appellants planned to file this appeal, a fact they even admit in their motion. *See* Owners' motion to dismiss, pg.5. Owners admit they were reminded again on July 22, 2011 when Appellants filed a related Complaint for Injunction and Motion for temporary, preliminary and permanent injunctive relief in D.C. Superior Court. *Id.* Because they were well aware that the Building Permit was subject to a potential appeal with the BZA and pending litigation in civil court, Owners were on notice that beginning significant and costly construction without a final adjudication in the matter was at their own risk.

CONCLUSION

Owners have completely missed the mark in their motion to dismiss. 11 DCMR § 3112.2(a) requires knowledge or constructive knowledge of a decision complained of before the 60 day limitations period can accrue. Controlling case law is very clear that the decision complained of cannot be ambiguous so as to cause confusion as to the true date of the triggering event. The June 14 email Owners claim triggered the 60 day limitations period is ambiguous on its face. Unlike the circumstances in *Basken*, the Appellants here had every indication to think no decision had been made. This ambiguity ceased on July 13, 2011 when building permit B1103986 was issued. The limitation period thereby accrued and Appellants timely filed this appeal within the 60 day window, on September 9, 2011.

In the alternative, Appellants submit that the limitation period should be permissibly extended under § 3112.2(d) because exceptional and reasonably unanticipated circumstances prevented Appellants from filing its appeal. As such, when are not prejudiced. Moreover, the extension would not prejudice Owners; they knew well in advance that Appellants intended to file this appeal before beginning construction, and in fact have not begun significant construction

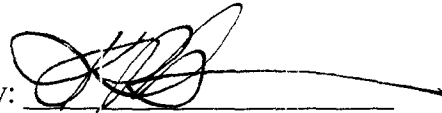
efforts under the Building Permit due to the pending litigation at the Superior Court and the instant appeal.

For all of the foregoing reasons, Appellants respectfully submit that Owners' motion to dismiss should be denied in its entirety and that Appellants appeal be ruled as timely.

Respectfully submitted,

ARENT FOX LLP

By:

A handwritten signature in black ink, appearing to be 'Kinley R. Bray', written over a horizontal line.

Kinley R. Bray

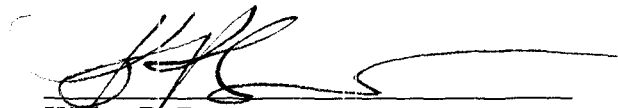
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November, a copy of the foregoing was mailed, first class, postage pre-paid and sent by electronic mail to the following:

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