

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

**OWNERS' REPLY TO APPELLANTS' OPPOSITION
TO MOTION TO DISMISS APPEAL**

**I.
INTRODUCTION**

"An appeal shall 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 earlier". 11 DCMR, Section 3112.2(a). On June 14, 2011, the Appellants "had notice or knowledge", or "reasonably should have had notice or knowledge" of the Zoning Administrator's decision to approve the project plans, based on the simple fact that he notified them of his decision by email on that day. Because this appeal was filed 86 days after the Appellants received notice of the Zoning Administrator's decision, this appeal should be dismissed.

**II.
THE ZONING ADMINISTRATOR'S JUNE 14, 2011 NOTICE TO
APPELLANTS OF HIS ZONING DECISION WAS CLEAR AND UNAMBIGUOUS**

The record shows that the Zoning Administrator informed the Appellants and their Counsel in writing on June 14, 2011 of his decision to approve the building plans. His email was in response to the inquiry from Appellants' Counsel on "the status of your review of Building Permit Application No. B1103986". The words he used to convey his decision are clear and unambiguous--"I have further reviewed the revised plans and additional materials submitted by Mr. Voorhees and his counsel. Based on this information, I find that the proposed addition is in

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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." See Tab A of Owners' Motion To Dismiss Appeal.

There is nothing ambiguous about that message. On June 14, the Appellants "had notice or knowledge", or "reasonably should have had notice or knowledge" of his zoning decision.

Appellants claim that the Zoning Administrator's message was ambiguous, because "no indication is given as to whether a decision was actually made or not, and no timetable is provided for when Mr. LeGrant will 'proceed' to make an appealable decision." Appellants' Opposition, at p. 7. Appellants are searching for ambiguity where none exists. It is simply not reasonable to interpret the Zoning Administrator's clear words above to mean that his "decision will be made sometime in the indefinite future", as Appellants claim. Id. The Zoning Administrator did not say "I have not yet made a decision", or "I will proceed to make a decision at some point later on", or anything of the sort. The Zoning Administrator clearly indicated his decision to approve the project plans. He clearly stated his findings. He clearly stated that based on these findings, he would approve the plans. There can be no doubt from this language that he had made his decision to approve, and he communicated that decision to the Appellants and their Counsel in writing on June 14, 2011. "A writing 'is ambiguous if, on its face, it has more than one reasonable interpretation', but 'is not ambiguous merely because the parties disagree over its meaning' ". Basken v. DC Board of Zoning Adjustment, 946 A.2d 359, 365 at footnote 21, citing Beck v. Continental Cas. Co. (In re May), 936 A.2d 747, 751 (DC 2007) (emphasis

added).¹ There is nothing ambiguous about the Zoning Administrator's June 14 notice to the Appellants. The Appellants' attempt to find another meaning to the Zoning Administrator's clear words yields only an unreasonable interpretation, and is nothing more than an attempt to excuse their untimely appeal.

Appellants' own document filed in this case undercuts their claim. The Appellants' minutes from their July 15, 2011 meeting with the Zoning Administrator, which they prepared and which is logged as Ex. 9 of the record in this case, state as follows:

-- "The Ausubels had requested that building permit B1103986 not be issued until they could meet with Mr. LeGrant to follow up with him on his decision regarding whether the proposed addition was consistent with the Tree and Slope Protection (TSP) Overlay." Page 1, first bullet point, emphasis added.

--"On June 15 (sic), Mr. LeGrant notified the Ausubels that he was intending to issue the permit B1103986, as he found the revised plans were in compliance with the 'underlying R-1-A base zone and the applicable TSP provisions set forth in Sections 1513 and 1514'...The Ausubels then requested a meeting with Mr. LeGrant [on June 15] to follow up on his decision...". Page 1, second bullet point, emphasis added.

--"Mr. LeGrant would only reevaluate a permit if new information came to light, as he made his decision based on all of the information he had received." Page 6, last bullet point, emphasis added.

¹ In their footnote 3, the Appellants only partially quote the Court of Appeals decision in Basken, where the Court found the DCRA Director's additional language, that the petitioners in that case had the right to appeal his decision, as being "an unambiguous signal that the decision was made." What the Court in that case actually said was that the additional language was "also an unambiguous signal that a decision had been made," meaning that it was another unambiguous signal. Earlier in that same paragraph, the Court quoted the first "unambiguous signal" - "...Director Canavan's letter stated clearly that the zoning decision had been made: The Zoning Administrator would not deny the certificate of occupancy...". Those words of the DCRA Director in Basken can be favorably compared to the phrasing of the Zoning Administrator's words in this case.

The Appellants' own July 15 minutes reflect that as of June 14, 2011, the Appellants knew that the Zoning Administrator's June 14 email represented his decision to approve. Appellants' new claim to justify their late filing, that "until July 13, 2011 [the permit issuance date], they had no reason to think that a decision had been made," is disingenuous at best.²

The Appellants also claim that surrounding circumstances following the issuance of the June 14, 2011 decision support their position that no zoning decision had been made at that point. However, none of the circumstances they cite support their position. First and foremost, if Appellants had no reason to think that a zoning decision had been made until July 13, then why did Appellants engage in a series of actions beginning on June 14 seeking to overturn the Zoning Administrator's decision? They wrote to the Zoning Administrator multiple times. They wrote to the DCRA Director Majett and to Ward 3 Councilmember Cheh. Councilmember Cheh wrote to Director Majett on July 12 asking him to "determine what is going on." Director Majett wrote to the Appellants the same day, stating that he would have the plans re-reviewed. None of this correspondence suggests that a final zoning decision had not yet been made. At best, they suggest an understanding that a building permit had not yet been issued. However, there is no denying that Appellants were on notice in writing by the Zoning Administrator on June 14 that the final zoning decision had been made.³

²Appellants want this Board to conclude that notice of the zoning decision only came upon formal issuance of the building permit. However, Section 3112.2(a) of the Zoning Regulations, and rulings by both this Board and the Court of Appeals, make it clear that the time for filing an appeal of a zoning decision begins when the Appellant has notice or knowledge of the zoning decision, or reasonably should have notice or knowledge, and not necessarily upon the subsequent formal issuance of a permit. See, e.g., Basken, *supra* at 366.

³Both this Board and the Court of Appeals have held that an Appellant's communications with city officials, attempting to reverse the zoning decision after receiving notice of that zoning decision, do not excuse the Appellant from filing a timely appeal. BZA Appeal No. 17411 of Basken and Meyer, at p. 6 (March 23, 2006), *affirmed*, Basken, *supra*; BZA Appeal No. 17391 of de Brito and Gottlieb, at p. 7 (October 2, 2006), *citing Waste Management of Md., Inc. v. DC Board of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (DC 2001). In Appeal No. 17411 of Basken and Meyer, this Board concluded that the Appellants, who pursued other avenues while their appeal period was running, "were represented by counsel who were not hindered from...determining the deadlines for filing a timely appeal." *Id.* At p. 6. The same is true here.

III.
THERE IS NO BASIS FOR EXTENDING THE 60-DAY DEADLINE
FOR FILING AN APPEAL IN THIS CASE

In order to extend the 60-day deadline for filing the appeal, the Board must find that both criteria of Section 3112.2(d) apply. However, neither one applies.

A. THERE ARE NO EXTENUATING CIRCUMSTANCES BEYOND THE APPELLANTS' CONTROL, WHICH COULD NOT HAVE BEEN REASONABLY ANTICIPATED, THAT SUBSTANTIVELY IMPAIRED THE APPELLANTS' ABILITY TO FILE A TIMELY APPEAL WITH THE BOARD

The Appellants claim that they were not able to file a timely appeal to this Board because, due to DCRA's "obstructionism", the building permit application was not made available to them until August 11, 2011, the day before the 60-day appeal period expired. However, even assuming that there is a valid reason that they did not pick up the building permit application from DCRA until the next day, there is no reason stated why they could not have filed a timely appeal by August 12, 2011.⁴

Moreover, the Appellants had sufficient information in order to file a lawsuit against the Owners in the DC Superior Court three weeks earlier, on July 22, 2011, seeking "to enforce the zoning laws of the District of Columbia". Lawrence M. Ausubel, et al., v. 2750 32nd Street Trust, et al., Case No. 2011 CA 5856. In that case, which is still pending in the Superior Court, the Appellants "seek a ruling that the Tree and Slope Protection Overlay zoning ordinance...requires a special exception to be obtained for construction that is proposed" on the Owner's property. Their 35-paragraph, 11-page Complaint details the facts and issues that are present in the instant appeal, and the relief that they are seeking in order "to enforce the zoning

⁴ Even if they had not gotten a copy of the building permit application to attach to a timely appeal to this Board, the Zoning Regulations allow an appellant to file "any additional statements, information, briefs, reports (including reports or statements of expert and other witnesses), plans, or other materials that the appellant may wish to offer into evidence at the hearing", at least 14 days in advance of the hearing. 11 DCMR, Section 3112.10. The hearing in this case is scheduled for January 24, 2012.

laws". That lawsuit was filed 38 days after the Appellants received written notice of the zoning decision in this case.

Appellants notified the Superior Court in their July 22 Complaint that they were going to file an appeal to this Board. They notified the Zoning Administrator on July 15 that they were going to file an appeal to this Board. See Ex. 9 of the record. There is no credible reason given why they could not have filed a timely appeal to this Board on that same date as their lawsuit was filed, or anytime within three weeks after that date.

B. AN EXTENSION OF TIME TO FILE THE APPEAL WILL PREJUDICE THE OWNERS

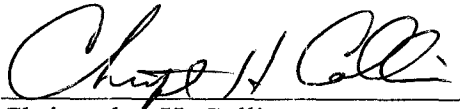
The Owners will suffer financial damages of approximately \$58,333.33 per month, if this untimely appeal is allowed to proceed. See Declaration of Christopher Dorobek, attached as Tab E to Owners' Motion To Dismiss Appeal.

**IV.
CONCLUSION**

Owners respectfully request that the Board apply Section 3112.2 and applicable prior rulings from the Board and from the Court of Appeals to the facts of this case, and dismiss this appeal as untimely filed.

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: 
Christopher H. Collins

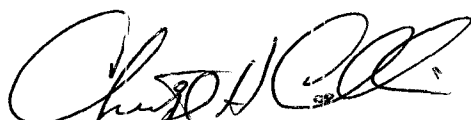
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2011, a copy of the foregoing was sent by email and U.S. Mail to the following:

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